SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER

Case No:	**STL-11-01/A-2/AC**
Before:	**Judge Ivana Hrdličková, Presiding** **Judge Ralph Riachy** **Judge David Baragwanath** **Judge Afif Chamseddine** **Judge Daniel David Ntanda Nsereko**
Registrar:	**Mr David Tolbert**
Date:	**10 March 2022**
Original language:	**English**
Classification:	**Public**

THE PROSECUTOR
v.
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI

APPEAL JUDGMENT

Office of the Prosecutor:
Mr Norman Farrell

Defence Office:
Ms Dorothée Le Fraper du Hellen

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

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini & Mr Jad Youssef Khalil

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

CONTENTS

I. INTRODUCTION

1. The Appeals Chamber of the Special Tribunal for Lebanon ("STL" or "Tribunal") is seised of the appeals filed by the Prosecution against the acquittals of Hassan Habib Merhi and Hussein Hassan Oneissi by the Judgment rendered by Trial Chamber I on 18 August 2020 in the case *Prosecutor v. Ayyash et al.*[1]

A. Background

2. The case originates from an explosion that occurred on Monday, 14 February 2005 in Beirut, near the St Georges Hotel, killing the former Lebanese Prime Minister Mr Rafik Hariri and 21 others and injuring at least another 226 people. Shortly after the explosion, the *Al-Jazeera* and *Reuters* news networks in Beirut received phone calls claiming responsibility for the attack and informing those news outlets that a video with a letter attached had been left in a tree in Beirut. In this video, Mr Ahmad Abu Adass, a Palestinian man—who had disappeared from his home in Beirut on Sunday, 16 January 2005 and had not been seen by his family since—claimed to represent a fundamentalist group called "Victory and Jihad in Greater Syria" and to have executed the attack against Mr Hariri. The claim of responsibility was false, and the fundamentalist group was fictitious. Moreover, Mr Abu Adass was not the suicide bomber.

3. On 18 February 2005, the United Nations ("UN") Secretary-General dispatched a fact-finding mission to Beirut to inquire into the causes, circumstances, and consequences of the assassination of Mr Hariri. As a result of the findings of this mission, the UN Security Council on 7 April 2005 established the UN International Independent Investigation Commission ("UNIIIC") to assist the Lebanese authorities in their investigation of the attack.

4. On 30 May 2007, the UN Security Council, by resolution 1757 and acting under Chapter VII of the UN Charter, created the Special Tribunal for Lebanon. The Tribunal commenced operation on 1 March 2009. The primary mandate of the Tribunal is to bring to justice persons responsible for the attack of 14 February 2005 and other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005.

[1] The Prosecution's present appeal against the acquittals of Messrs Merhi and Oneissi proceeded under case number STL-11-01/A-2 (*Prosecutor v. Merhi and Oneissi*).

B. The Proceedings Before the Tribunal

5 The Prosecution charged Messrs Salim Jamil Ayyash, Mustafa Amine Badreddine, Hassan Habib Merhi, Hussein Hassan Oneissi, and Assad Hassan Sabra with participating in a conspiracy aimed at committing a terrorist act. The Prosecution also charged Messrs Ayyash and Badreddine as co-perpetrators, and Messrs Merhi, Oneissi, and Sabra as accomplices, with committing a terrorist act by means of an explosive device, committing the intentional homicide of Mr Hariri and 21 others, and the attempted intentional homicide of 226 others.

6 According to the Prosecution, the conspiracy had two components: the surveillance and assassination of Mr Hariri, carried out by Mr Ayyash, and the cover-up aimed at diverting attention away from the real perpetrators, for which Messrs Merhi, Oneissi, and Sabra were alleged to be responsible. The Prosecution alleged that Mr Badreddine was at the apex of the conspiracy and connected the two components.

7 Upon request by the Prosecution, the Pre-Trial Judge issued arrest warrants and international arrest warrants against the accused. Despite the Lebanese authorities' attempts to execute the arrest warrants, the accused have never been apprehended. Trial Chamber I decided, pursuant to Article 22 of the Statute of the Tribunal ("Statute") and Rule 106 of the Rules of Procedure and Evidence ("Rules"), to try the five accused *in absentia*. The trial in the *Ayyash et al.* case commenced on 16 January 2014.

8 The Statute of the Tribunal expressly provides for trials *in absentia*. This element of the Tribunal's legal framework is novel, as, since the International Military Tribunal at Nuremberg, the founding Statutes of other international criminal tribunals have not granted them jurisdiction to try absent accused.[2] The conduct of trials *in absentia* plays a role in promoting justice for victims and social peace and ensures that an accused evading arrest and trial does not obstruct the course of justice. The Statute and the Rules of the Tribunal nevertheless provide safeguards necessary to ensure that proceedings *in absentia* comply with the rights of the accused persons. Article 22 of the Statute and Rule 109 of the Rules specifically set out the safeguards for an accused appearing before the Tribunal following a conviction *in absentia*—in particular, the right be tried again in person. Apart from this, the legal standards

[2] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed 8 August 1945, 82 U.N.T.S. 279, Annex, Charter of the International Military Tribunal, Art. 12.

applicable throughout trials *in absentia* and trials *in praesentia* are the same—most notably, the beyond reasonable doubt standard of proof.

9. The Prosecution's case was based essentially on circumstantial rather than direct evidence, and thus consisted of evidence of facts from which, the Prosecution argues, the only reasonable inference available is that the accused were guilty as charged. Most of the evidence offered by the Prosecution consisted of telecommunication evidence. As a matter of law and fact, circumstantial evidence is not necessarily of lesser value than direct evidence; and, depending on its strength, both types of evidence are equally capable of proving a crime and leading to a conviction.

10. On 13 May 2016, the Lebanese media reported that Mr Badreddine had been killed in an explosion in the Syrian Arab Republic, while commanding Hezbollah fighters near Damascus. Trial Chamber I held that the evidence presented to establish Mr Badreddine's death was not sufficient to terminate the proceedings against him. On 11 July 2016, the Appeals Chamber, by majority, reversed the decision and found that Mr Badreddine's death had been sufficiently proved and directed Trial Chamber I to terminate the proceedings against Mr Badreddine without prejudice.

11. On 18 August 2020, Trial Chamber I issued its Judgment. It found Mr Ayyash guilty of all crimes charged against him. It found that the evidence offered by the Prosecution was insufficient to establish a link between Mr Badreddine and the attack. The Trial Chamber found Messrs Merhi, Oneissi, and Sabra not guilty of the crimes charged against them.

12. The Trial Chamber sentenced Mr Ayyash to five concurrent terms of life-imprisonment. Assigned Counsel for Mr Ayyash sought to appeal the conviction of Mr Ayyash. However, on 29 March 2021, the Appeals Chamber, by majority, dismissed as inadmissible the notice of appeal filed by the Assigned Counsel, holding that counsel for an accused *in absentia* have no standing to file the notice under the regulatory framework of the Tribunal as long as the accused has not appeared before the Tribunal. On 24 February 2021, the Appeals Chamber also dismissed as inadmissible the notice of appeal filed by the Legal Representative of Victims ("LRV").[3]

13. The Prosecution appealed against the acquittals of Messrs Merhi and Oneissi. In the Prosecution's submission, Messrs Merhi and Oneissi are guilty as charged for having

[3] LRV Appeal Admissibility Decision.

participated—Mr Merhi coordinating and Mr Oneissi executing—the preparation and dissemination of the false claim of responsibility for the attack of 14 February 2005. The Prosecution advances eight grounds of appeal, alleging errors of law and fact on the part of the Trial Chamber, and requests the Appeals Chamber to reverse the acquittals of Messrs Merhi and Oneissi and enter convictions against them.

C. The Role of the Appeals Chamber

14. The Appeals Chamber's role in the present case is to assess whether the grounds of appeal set forth by the Prosecution have merit and, if so, whether they meet the standard of appellate review for alleged errors of law and/or fact. The Appeals Chamber will exercise its authority under Article 26 of the Statute to determine whether the Trial Chamber committed an error of law that invalidates the decision or an error of fact that occasions a miscarriage of justice, and affirm, reverse, or revise the Trial Chamber's Judgment accordingly.

15. In exercising its functions, the Appeals Chamber's role is different from that of the Trial Chamber, although both are essential. The Appeals Chamber's role is merely correctional. It generally does not carry out an independent review of the entire Trial Judgment or conduct a trial *de novo*, but rather focuses its attention on the submissions of the Parties and of the LRV. It normally defers to the factual findings made by the Trial Chamber and does not review or substitute such findings with its own, unless a party shows that a factual error occasioned a miscarriage of justice. In the present case, the burden is on the Prosecution, as appellant, to identify any alleged errors in the Trial Judgment and to explain why, in its view, these alleged errors meet the standard of appellate review. The Appeals Chamber will also correct errors of law that invalidate the Trial Chamber's decision.

16. Nor is the Appeals Chamber tasked with writing history. The Appeals Chamber has based its conclusions on the evidence brought before it by the Parties and the LRV and upon the analysis and findings of the Trial Chamber. Historians will have the opportunity to pass their own judgement on the events of Monday, 14 February 2005 and will no doubt have access to a great array of information, among which will be the Trial Judgment in this case and the present Appeal Judgment.

D. Summary of the Appeals Chamber's Findings

17 In **Ground 1**, **Sub-ground 5 (E)**, and **Sub-grounds 8 (A)–(C)**, the Prosecution submits that the Trial Chamber erred in law in the articulation and application of the legal standards for assessing circumstantial evidence. The Appeals Chamber finds that the Trial Chamber has not committed errors of law invalidating the Judgment in the articulation of the legal standards for assessing circumstantial evidence (Sub-ground 1 (A)), in the application of the beyond reasonable doubt standard of proof to circumstantial evidence (Sub-grounds 1 (B) and 8 (B)), in the assessment of the evidence in its totality (Sub-grounds 1 (C) and 8 (A)), in the identification of reasonable alternative inferences (Sub-grounds 1 (D), 5 (E), and 8 (C)), and in the treatment of Messrs Ziad Ramadan, and Taysir Abu Adass, and Witness PRH056's Rule 158 evidence (Sub-ground 1 (E)).[4] The Appeals Chamber therefore dismisses Ground 1, Sub-ground 5 (E), and Sub-grounds 8 (A)–(C) of the Prosecution Appeal Brief.[5]

18 In **Ground 4**, the Prosecution alleges errors of law and errors of fact on the part of the Trial Chamber for failing to attribute Green 071 to Mr Merhi—in other words, for failing to find that Mr Merhi was the user of Green 071 during the relevant period. The Appeals Chamber finds that the Trial Chamber has not committed an error of law in the identification and analysis of the telecommunication evidence relevant to the attribution of Green 071 to Mr Merhi (Sub-grounds 4 (A)–(B)), nor has it erred in law by failing to take into account relevant evidence on whether Mr Merhi used Green 071 (Sub-ground 4 (C)). However, the Appeals Chamber finds that the Trial Chamber has committed errors of fact occasioning a miscarriage of justice by miscalculating Green 071's cell activations in SFEIR3 and by failing to find that Mr Merhi used Green 071 during the attribution period based on the totality of the evidence (Sub-grounds 4 (D)–(E)). The Appeals Chamber therefore dismisses Sub-grounds 4 (A)–(C) of the Prosecution Appeal Brief and grants Sub-grounds 4 (D)–(E).

19 In **Sub-grounds 5 (A)–(D)**, the Prosecution submits that the Trial Chamber erred in law and in fact by failing to find that the Green Network was used to monitor and coordinate the attack and the preparation of the false claim of responsibility. However, the Appeals Chamber finds that the Trial Chamber has not erred in law by failing to take into account relevant evidence and findings in determining the role of the Green Network (Sub-

[4] The Trial Chamber and the Prosecution also refer to Witness PRH056 as "Witness 56".
[5] STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0024, Prosecution Appeal Brief, Public with Confidential Annex A and Public Annexes B and C, 29 March 2021 ("Prosecution Appeal Brief").

ground 5 (A)), nor has it erred in law by considering each hierarchical call flow in isolation from the others and from all other evidence or by limiting its contextual assessment to events on the specific day of the call flow (Sub-ground 5 (B)). Nevertheless, the Appeals Chamber finds that the Trial Chamber has committed an error of fact occasioning a miscarriage of justice by failing to find that Mr Badreddine was a Hezbollah military commander in 2004 and 2005 (Sub-ground 5 (C)). The Appeals Chamber also finds that the Trial Chamber has committed errors of law and fact by holding that Mr Wissam Al-Hassan's evidence on the Green Network being a Hezbollah network was not corroborated (Sub-ground 5 (D)). The Appeals Chamber therefore dismisses Sub-grounds 5 (A) and 5 (B) of the Prosecution Appeal Brief and grants Sub-grounds 5 (C) and 5 (D).

20. In **Ground 6**, the Prosecution submits that the Trial Chamber erred in fact in its assessment of the accuracy of the telecommunication evidence, in particular of the best server coverage maps. The Appeals Chamber finds that the Trial Chamber has committed an error of fact occasioning a miscarriage of justice by over-expanding the areas where Mr Oneissi and the user of Purple 018 could have been located at the relevant times on the afternoon of 14 February 2005. The Appeals Chamber therefore grants Ground 6 of the Prosecution Appeal Brief.

21. In **Ground 7**, the Prosecution alleges that the Trial Chamber erred in fact in its assessment that the congestion on the Alfa mobile network on 14 February 2005 caused numerous calls to be redirected from the best serving cell to one of the neighbouring cells, through the mechanism of "directed retry". The Appeals Chamber finds that the Trial Chamber has committed an error of fact occasioning a miscarriage of justice by finding that the congestion on the Alfa mobile network on 14 February 2005 undermined the reliability of the cell site evidence related to the aftermath of the attack. The Appeals Chamber therefore grants Ground 7 of the Prosecution Appeal Brief.

22. In **Sub-ground 8 (D)**, the Prosecution submits that the Trial Chamber erred in fact by failing to find that Messrs Merhi and Oneissi and the user of Purple 018 disseminated the false claim of responsibility. The Appeals Chamber finds that the Trial Chamber has committed an error of fact occasioning a miscarriage of justice by failing to find that Messrs Merhi and Oneissi participated in the preparation and dissemination of the false claim of responsibility for the assassination of Mr Hariri. The Appeals Chamber therefore grants Sub-ground 8 (D) of the Prosecution Appeal Brief.

23 In **Ground 2**, the Prosecution claims that the Trial Chamber added legal requirements to the crime of conspiracy to commit a terrorist act that are not provided for under Lebanese law and were not identified by the Appeals Chamber in the 2011 Interlocutory Decision on Applicable Law.[6] The Appeals Chamber finds that the Trial Chamber has committed an error of law invalidating the Judgment in requiring that the conspirators knew that the planned felony would involve the killing of a specific individual *in addition* to the use of an explosive device (Sub-ground 2 (A)). The Appeals Chamber holds that the Trial Chamber has not erred in law by requiring proof of material facts that the conspirators agreed that the explosive device would be large and would kill and injure people, provided that the use of a large explosive device in a public place constitutes the means liable to create a public danger (Sub-grounds 2 (B) and 2 (C)). The Appeals Chamber therefore grants Sub-ground 2 (A) of the Prosecution Appeal Brief and dismisses Sub-grounds 2 (B) and 2 (C).

24 In **Ground 3**, the Prosecution avers that the Trial Chamber added legal requirements to accomplice liability that are not required under Lebanese law and that were not identified by the Appeals Chamber in the 2011 Interlocutory Decision on Applicable Law. The Appeals Chamber holds that the Trial Chamber has committed errors of law invalidating the Judgment when it required that Messrs Merhi and Oneissi must have known that Mr Hariri was the target of the attack in addition to knowing that an explosive device would be detonated in order to be accomplices to the terrorist act (Sub-ground 3 (A)) and that they must have known that Mr Hariri was the target of the attack in order to be accomplices to intentional homicide (Sub-ground 3 (C)). The Appeals Chamber holds that the Trial Chamber has not committed an error of law by requiring proof of material facts that Messrs Merhi and Oneissi knew that a large explosive device would be used and that people would be killed and injured in the attack—provided that the use of a large explosive device in a public place constitutes the means liable to create a public danger (Sub-ground 3 (B)). The Appeals Chamber therefore grants Sub-grounds 3 (A) and 3 (C) of the Prosecution Appeal Brief and dismisses Sub-ground 3 (B).

25 As stated above, Article 26 (2) of the Statute provides that "[t]he Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber." Rule 188 (C) of the Rules similarly provides for the same discretion and adds that the Appeals Chamber *may* order an accused to be retried by a trial chamber, but only if it is in the interests of justice. Accordingly,

---

[6] 2011 Interlocutory Decision on Applicable Law.

the Appeals Chamber has the power to reverse the Judgment and does not need to refer the case back to the Trial Chamber unless there is a particular reason to do so.[7] In the present case, the Appeals Chamber has decided to reverse the decision of the Trial Chamber and to enter convictions on appeal, thus finding no need for remanding the case to that Chamber for retrial. It bases its decision entirely on the evidence on the record and on the written and oral arguments of the Parties, which have been discussed at length in the course of the proceedings. The Appeals Chamber is therefore in a position to make a determination on Messrs Merhi and Oneissi's individual criminal responsibility. Given that the proceedings are *in absentia*, the accused will be able to exercise their right to be retried in person should they appear.[8] The rights of the accused and the interests of justice are thus safeguarded.[9]

26. Turning to the impact of these conclusions on the acquittals of Messrs Merhi and Oneissi, the Appeals Chamber finds that it has been established that the Green Network was a covert Hezbollah network acting as the mission command of the attack and that its members were Messrs Badreddine, Ayyash, and Merhi. The Appeals Chamber also finds that the Purple Phones' movements and activities during the COLA phase[10] and in the afternoon of 14 February 2005, as well as their simultaneous discarding after the attack, prove beyond reasonable doubt that Mr Merhi coordinated Mr Oneissi and the user of Purple 018 in the preparation and dissemination of the false claim of responsibility for the attack.

27. The Appeals Chamber therefore finds Messrs Merhi and Oneissi guilty (a) as co-perpetrators of the crime of conspiracy aimed at committing a terrorist act (Count 1); (b) of being an accomplice to the felony of committing a terrorist act (Count 6); (c) of being an accomplice to the felony of intentional homicide of Mr Rafik Hariri and 21 other persons

---

[7] *Krnojelac* Appeal Judgment, paras 172, 180, 207, 239-248, 263-264, disposition; *Krstić* Appeal Judgment, paras 143, 266, disposition; *Strugar* Appeal Judgment, paras 309-310, 321-333, 385-388, disposition; *Martić* Appeal Judgment, paras 315-321, 346, 351-355; *Mrkšić and Šljivančanin* Appeal Judgment, paras 101-103, 418-419, disposition; *Đorđević* Appeal Judgment, paras 928-929, 976-981; *Popović et al.* Appeal Judgment, paras 534-546, 555-557, 1710-1718, 1774-1836, 1900-1949, 2110-2117; *Rutaganda* Appeal Judgment, paras 580-585, 588-589, 592, disposition; *Ntakirutimana and Ntakirutimana* Appeal Judgment, paras 559-560, 568, disposition; *Semanza* Appeal Judgment, paras 355-371, disposition; *Gacumbitsi* Appeal Judgment, paras 118-125, 207; *Setako* Appeal Judgment, paras 253-262, 301; *Šešelj* Appeal Judgment, paras 78, 166, 181; *Fofana and Kondewa* Appeal Judgment, paras 321-322, disposition; *Kaing* Appeal Judgment, para. 336, disposition.
[8] Rule 109 (E) STL RPE.
[9] The Appeals Chamber notes that, under Lebanese law, the *théorie du renvoi* is not applicable. Consequently, if the Court of Cassation upholds an application and quashes the decision of the lower court, it will hold new public proceedings to examine the case and deliver a judgment on the merits. *See* Lebanon, Code of Criminal Procedure, Art. 321.
[10] The Prosecution uses the term "COLA phase" to refer to the Purple Phones' activity in the area of COLA1, COLA2, and COLA3 (the "COLA cells") between 29 December 2004 and 7 January 2005. *See* Judgment, para. 5170.

(Counts 7 and 8); and (d) of being an accomplice to the felony of attempted intentional homicide of 226 persons (Count 9). The aggravating circumstances pleaded in the Amended Consolidated Indictment will be assessed at the sentencing stage. The impact of the Appeals Chamber's findings on the individual criminal responsibility of Messrs Merhi and Oneissi is detailed further in Section XII below.

II. STANDARD OF APPELLATE REVIEW

28. Pursuant to Article 26 of the Statute and Rule 176 of the Rules, an appeal may be lodged on the grounds of "an error on a question of law invalidating the decision" or "an error of fact that has occasioned a miscarriage of justice". The Prosecution argues that the Trial Chamber committed both errors of law and errors of fact in the Trial Judgment.

29. 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.[11]

30. Moreover, the Appeals Chamber may also address legal issues that would not lead to the invalidation of the impugned decision, but are nevertheless of general significance to the Tribunal's jurisprudence.[12]

31. Regarding the standard of appellate review applicable to alleged errors of fact, the Appeals Chamber has previously stated that:

> When reviewing alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness. 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. 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, because it is primarily the task of that Chamber to hear, assess and weigh the evidence presented at trial. Furthermore, the Appeals Chamber will only revoke or revise an erroneous factual finding which has occasioned a miscarriage of justice.[13]

32. The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[14]

---

[11] *Ayyash* Jurisdiction Appeal Decision, para. 11, *citing* Victim Applicant Appeal Decision, para. 12, *citing* Death of Badreddine Appeal Decision, para. 26; Legality of Transfer of CDRs Appeal Decision, para. 21; LRV Protective Measures Appeal Decision, para. 19; *Ayyash et al.* Jurisdiction Appeal Decision, para. 10.
[12] *Ayyash* Jurisdiction Appeal Decision, para. 12, *citing* Personal Jurisdiction in Contempt Proceedings Appeal Decision, para. 39; *Al Jadeed* Appeal Judgment, para. 12.
[13] *Ayyash* Jurisdiction Appeal Decision, para. 13, *citing* Death of Badreddine Appeal Decision, para. 27, *citing Al Jadeed* Appeal Judgment, para. 15; Absence of Authority Appeal Decision, para. 5.
[14] *Al Jadeed* Appeal Judgment, para. 16.

[illegible] We emphasize that the Appeals Chamber has inherent discretion to select which submissions merit a detailed and reasoned opinion in writing and may dismiss, without providing such reasoning, arguments that are manifestly unfounded. Furthermore, the Appeals Chamber may summarily dismiss, without consideration on the merits, arguments lacking the potential to result in the revision or reversal of the impugned decision.[15]

[15] *Ayyash* Jurisdiction Appeal Decision, para. 14, *citing Al Jadeed* Appeal Judgment, para. 18.

III. STRUCTURE OF THE APPEAL JUDGMENT

34 The Appeals Chamber in general will address the grounds of appeal in the order in which they were presented in the Prosecution Appeal Brief.

35 We will depart from this order with respect to Grounds 2 and 3. Whether the errors of law alleged in these two grounds of appeal invalidate the Judgment—and, by extension, whether these grounds succeed—builds upon the conclusions reached in the other grounds of appeal. We will therefore address Grounds 2 and 3 last.

36 Furthermore, some sub-grounds of appeal are intrinsically linked to each other in that they involve interrelated issues of law and fact. For reasons of cogency, coherence, and efficiency, we will analyze these sub-grounds together, as necessary and appropriate.[16]

[16] These are Sub-grounds 1 (B) and 8 (B), Sub-grounds 1 (C) and 8 (A), Sub-grounds 1 (D), 5 (E), and 8 (C), Sub-grounds 2 (A)-(C), and Sub-grounds 3 (A)-(B).

IV. GROUND 1, SUB-GROUND 5 (E), AND SUB-GROUNDS 8 (A)–(C): WHETHER THE TRIAL CHAMBER ERRED IN LAW IN THE LEGAL STANDARDS FOR ASSESSING EVIDENCE

37 The Prosecution submits that the Trial Chamber erred in the articulation and application of the legal standards for assessing evidence.[17] It contends that the Trial Chamber's approach to circumstantial evidence led to five stand-alone errors, which "often appear in combination and are inherently interrelated, both reinforcing and exacerbating each other".[18] As the Prosecution has elaborated each alleged error of law individually, the Appeals Chamber will address each sub-ground of the first ground of appeal separately. Since the Prosecution's submissions on Sub-grounds 1 (B), 1 (C), and 1 (D) are repeated and further expanded upon under Sub-grounds 8 (B), 8 (A), 5 (E), and 8 (C), respectively, the Appeals Chamber will address those submissions together.

A. Sub-ground 1 (A): Whether the Trial Chamber Erred in Law by Treating Circumstantial Evidence as Having Less Evidentiary Value than Direct Evidence

1. Submissions of the Parties and LRV

38 The Prosecution submits that, despite reciting the correct law on circumstantial evidence,[19] the Trial Chamber adopted an approach to such evidence that did not, in fact, reflect the identified applicable law.[20] The Prosecution first argues that it is not *any* evidentiary doubt that is to be exercised in favour of the accused by the Trial Chamber, but only *reasonable* doubt, regardless of whether the evidence is direct or circumstantial.[21] The Prosecution also contends that the Trial Chamber erred in concluding that, by virtue of the circumstantial nature of much of the evidence it adduced, "corroboration was more desirable than in Prosecution cases based on more direct evidence", without giving reasons for such an approach and "without regard to the value of the totality of the circumstantial evidence".[22] The Prosecution further argues, in effect, that statements such as this are indicative that the Trial Chamber treated circumstantial evidence as having less evidentiary value than direct evidence.[23] The

[17] Prosecution Appeal Brief, para. 12.
[18] Prosecution Appeal Brief, para. 15.
[19] Prosecution Appeal Brief, para. 17.
[20] Prosecution Appeal Brief, para. 18.
[21] Prosecution Appeal Brief, para. 18.
[22] Prosecution Appeal Brief, para. 19, *citing* Judgment, para. 285.
[23] Prosecution Appeal Brief, paras 16, 20.

Prosecution also avers that it was an error for the Trial Chamber to hold that circumstantial evidence requires the combination of more than one item of evidence to prove a fact beyond reasonable doubt.[24] In the Prosecution's view, the Trial Chamber also erred in requiring findings based on circumstantial evidence to be the only reasonable inference and then in requiring that this be proved beyond reasonable doubt.[25]

39. The Prosecution requests the Appeals Chamber to find that the standard of proof applies to direct and circumstantial evidence equally and that corroboration is not "more desirable" in a circumstantial case and to apply the correct law as it arises in the Prosecution's other grounds of appeal.[26] In the alternative, the Prosecution requests the Appeals Chamber to clarify the legal standards for assessing circumstantial evidence as matters of general importance to the development of the Tribunal's jurisprudence.[27]

40. Counsel for Mr Merhi respond that the Prosecution's submissions are erroneous for multiple reasons.[28] First, they argue that a reading of the Judgment in its entirety shows that the Trial Chamber correctly referred to the *in dubio pro reo* principle, when stating that it exercised any evidentiary doubt in favour of the accused.[29] Second, Counsel for Mr Merhi contend that the Trial Chamber's consideration that corroboration was more required in circumstantial cases than in cases featuring direct evidence did not establish a legal requirement for the assessment of circumstantial evidence, but simply fell within the discretionary prerogatives of a trial chamber when weighing evidence.[30] They also argue that the Prosecution has not demonstrated how such consideration invalidated the decision.[31] Third, Counsel for Mr Merhi submit that the Prosecution only referred to two examples of the Trial Chamber's alleged mistrust for circumstantial evidence, neither of which demonstrates that the Trial Chamber considered circumstantial evidence as having less evidentiary value than direct evidence.[32] Lastly, they contend that circumstantial evidence consists of evidence "of a number

---

[24] Prosecution Appeal Brief, para. 21, *citing* Judgment, para. 271.
[25] Prosecution Appeal Brief, para. 21, *citing* Judgment, paras 5663, 6583, and *referring to* Prosecution Appeal Brief, Sub-ground 1 (B). *See* Sub-grounds 1 (B) and 8 (B) below.
[26] Prosecution Appeal Brief, para. 22.
[27] Prosecution Appeal Brief, para. 22
[28] STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0029, *Mémoire de la Défense de Merhi en réponse au «* Prosecution Appeal Brief *» déposé en vertu de l'article 183 du Règlement de procédure et de preuve*, 31 May 2021 ("Merhi Response Brief"), para. 42.
[29] Merhi Response Brief, para. 43.
[30] Merhi Response Brief, para. 44.
[31] Merhi Response Brief, para. 44.
[32] Merhi Response Brief, paras 45-47.

of different circumstances" and thus logically requires more than one item of indirect evidence.[33] Counsel for Mr Merhi therefore submit that the Prosecution did not demonstrate any error of law on the part of the Trial Chamber.[34]

41 Counsel for Mr Oneissi argue that the Prosecution does not specify whether the alleged error is an error of law or an error of fact and fails to demonstrate that the alleged error meets either standard of appellate review.[35] First, they note the Prosecution's submission that it is not "any" evidentiary doubt, but only reasonable doubt, that should be exercised in favour of an accused person and that the beyond reasonable doubt standard applies to both direct and circumstantial evidence.[36] Counsel for Mr Oneissi contend that this submission is "vague, undeveloped, unreferenced, and thus insufficient to warrant consideration by the Appeals Chamber".[37] As a consequence, Counsel for Mr Oneissi request that these submissions be summarily dismissed by the Appeals Chamber.[38]

42 Furthermore, Counsel for Mr Oneissi submit that the Trial Chamber has the discretion to decide in the circumstances of each case whether corroboration is necessary at all and as to which witnesses.[39] They point out that, although the Prosecution alleges that the Trial Chamber had a mistrust for circumstantial evidence "*across* the Judgment",[40] the Prosecution merely refers to two extracts of the Judgment.[41] With respect to the Trial Chamber's consideration that corroboration was more desirable than in cases featuring direct evidence, Counsel for Mr Oneissi argue that "the Prosecution exaggerates the impact of the Trial Chamber's *obiter dicta*", as the Trial Chamber did not state that it would exclude any circumstantial evidence when it was not corroborated.[42] Lastly, Counsel for Mr Oneissi note the Prosecution's argument that the Trial Chamber required findings based on circumstantial evidence to be the only reasonable inference and then required that this be proved beyond reasonable doubt.[43] Counsel for Mr Oneissi contend that this submission should be dismissed because it is legally

[33] Merhi Response Brief, para. 48, *citing Čelebići* Appeal Judgment, para. 458.
[34] Merhi Response Brief, para. 49.
[35] STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0030, Oneissi Defence Response to the Prosecution Appeal Brief, 31 May 2021 ("Oneissi Response Brief"), para. 46.
[36] Oneissi Response Brief, para. 49, *citing* Prosecution Appeal Brief, para. 18.
[37] Oneissi Response Brief, para. 50 (footnotes omitted).
[38] Oneissi Response Brief, para. 51.
[39] Oneissi Response Brief, para. 53, *citing Nizeyimana* Appeal Judgment, para. 63.
[40] Oneissi Response Brief, para. 54 (emphasis in the original), *citing* Prosecution Appeal Brief, para. 20.
[41] Oneissi Response Brief, para. 54.
[42] Oneissi Response Brief, para. 55.
[43] Oneissi Response Brief, para. 57, *citing* Prosecution Appeal Brief, para. 21.

correct to state that the only reasonable inference must be established beyond reasonable doubt, since the existence of another reasonable inference on the evidence would imply the existence of a doubt.[44] Counsel for Mr Oneissi therefore request that the Appeals Chamber dismiss the remaining Prosecution submissions under Sub-ground 1 (A), as they consist of mere allegations unsupported by evidence.[45]

43 The Prosecution replies that the Trial Chamber manifested its devaluation of circumstantial evidence throughout the Judgment in the unsubstantiated desire for greater corroboration, the over-application of the beyond a reasonable doubt standard to circumstantial evidence, "and the inferences drawn and not drawn from the evidence".[46] The Prosecution contends that it does not need to show that this error was the only reason the Chamber failed to convict Messrs Merhi and Oneissi or that this devaluation independently determined the outcome.[47] The Prosecution does not challenge the Trial Chamber's discretion to require corroboration, but rather its erroneous view that circumstantial evidence is inherently more in need of corroboration.[48]

44 The LRV concurs with the Prosecution's submission that the Trial Chamber treated circumstantial evidence as having less evidentiary value than direct evidence and required corroboration for circumstantial evidence where such was not necessary.[49] The LRV argues that the manner in which the Trial Chamber assessed the circumstantial evidence presented by the Prosecution in relation to Messrs Merhi and Oneissi may have inexorably impacted the findings of not guilty of both accused.[50]

---

[44] Oneissi Response Brief, para. 63. To support their submissions, Counsel for Mr Oneissi referred to the approaches adopted by the Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), International Criminal Tribunal for Rwanda ("ICTR"), and International Criminal Court ("ICC"). Oneissi Response Brief, paras 64-65, *citing Čelebići* Appeal Judgment, para. 2001; *Ntagerura et al.* Appeal Judgment, para. 306; *Bemba et al.* Appeal Judgment, para. 868.
[45] Oneissi Response Brief, paras 56, 66.
[46] STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0035, Prosecution Brief in Reply, 16 June 2021 ("Prosecution Reply Brief"), para. 13.
[47] Prosecution Reply Brief, para. 14.
[48] Prosecution Reply Brief, para. 15 (footnotes omitted).
[49] STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0034, The Legal Representative of Victims Observations on the Appellant and Respondent Briefs, 14 June 2021 ("LRV Observations"), para. 32.
[50] LRV Observations, para. 35.

45 Counsel for Mr Merhi respond that the LRV did not point to any specific item of evidence for which the Trial Chamber required corroboration where such was not necessary.[51]

2. Trial Chamber Findings

46 The Trial Chamber stated that "[c]ircumstantial evidence does not have less value than direct evidence, and a chamber may convict solely on circumstantial evidence".[52] It also held that "when the Prosecution relies by inference upon circumstantial evidence to prove the facts constituting the elements of an offence, or those indispensable for a conviction, that inference must be the only reasonable conclusion available from the evidence".[53] The Trial Chamber acknowledged that "the same standard of proof applies to both direct and circumstantial evidence".[54] The Trial Chamber also stated that, "as it must in a case based on circumstantial evidence, [it] has exercised any evidentiary doubt in favour of an [a]ccused person".[55] Furthermore, the Trial Chamber recalled that "circumstantial evidence can suffice to establish material facts, even if uncorroborated",[56] although it later "generally considered" that, "[d]ue to the circumstantial nature of much of the evidence in this case, […] corroboration was more desirable than in Prosecution cases based on more direct evidence".[57] The Trial Chamber also held that "[t]he nature of circumstantial evidence is that it requires the combination of more than one piece of indirect evidence to reach the standard of proof beyond reasonable doubt of those facts indispensable to a conviction".[58]

3. Discussion

a. Applicable Law

47 From the outset, the Appeals Chamber recalls that "circumstantial evidence is evidence of circumstances surrounding an event or an offence from which a fact at issue may be

[51] STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0037, *Réponse de la Défense de Merhi aux «* Legal Representative of Victims Observations on the Appellant and Respondents Briefs *»*, 25 June 2021 ("Merhi Response to LRV Observations"), para. 23.
[52] Judgment, para. 257 (footnote omitted).
[53] Judgment, para. 257.
[54] Judgment, para. 258.
[55] Judgment, para. 35.
[56] Judgment, para. 258 (footnote omitted).
[57] Judgment, para. 285.
[58] Judgment, para. 271.

reasonably inferred".[59] Circumstantial evidence has also been defined as "[e]vidence directed to the attending circumstances […] which inferentially proves the principal fact by establishing a condition of surrounding and limiting circumstances, whose existence is a premise from which the existence of the principal fact may be concluded by necessary laws of reasoning".[60] As stated by the Appeals Chamber of the ICTY in the *Čelebići* case, "[a] circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him".[61]

48. International criminal jurisprudence is uniform in requiring the same beyond reasonable doubt standard in relation to both direct and circumstantial evidence.[62] Although international criminal courts and tribunals have, at times, adopted different linguistic formulations of this standard when applying it to circumstantial cases, the substance of the standard is the same. In cases featuring direct evidence, the beyond reasonable doubt standard applies to the evidence admitted at trial in order to prove facts material to the guilt of the accused.[63] In circumstantial cases, on the other hand, that standard applies to the inference(s) that the Prosecution asks a chamber to draw from circumstantial evidence in order to establish the guilt of the accused, which must be the only reasonable inference(s).[64] As stated by the Appeals Panel in the *Al Jadeed* contempt case, "when the prosecution relies upon circumstantial evidence to prove the facts constituting the elements of an offence by inference, that inference must be the only reasonable conclusion available from the evidence".[65]

49. It is thus a well-established principle of international criminal law that the beyond reasonable doubt standard of proof applies to direct and circumstantial evidence equally. Moreover, it is also wholly accepted that a conviction can be based solely on circumstantial evidence, when the only reasonable inference to be drawn from such evidence points to the

[59] *Al Jadeed* Appeal Judgment, para. 104, fn. 286. *See also Martić* Decision Adopting Guidelines, para. 10, *citing Krnojelac* Trial Judgment, para. 67; *Perišić* Order for Guidelines para. 39, *citing, inter alia, Kupreškić et al.* Appeal Judgment, para. 303. *See also Sesay et al.* Trial Judgment para. 499; *Brima et al.* Trial Judgment, para. 101.
[60] *Black's Law Dictionary – Free Online Legal Dictionary*, 2nd ed.
[61] *Čelebići* Appeal Judgment, para. 458. *See also Ntagerura et al.* Appeal Judgment, para. 304.
[62] *See*, *e.g.*, *Blagojević and Jokić* Appeal Judgment, para. 226; *Stakić* Appeal Judgment, para. 219.
[63] *See*, *e.g.*, *Martić* Appeal Judgment, para. 55; *Rutaganda* Appeal Judgment, para. 488.
[64] *Đorđević* Appeal Judgment, para. 296; *Blagojević and Jokić* Appeal Judgment, para. 226; *Stakić* Appeal Judgment, para. 219.
[65] *Al Jadeed* Appeal Judgment, para. 104 (footnotes omitted).

guilt of the accused.[66] It follows that circumstantial evidence cannot be given less value than direct evidence, the two categories of evidence being subject to the same standard of proof and being equally capable of leading to a conviction, provided that such standard is satisfied. Consequently, we hold that circumstantial evidence does not have less value than direct evidence.[67]

b. Analysis of Trial Chamber Findings

i. <u>Whether the Trial Chamber Erred in Finding that It had to Exercise "Any Evidentiary Doubt" in Favour of the Accused</u>

50. The Appeals Chamber notes that the Trial Chamber correctly stated the applicable law on evidence when it acknowledged that "[c]ircumstantial evidence does not have less value than direct evidence, and a chamber may convict solely on circumstantial evidence".[68] The Trial Chamber also correctly set out the beyond reasonable doubt standard of proof applicable to cases featuring circumstantial evidence.[69] It then held that, "as it must in a case based on circumstantial evidence, [it] has exercised any evidentiary doubt in favour of an Accused person".[70] In the Prosecution's view, it is not *any* evidentiary doubt that is to be exercised in favour of the accused by the Trial Chamber, but only *reasonable* doubt.[71]

51. The Appeals Chamber observes that the issue is more semantic than substantive. As mentioned above, the Trial Chamber correctly identified the legal standard for the assessment of evidence, namely the beyond reasonable doubt standard.[72] It follows that the Trial Chamber, by using the adjective "evidentiary" when referring to "any" doubt exercised in favour of the accused, implicitly subordinated "any" doubt to the beyond reasonable doubt standard of proof. We agree with this implied consideration, as any doubt arising from the application of the beyond reasonable doubt standard to the evidence must be reasonable doubt and must be exercised in favour of the accused, in accordance with the well-established principle *in dubio pro reo*, which is a fundamental tenet of criminal law.

---

[66] *Kupreškić et al.* Appeal Judgment, para. 303. The ICTY Appeals Chamber noted that "[c]ircumstantial evidence can often be sufficient to satisfy a fact finder beyond reasonable doubt". *Kupreškić et al.* Appeal Judgment, para. 303; *see also Taylor* Appeal Judgment, para. 182.
[67] *Al Jadeed* Appeal Judgment, para. 104, fn. 286.
[68] Judgment, para. 257 (footnote omitted).
[69] Judgment, paras 257-258.
[70] Judgment, para. 35.
[71] Prosecution Appeal Brief, para. 18.
[72] Judgment, paras 257-258.

52. Despite the unfortunate formulation of the impugned finding, the Appeals Chamber considers that the Trial Chamber did not err in stating that "any evidentiary doubt" is to be exercised in favour of the accused. However, the Appeals Chamber agrees with the Prosecution that the principle *in dubio pro reo* applies regardless of whether the evidence is direct or circumstantial. Consequently, the Trial Chamber erred in linking its exercise of "any evidentiary doubt" in favour of the accused to the circumstantial nature of the case. When the evidence presented by the Prosecution—be it direct or circumstantial—does not satisfy the beyond reasonable doubt standard of proof, and hence an "evidentiary doubt" exists, the accused must be acquitted.

53. The Trial Chamber's statement—that it exercised the *in dubio pro reo* principle in favour of the accused, "as it must in a case based on circumstantial evidence"—is therefore superfluous, as the same principle would also apply in a case based exclusively on direct evidence. Nevertheless, the Prosecution has not demonstrated—and we are thus not satisfied—that this error systematically or necessarily affected the way the Trial Chamber approached circumstantial evidence throughout the Judgment, as the Chamber correctly stated that it exercised any evidentiary doubt in favour of the accused. Specific findings will be assessed in the present Judgment on a case-by-case basis.

ii. <u>Whether the Trial Chamber Erred in Finding that Corroboration was More Desirable than in Cases Featuring Direct Evidence</u>

54. The Prosecution also challenges the Trial Chamber's general consideration that, because of the circumstantial nature of much of the evidence, "corroboration was more desirable than in Prosecution cases based on more direct evidence".[73] The Appeals Chamber agrees with the Prosecution that this statement is erroneous, as the circumstantial nature of the evidence of a case does not necessarily make corroboration of such evidence more desirable than in cases featuring direct evidence.

55. The Appeals Chamber finds that the Prosecution needs to prove the guilt of the accused beyond reasonable doubt, but is at liberty as to what kind of evidence to tender in order to discharge its burden of proof. Nothing prevents the Prosecution from relying exclusively on

[73] Prosecution Appeal Brief, para. 19, *citing* Judgment, para. 285.

circumstantial evidence to prove its case,[74] provided that the inference it requires the Trial Chamber to draw is the only reasonable inference that can be drawn from all the evidence on the record.[75] When the only reasonable inference available from the evidence points to the guilt of the accused, no further corroboration is required to reach the standard of proof beyond reasonable doubt. Nonetheless, as submitted by Counsel for Mr Oneissi,[76] the Trial Chamber retains the discretion to decide on a case-by-case basis whether corroboration is necessary at all and as to which items of evidence, irrespective of their circumstantial nature. Such discretion pertains to the weight to be given to the evidence and falls within the prerogative of a trier of fact. Circumstantial evidence thus does not necessarily require more corroboration than direct evidence.

56. The Trial Chamber stated elsewhere in the Judgment that "circumstantial evidence can suffice to establish material facts, even if uncorroborated".[77] We agree with this statement, but note that it contradicts the Trial Chamber's impugned finding on corroboration being more desirable due to the circumstantial nature of the evidence. We therefore hold that by this finding the Trial Chamber evinced a mistrust for circumstantial evidence that amounts to an error of law, as the legal standard for the assessment of circumstantial evidence does not necessarily require that such evidence be corroborated.[78]

57. Nevertheless, we are of the view that the Trial Chamber's erroneous finding was made in the abstract ("[it] generally considered"[79]), remained isolated, and—as mentioned above—was contradicted by the Trial Chamber itself in a finding made elsewhere in the Judgment. Moreover, we recall that "[w]hen a party alleges an error of law, it must identify the alleged error, […] and explain how the alleged error invalidates the decision."[80] The Prosecution has not demonstrated that the Trial Chamber, because of the erroneous abstract consideration alone, generally approached circumstantial evidence as having less value than direct evidence or cast a mistrust for circumstantial evidence as such throughout the entire Judgment. We therefore

[74] *Taylor* Appeal Judgment, para. 182. *See also Kupreškić et al.* Appeal Judgment, para. 303.
[75] *Bemba et al*. Appeal Judgment, para. 868.
[76] Oneissi Response Brief, para. 53, *citing Nizeyimana* Appeal Judgment, para. 63.
[77] Judgment, para. 258 (footnote omitted).
[78] The Appeals Chamber notes that the Prosecution also argues that the Trial Chamber erred in holding that circumstantial evidence requires the combination of more than one item of evidence to prove a fact beyond reasonable doubt (Prosecution Appeal Brief, para. 21, *citing* Judgment, para. 271). We observe that our findings on circumstantial evidence not requiring corroboration apply to this argument equally.
[79] Judgment, para. 285.
[80] *Al Jadeed* Appeal Judgment, para. 12, *citing Stanišić and Simatović* Appeal Judgment, para. 16; *Nyiramasuhuko et al.* Appeal Judgment, para. 30; *Ngirabatware* Appeal Judgment, para. 8; *Lubanga* Appeal Judgment, para. 31; *Taylor* Appeal Judgment, para. 25; *Ayyash et al.* Jurisdiction Appeal Decision, paras 10, 24.

find that the Prosecution has failed to explain how the Trial Chamber's error of law invalidated the Judgment.

iii. Whether the Trial Chamber Expressed Its Mistrust for Circumstantial Evidence

٥٨ The Appeals Chamber will now turn to examine the specific instances enumerated by the Prosecution in which the Trial Chamber allegedly expressed its mistrust for circumstantial evidence.[81]

٥٩ First, the Trial Chamber found that "[t]he evidence—*albeit circumstantial*—that mobile Red 741 was used by someone involved in the attack is overwhelming."[82] The Appeals Chamber agrees that the use of the adverb "albeit" is unfortunate as it suggests that the Trial Chamber attached less value to circumstantial evidence than to direct evidence. Circumstantial evidence can be more probative than direct evidence. However, the challenged statement aside, we note that the Trial Chamber came to the conclusion that the circumstantial evidence on this point was overwhelming. This shows that the Trial Chamber did not let the circumstantial nature of the evidence on Red 741 affect its assessment of the evidence. Indeed, the Trial Chamber eventually convicted Mr Ayyash based on circumstantial evidence.[83] We are therefore not persuaded that the contested statement shows that the Trial Chamber generally spurned the evidence before it because of its circumstantial nature.

٦٠ Second, the Trial Chamber stated that, "in the absence of any *direct* evidence", it could not make a positive finding that those who disseminated the false claim of responsibility had advance knowledge of the attack.[84] We note that the Trial Chamber's statement was formulated only after it assessed the circumstantial evidence presented and concluded that it was unable to draw from such evidence the only reasonable inference that those who disseminated the false claim of responsibility must have had advance knowledge of the attack. The Trial Chamber refused to make the requested finding due to the existence of a competing alternative inference, while noting the absence of direct evidence excluding that alternative inference. A trial chamber should refrain from offering its views on what kind of evidence might have been more palatable to it to prove a fact at issue. Nevertheless, we find that the Trial Chamber did not

---

[81] Prosecution Appeal Brief, para. 20, *citing* Judgment, paras 6717, 6876.
[82] Judgment, para. 6717 (emphasis added).
[83] Judgment, paras 6645, 6769, 6818, 6831, 6839-6841.
[84] Judgment, para. 6876 (emphasis added).

express a general preference for direct evidence, nor did it refuse to make the finding requested by the Prosecution only because of the absence of direct evidence. It was simply unable to make the requested finding based on the available circumstantial evidence. We therefore do not agree that the impugned statement shows that the Trial Chamber attached little or no weight to the evidence before it because of its circumstantial nature.

61. The Prosecution also argues that the Trial Chamber incorrectly adopted a two-stage assessment of the evidence and disregarded the value of the totality of the circumstantial evidence.[85] We recall that the Trial Chamber correctly stated the standard of proof applicable to circumstantial evidence by finding that "when the Prosecution relies by inference upon circumstantial evidence to prove the facts constituting the elements of an offence, or those indispensable for a conviction, that inference must be the only reasonable conclusion available from the evidence".[86] We also note that the Trial Chamber correctly held that "[a] chamber cannot evaluate evidence in a 'piecemeal' fashion",[87] as "[t]he quality of a piece of evidence may not be evident when it is viewed in isolation."[88] The Prosecution therefore has not demonstrated that the Trial Chamber erred in law when identifying the standard of proof applicable to circumstantial evidence. Similarly, the Prosecution has not demonstrated that the Trial Chamber generally disregarded the value of the totality of the circumstantial evidence. However, these arguments will be further addressed in the sections below dealing with the Prosecution's sub-grounds of appeal specifically challenging the Trial Chamber's application of the legal standards it identified for the assessment of evidence.[89]

4. Conclusion

62. We find that the Trial Chamber did not err in stating the *in dubio pro reo* principle. While we find the Trial Chamber's statement—that it exercised the *in dubio pro reo* principle in favour of the accused, "as it must in a case based on circumstantial evidence"—to be legally erroneous, the Prosecution has not demonstrated that this statement affected the way the Trial Chamber approached circumstantial evidence throughout the Judgment.

[85] Prosecution Appeal Brief, paras 19, 21.
[86] Judgment, para. 257.
[87] Judgment, para. 232 (footnote omitted).
[88] Judgment, para. 230.
[89] *See* Sub-grounds 1 (B) and 8 (B) and Sub-grounds 1 (C) and 8 (A) below.

63 We find the Trial Chamber's abstract statement—that corroboration was more desirable than in cases featuring direct evidence—to be legally erroneous. We hold that the standard of proof beyond reasonable doubt applies to direct and circumstantial evidence equally and that corroboration is not necessarily "more desirable" in a circumstantial case. However, the Prosecution has not demonstrated that the Trial Chamber's error of law affected its evaluation and application of circumstantial evidence throughout the Judgment.

64 We find that the Prosecution has not demonstrated that the Trial Chamber generally approached circumstantial evidence as having less value than direct evidence.

65 For the foregoing reasons, Sub-ground 1 (A) is dismissed.

66 The arguments where the Prosecution draws the attention of the Appeals Chamber to specific findings of the Trial Chamber and alleges that the law in relation to circumstantial evidence was misapplied will be further addressed in the sections below dealing with the Prosecution's sub-grounds of appeal specifically challenging the relevant findings.

B. Sub-grounds 1 (B) and 8 (B): Whether the Trial Chamber Erred in Law by Applying the Beyond Reasonable Doubt Standard, Including Its Application to Circumstantial Evidence in the Form of the Only Reasonable Inference Standard, to Facts to Which the Standard Does Not Apply

1. Submissions of the Parties and LRV

67 The Prosecution submits that the Trial Chamber "erred in law in applying the beyond reasonable doubt standard to facts other than those which constitute the elements of the charged crimes and modes of liability, including when applying the standard to circumstantial evidence in the form of the only reasonable inference standard".[90] The Prosecution contends that this error "played a critical role" in the acquittals of Messrs Merhi and Oneissi.[91] According to the Prosecution, the beyond reasonable doubt standard of proof applies to the facts that constitute the elements of the charged crimes and modes of liability, as well as to the ultimate question of guilt.[92] The Prosecution submits that the Trial Chamber consequently erred by expanding the scope of application of the beyond reasonable doubt standard to all facts underlying the

[90] Prosecution Appeal Brief, para. 23. *See also id*. at para. 414.
[91] Prosecution Appeal Brief, para. 24.
[92] Prosecution Appeal Brief, para. 25.

elements of the crime or the form of responsibility alleged, as well as to all facts that are indispensable for entering a conviction.[93] In particular, the Prosecution contends that the Trial Chamber erred in adopting this extensive formulation from the ICTY *Halilović* Appeal Judgment.[94] In the Prosecution's view, this authority is not persuasive,[95] and its expansion of the beyond reasonable doubt standard finds no support in generally accepted sources of international law, such as customary international law or general principles of law.[96]

68 The Prosecution submits that, having mistakenly adopted the *Halilović* formulation, the Trial Chamber then proceeded to apply it indiscriminately to facts other than those that constituted the elements of the charged crimes and modes of liability, as well as "to things that were not facts at all" and "to facts to which it expressly or effectively acknowledged it should not apply".[97] In particular, the Prosecution challenges the Trial Chamber's application of the beyond reasonable doubt standard to: (a) the exact date the Canter van was purchased; (b) the role of particular network mobile users in purchasing the van or preparing it for use in the attack; (c) whether the man who purchased the van knew it would be used for a terrorist attack on Mr Hariri; (d) whether on 4 February 2005 the user of Purple 018 visited the vicinity of the tree where the videotape was later hidden; (e) whether items of evidence corroborated each other; (f) the Trial Chamber's own inability to reach a finding; and (g) facts to which the Trial Chamber recognized that such a standard did not apply.[98]

69 The Prosecution also argues that the Trial Chamber incorrectly engaged in a series of erroneous double-applications of the standard of proof by holding that it "must be convinced beyond reasonable doubt that the Prosecution's pleading is the only inference reasonably available on the evidence".[99] In the Prosecution's view, this misapplication of the standard of proof led the Trial Chamber to exclude from consideration those facts—as well as evidence supporting them—that had not been proved beyond reasonable doubt, when determining whether the elements of crimes and modes of liability had been proved beyond reasonable doubt.[100]

---

93 Prosecution Appeal Brief, para. 25, *citing* Judgment, paras 214, 218.
94 Prosecution Appeal Brief, paras 26, 29.
95 Prosecution Appeal Brief, paras 31-37.
96 Prosecution Appeal Brief, paras 29, 39.
97 Prosecution Appeal Brief, para. 42 (footnotes omitted). *See also id.* at para. 415.
98 Prosecution Appeal Brief, para. 42.
99 Prosecution Appeal Brief, para. 43, *citing* Judgment, para. 5663.
100 Prosecution Appeal Brief, para. 44.

70. Furthermore, the Prosecution argues that the Trial Chamber "repeatedly subjected individual pieces of evidence to the standard of beyond reasonable doubt, and asked if that single piece of evidence proved a given point".[101] In particular, the Prosecution claims that the Trial Chamber erroneously applied the beyond reasonable doubt standard of proof to the following individual items of evidence (and underlying issues): (a) the inactivity of the Purple Phones on 16 January 2005; (b) the increased activity of the Green Network mobiles on 16 January 2005; (c) the calls between Messrs Merhi, Oneissi, and the user of Purple 018 on 14 and 15 January 2005; (d) the calls between Messrs Merhi and Ayyash's personal mobiles on 6 February 2005; (e) the calls or groups of calls near each of the payphones and the tree on 14 February 2005; and (f) the deactivation of the three Purple Phones on 15–16 February 2005.[102] The Prosecution also argues that the Trial Chamber mistakenly applied the beyond reasonable doubt standard of proof to the following issues: (a) the "*modus operandi*" of the callers for the payphone calls on 14 February 2005 and the issue whether there was a lookout to "ensure that no one else could hear the call, or interfere"; and (b) the reason the Purple Phone holders would have used their Purple Phones when delivering the false claim.[103]

71. The Prosecution requests that the Appeals Chamber hold that "the beyond reasonable doubt and only reasonable inference standards apply only to the ultimate question of guilt and the facts which constitute the elements", correct the Trial Chamber's misapplications of the standard, and consider any evidence and facts wrongly set aside by the Trial Chamber when assessing the remaining grounds of appeal.[104] In the alternative, the Prosecution requests that the Appeals Chamber clarify the correct scope of application of both the beyond reasonable doubt standard and the only reasonable inference standard as a matter of general significance to the Tribunal's jurisprudence.[105]

72. Counsel for Mr Merhi respond that the Trial Chamber correctly identified the scope of application of the standard of proof beyond reasonable doubt.[106] They argue that the *Halilović* Appeal Judgment did not extend the scope of application of the standard when requiring that it be applied to the facts underlying the elements of the crime or the form of responsibility and to

[101] Prosecution Appeal Brief, para. 415.
[102] Prosecution Appeal Brief, para. 416. *See also id.* at paras 41, 418.
[103] Prosecution Appeal Brief, para. 418 (footnote omitted). *See also id.* at para. 41.
[104] Prosecution Appeal Brief, para. 45.
[105] Prosecution Appeal Brief, para. 45.
[106] Merhi Response Brief, p. 13. *See also id.* at paras 50-62.

facts indispensable to enter a conviction.[107] They contend that the attribution of mobiles and the identification of Mr Oneissi as "Mohammed" are examples of facts indispensable for the conviction of the accused in the instant case.[108]

73 Counsel for Mr Merhi challenge the Prosecution's submissions that the Trial Chamber applied the beyond reasonable doubt standard of proof: (a) "to things that were not facts at all",[109] namely, to the issue whether items of evidence corroborated each other [110] and to "the Chamber's own inability to reach a finding",[111] as well as (b) to facts to which the Trial Chamber recognized that the standard did not apply.[112] Counsel for Mr Merhi also oppose the Prosecution's submission that the Trial Chamber incorrectly adopted a two-stage assessment of the evidence.[113]

74 Counsel for Mr Merhi claim that the errors alleged by the Prosecution in relation to the Trial Chamber's application of the beyond reasonable doubt standard of proof qualify as errors of fact and not as errors of law.[114] In particular, Counsel for Mr Merhi submit that, contrary to what is argued by the Prosecution, the Trial Chamber did not apply the beyond reasonable doubt standard of proof to: (a) the inactivity of the Purple Phones on 16 January 2005;[115] (b) the increased activity of the Green Network mobiles on 16 January 2005;[116] (c) the calls between Messrs Merhi and Oneissi and the user of Purple 018 on 14 and 15 January 2005;[117] (d) the calls between Messrs Merhi and Ayyash on 6 February 2005;[118] or (e) the deactivation of the three Purple Phones.[119] Moreover, Counsel for Mr Merhi argue that the Trial Chamber did not err in its application of the beyond reasonable doubt standard to the following issues, as it expressly concluded that they constituted material facts: (a) the calls or groups of calls near each of the payphones and the tree on 14 February 2005;[120] (b) whether the Purple Phones' period of inactivity after Mr Abu Adass's disappearance was linked to the preparation of the

---

107 Merhi Response Brief, paras 52-53, *referring to, inter alia, Halilović* Appeal Judgment, paras 125, 129.
108 Merhi Response Brief, para. 58.
109 Merhi Response Brief, para. 66, *citing* Prosecution Appeal Brief, para. 42.
110 Merhi Response Brief, para. 67.
111 Merhi Response Brief, para. 68, *citing* Prosecution Appeal Brief, para. 42.
112 Merhi Response Brief, para. 69.
113 Merhi Response Brief, para. 70.
114 Merhi Response Brief, para. 462.
115 Merhi Response Brief, paras 464-468.
116 Merhi Response Brief, paras 469-472.
117 Merhi Response Brief, paras 473-476. *See also id.* at para. 491.
118 Merhi Response Brief, paras 477-481. *See also id.* at para. 492.
119 Merhi Response Brief, paras 485-489.
120 Merhi Response Brief, paras 482-484.

video;[121] and (c) the identities and number of the callers for the payphone calls on 14 February 2005.[122] Lastly, Counsel for Mr Merhi contend that the Prosecution did not demonstrate how the alleged errors affected the assessment of the entirety of the evidence presented against Mr Merhi.[123]

75. Counsel for Mr Merhi therefore argue that Sub-grounds 1 (B) and 8 (B) should be dismissed.[124]

76. Counsel for Mr Oneissi respond that the error alleged by the Prosecution in relation to the Trial Chamber's application of the beyond reasonable doubt standard amounts to an error of fact and not an error of law. They argue that, as a consequence, the Prosecution should have demonstrated whether this alleged error had occasioned a miscarriage of justice,[125] which it failed to do.[126] Counsel for Mr Oneissi contend that, should the Appeals Chamber consider the alleged error as an error of law, the Prosecution has failed to demonstrate how this error invalidates the decision.[127] They submit that the Prosecution did not identify the problems inherent in the adoption of the *Halilović* formulation and therefore failed to demonstrate that those problems are reflected in the Judgment.[128] Counsel for Mr Oneissi also assert that, contrary to the Prosecution's submissions, the Trial Chamber did not err in law in applying the beyond reasonable doubt standard to facts underlying the elements of the crimes and modes of liability and to those facts indispensable for entering a conviction.[129] They argue that no case cited by the Prosecution rejected this approach.[130]

77. Furthermore, Counsel for Mr Oneissi state that the Trial Chamber did not err in applying the beyond reasonable doubt standard of proof to the following issues, as they constitute material facts: (a) whether the caller who made the 14 February 2005 false claim payphone calls would have used a lookout; and (b) the reason the Purple Phone holders used their non-network Purple Phones when delivering the false claim.[131] Counsel for Mr Oneissi

[121] Merhi Response Brief, paras 493-495.
[122] Merhi Response Brief, para. 496.
[123] Merhi Response Brief, para. 498.
[124] Merhi Response Brief, paras 71, 498.
[125] Oneissi Response Brief, para. 67.
[126] Oneissi Response Brief, para. 74.
[127] Oneissi Response Brief, paras 68, 75.
[128] Oneissi Response Brief, paras 77-78.
[129] Oneissi Response Brief, para. 82.
[130] Oneissi Response Brief, para. 83, *citing* Judgment, para. 216.
[131] Oneissi Response Brief, paras 69-70.

also enumerate facts identified by the Trial Chamber as material facts that the Prosecution did not prove beyond reasonable doubt.[132] They note that, in the Prosecution's view, none of those facts or any other fact alleged against Mr Oneissi would be required to meet the beyond reasonable doubt standard, as it would be sufficient that the combination of *all* the facts alleged reach that standard.[133] Counsel for Mr Oneissi contend that such a position is unsustainable, since the beyond reasonable doubt standard must apply to *each* material fact underpinning the elements of crimes and modes of liability, as well as to the facts indispensable for entering a conviction.[134]

78. Counsel for Mr Oneissi also note the Prosecution's submission that the Trial Chamber applied the beyond reasonable doubt standard of proof to individual items of evidence, including: (a) the inactivity of the Purple Phones on 16 January 2005; (b) the calls between Messrs Merhi and Oneissi and the user of Purple 018 on 14 and 15 January 2005; (c) the calls or groups of calls near each of the payphones and the tree on 14 February 2005; and (d) the deactivation of the three Purple Phones on 15–16 February 2005.[135] They contend that these are not individual items of evidence, but rather "the accumulation of small unestablished individual facts", which cannot serve as a basis for a finding on a key fact.[136] Counsel for Mr Oneissi argue that, since the Prosecution chose to demonstrate Mr Oneissi's alleged participation based on a series of successive alleged acts from December 2004 to February 2005, it had to prove each of these material acts.[137] Lastly, they challenge the Prosecution's submission that, in a circumstantial case such as this one, the beyond reasonable doubt standard can only be applied to the evidence as a whole, and not to any isolated item of evidence.[138]

79. Counsel for Mr Oneissi therefore ask the Appeals Chamber to dismiss Sub-grounds 1 (B) and 8 (B).[139]

80. The Prosecution replies that the only requirement for establishing guilt is that the elements of the crime and mode of liability must be proved beyond reasonable doubt.[140] It

[132] Oneissi Response Brief, paras 70-71.
[133] Oneissi Response Brief, para. 72.
[134] Oneissi Response Brief, para. 73.
[135] Oneissi Response Brief, paras 234-235.
[136] Oneissi Response Brief, para. 236.
[137] Oneissi Response Brief, paras 239-240.
[138] Oneissi Response Brief, paras 241-242.
[139] Oneissi Response Brief, paras 74, 79, 85, 242.
[140] Prosecution Reply Brief, para. 19.

reiterates that the *Halilović* formulation adopted by the Trial Chamber is amongst the broadest formulations to appear in the jurisprudence.[141] The Prosecution argues that "facts indispensable to a conviction" is not a distinct category of findings which must be proved beyond reasonable doubt.[142] Furthermore, it contends that an error in the scope of application of the beyond reasonable doubt standard is "a quintessential legal error".[143]

81 With respect to the Trial Chamber's alleged misapplication of the beyond reasonable doubt standard, the Prosecution reiterates that the Trial Chamber subjected individual items of evidence to the standard, asked whether that single item of evidence proved a given point beyond reasonable doubt, and then applied the standard to findings other than the elements of the offences and the modes of liability.[144]

82 The LRV observes that the Trial Chamber approached the beyond reasonable doubt standard in a discretionary manner. In the view of the LRV, the circumstances requiring the expansive application of the beyond reasonable doubt standard are non-existent when the evidence is viewed holistically.[145] The LRV argues that the Trial Chamber did not need to accept each and every item of evidence separately as the only reasonable inferences, but should have taken them into consideration together and then applied the only reasonable inference standard.[146]

83 Counsel for Mr Merhi respond that the LRV's arguments are obscure and reiterate that the Trial Chamber correctly identified the scope of application of the standard of proof beyond reasonable doubt.[147]

2. Trial Chamber Findings

84 The Trial Chamber stated that the Prosecution must rebut the presumption of innocence and prove the guilt of the accused beyond reasonable doubt.[148] The Trial Chamber recognized that "circumstances may exist where a factual finding is indispensable to convicting an accused person, even though it is not directly or strictly required to establish an element of a crime or a

[141] Prosecution Reply Brief, para. 21.
[142] Prosecution Reply Brief, para. 23.
[143] Prosecution Reply Brief, para. 29.
[144] Prosecution Appeal Brief, para. 137.
[145] LRV Observations, para. 45.
[146] LRV Observations, para. 51.
[147] Merhi Response to LRV Observations, paras 39-41, 58.
[148] Judgment, para. 203.

mode of liability".[149] Accordingly, it held that a trial chamber, in order to enter a conviction, must find such facts proved beyond reasonable doubt.[150] The Trial Chamber also observed that, pursuant to the general principles of international criminal procedural law, "[a]ll facts underlying the elements of the crime or the form of responsibility alleged as well as all those, which are indispensable for entering a conviction, must be proven beyond reasonable doubt".[151] In the Trial Chamber's view, "[t]his approach has the merit of avoiding overly narrow, artificial distinctions between different facts, all of which must exist for the alleged crime or form of participation in it to have occurred."[152] Based on this approach, the Trial Chamber was unable to make findings beyond a reasonable doubt on numerous facts alleged by the Prosecution that were crucial for the success of the case against the accused.[153]

3. <u>Discussion</u>

a. Applicable Law

85. The Appeals Chamber recalls that the STL Statute explicitly provides for the applicable standard of proof under Article 16, entitled the "Rights of the accused". Article 16 (2) (c) reads as follows:

> In order to convict the accused, the relevant Chamber must be convinced of the guilt of the accused beyond reasonable doubt.

86. This statutory provision is mirrored by Rule 148 (A) of the STL Rules on "Deliberations", providing, in relevant part, that:

> A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.

87. In the *Al Jadeed* contempt case, the STL Appeals Panel elaborated on the foregoing provisions and found that "the criminal standard of 'beyond reasonable doubt' must be applied to the facts forming the elements of an offence".[154] In so ruling, the Appeals Panel referred to the jurisprudence of the ICTY and of the ICTR, which limited the scope of application of the beyond reasonable doubt standard of proof to "the facts forming the elements of the crime or

---

[149] Judgment, para. 214, *referring to* the jurisprudence of ICTY, ICTR, ICC, and Special Court for Sierra Leone ("SCSL").
[150] Judgment, para. 214.
[151] Judgment, para. 218. In stating such principle, the Trial Chamber explicitly endorsed the formulation adopted by the ICTY Appeals Chamber in the *Halilović* case. *See Halilović* Appeal Judgment, para. 129.
[152] Judgment, para. 219.
[153] *See*, *e.g.*, Judgment, paras 4901, 5466, 5473, 5483, 5529, 5536, 5658-5664, 5680, 5815-5818.
[154] *Al Jadeed* Appeal Judgment, para. 126 (footnote omitted).

the form of responsibility alleged against the accused",[155] as well as "the facts which are indispensable for entering a conviction".[156] We observe that this jurisprudence was later endorsed by the Appeals Chamber of the ICC when stating that "the standard of proof 'beyond reasonable doubt' is to be applied only to the facts constituting the elements of the crime and mode of liability of the accused as charged",[157] as well as to "the facts which are 'indispensable for entering a conviction'".[158]

88 In other cases, as observed by the Prosecution, the ICTY Appeals Chamber has adopted different linguistic formulations of the scope of application of the beyond reasonable doubt standard of proof, requiring that this standard be fulfilled for "each element of [the] crime (as defined with respect to the relevant mode of liability)",[159] for "all the facts which are material to the elements of [the] crime [charged]",[160] or for "those [facts] on which a conviction or the sentence depends".[161]

89 In the *Halilović* case, the ICTY Appeals Chamber further noted that, because of the way the Prosecution had pleaded the case in the indictment and presented it during trial, a trier of fact might have to make findings beyond reasonable doubt on facts other than those "which are essential to proving the elements of the crimes and the forms of responsibility".[162] The *Halilović* Appeals Chamber therefore held that "[a]ll facts underlying the elements of the crime or the form of responsibility alleged as well as all those, which are indispensable for entering a conviction, must be proven beyond reasonable doubt."[163]

---

[155] *Ntagerura et al.* Appeal Judgment, para. 174.
[156] *Ntagerura et al.* Appeal Judgment, para. 174. *See also Mrkšić and Šljivančanin* Appeal Judgment, paras 220, 325.
[157] *Lubanga* Appeal Judgment, para. 22.
[158] *Ngudjolo* Appeal Judgment, para. 125 (footnote omitted).
[159] *Stakić* Appeal Judgment, para. 219.
[160] *Martić* Appeal Judgment, para. 55. *See also D. Milošević* Appeal Judgment, para. 20.
[161] *Đorđević* Appeal Judgment, para. 296 (footnote omitted). *See also Taylor* Appeal Judgment, para. 181; *D. Milošević* Appeal Judgment, para. 20.
[162] *Halilović* Appeal Judgment, para. 129.
[163] *Halilović* Appeal Judgment, para. 129, *citing Ntagerura et al.* Appeal Judgment, para. 174; *Blagojević and Jokić* Appeal Judgment, para. 226.

b. Analysis of Trial Chamber Findings

i. <u>Whether the Trial Chamber Erred in Identifying the Scope of Application of the Standard of Proof Beyond Reasonable Doubt</u>

90. The Prosecution argues that the *Halilović* formulation unduly expanded the scope of application of the beyond reasonable doubt standard of proof.[164] It therefore submits that the Trial Chamber erred in law in adopting such a formulation.[165]

91. The Appeals Chamber notes that, despite some linguistic differences in the formulation of the scope of application of the beyond reasonable doubt standard, international criminal jurisprudence has uniformly defined what that scope encompasses. The overarching principle is that, regardless of whether the evidence is direct or circumstantial, not all facts pleaded in an indictment necessarily need be proved beyond a reasonable doubt, but only those facts that are material to the guilt of an accused insofar as they form, constitute, or underlie the elements of the crimes and the modes of liability charged, or are indispensable for entering a conviction or sentence as the conviction or the sentence depends on them.[166] In this regard, we note that whether a fact is material to the guilt of the accused or indispensable for their conviction is a determination that cannot be made in the abstract and depends on the nature of the Prosecution's case.[167]

92. We are of the view that, contrary to what the Prosecution argues, the *Halilović* Appeal Judgment neither expanded the beyond reasonable doubt standard nor altered the principle. We note that, despite challenging the Trial Chamber's identification of the scope of application of the beyond reasonable doubt standard, the Prosecution argued that "[t]he beyond reasonable doubt standard of proof applies to the facts which constitute the elements of the charged crimes and modes of liability, as well as to the ultimate question of guilt".[168] Setting aside minor linguistic discrepancies, the Prosecution's suggested scope of application of the beyond reasonable doubt standard substantially overlaps with the *Halilović* formulation, which in turn

---

[164] Prosecution Appeal Brief, paras 29-39.
[165] Prosecution Appeal Brief, paras 25-26.
[166] *See*, *e.g.*, *Ngudjolo* Appeal Judgment, para. 125; *Lubanga* Appeal Judgment, para. 22; *Đorđević* Appeal Judgment, para. 296; *Taylor* Appeal Judgment, para. 181; *D. Milošević* Appeal Judgment, para. 20; *Mrkšić and Šljivančanin* Appeal Judgment, paras 220, 325; *Martić* Appeal Judgment, para. 55; *Halilović* Appeal Judgment, para. 129; *Blagojević and Jokić* Appeal Judgment, para. 226; *Ntagerura et al.* Appeal Judgment, para. 174; *Stakić* Appeal Judgment, para. 219.
[167] *Kupreškić et al.* Appeal Judgment, para. 89.
[168] Prosecution Appeal Brief, para. 25 (footnote omitted).

reflected the international jurisprudence existing at the time[169] and which has been consistently endorsed by subsequent case law.[170]

93 The *Halilović* Appeal Judgment is persuasive authority on the scope of application of the beyond reasonable doubt standard, to which the Trial Chamber was allowed to turn when carrying out its duty to identify the applicable law. We recall that, as recognized by the Prosecution,[171] the jurisprudence of other international criminal tribunals—and especially that of the *ad hoc* tribunals—may constitute persuasive authority, provided that a chamber conducts a careful appraisal to ensure that the legal reasoning is sound. The Trial Chamber conducted an appraisal of the *Halilović* formulation and decided to resort to such authority because it "avoid[s] overly narrow, artificial distinctions between different facts, all of which must exist for the alleged crime or form of participation in it to have occurred".[172] The Appeals Chamber therefore finds that the Prosecution has not demonstrated that the Trial Chamber erred in law in adopting the *Halilović* formulation of the scope of application of the beyond reasonable doubt standard of proof.

ii. <u>Whether the Trial Chamber Erred in the Application of the Beyond Reasonable Doubt Standard</u>

94 The Prosecution challenges the Trial Chamber's holding that it "must be convinced beyond reasonable doubt that the Prosecutor's pleading is the only inference reasonably available on the evidence".[173]

95 The Appeals Chamber is not persuaded that this statement demonstrates that the Trial Chamber incorrectly engaged in an erroneous double-application of the beyond reasonable doubt standard of proof.[174] As stated above, the Trial Chamber correctly identified the "only reasonable inference" standard as the standard of proof for the assessment of circumstantial evidence.[175] The Trial Chamber noted that, if alternative reasonable inferences are available, then the inference that the prosecution asks a chamber to find is not proved

[169] *See, e.g., Blagojević and Jokić* Appeal Judgment, para. 226; *Ntagerura et al.* Appeal Judgment, para. 174.
[170] *See, e.g., Ngudjolo* Appeal Judgment, para. 125; *Đorđević* Appeal Judgment, para. 296; *Taylor* Appeal Judgment, para. 181; *D. Milošević* Appeal Judgment, para. 20; *Mrkšić and Šljivančanin* Appeal Judgment, paras 220, 325.
[171] Prosecution Appeal Brief, para. 31, fn. 42.
[172] Judgment, para. 219.
[173] Prosecution Appeal Brief, para. 43, *citing* Judgment, para. 5663.
[174] Prosecution Appeal Brief, para. 43.
[175] *See* above Sub-ground 1 (A).

beyond reasonable doubt.[176] We agree with this statement. For the prosecution's inference to be the only reasonable one, a chamber must be satisfied that no alternative reasonable inferences are available from the evidence, which is effectively equivalent to stating that it must be convinced beyond reasonable doubt that the prosecution's inferences are the only reasonable ones.

96 For these reasons, we conclude that the Trial Chamber did not err in law and did not engage in a double-application of the beyond reasonable doubt standard of proof.

97 The Prosecution contends that the Trial Chamber excluded from consideration facts (and supporting evidence) that were not proved beyond reasonable doubt when assessing whether the elements of crimes and modes of liability had been proved beyond reasonable doubt.[177]

98 The Appeals Chamber finds that the Prosecution failed to explain how this constitutes an error of law. If an item of evidence offered to prove a fact material to the guilt of an accused does not prove that fact beyond a reasonable doubt, then that fact is not established. Such a situation does not mean that the evidence was "excluded". It was considered, weighed, and found wanting. In any case, the Prosecution did not point to any such item of evidence that the Trial Chamber left unconsidered when assessing the elements of crimes and modes of liability. We recall that a party alleging an error of law must identify the alleged error and explain how the alleged error invalidates the decision.[178]

99 Therefore, the Prosecution has not demonstrated that the Trial Chamber, as a general matter, erred in law. However, this argument will be further addressed in the section below dealing with the Prosecution's argument that the Trial Chamber analyzed evidence in isolation rather than in its totality.[179]

[176] Judgment, para. 257.
[177] Prosecution Appeal Brief, para. 44.
[178] *Al Jadeed* Appeal Judgment, para. 12. *See also Stanišić and Simatović* Appeal Judgment, para. 16; *Nyiramasuhuko et al.* Appeal Judgment, para. 30; *Ngirabatware* Appeal Judgment, para. 8; *Lubanga* Appeal Judgment, para. 30; *Taylor* Appeal Judgment, para. 25; *Ayyash et al.* Jurisdiction Appeal Decision, para. 10.
[179] *See* Sub-grounds 1 (C) and 8 (A) below.

iii. Whether the Trial Chamber Erred in Applying the Standard of Proof Beyond Reasonable Doubt to Facts to Which the Standard Does Not Apply

100. The Prosecution submits that the Trial Chamber erred in law in applying the beyond reasonable doubt standard to a series of facts, issues, and items of evidence to which the standard does not apply.[180] Defence Counsel for Messrs Merhi and Oneissi claim that the errors alleged by the Prosecution in relation to the application of the beyond reasonable doubt standard by the Trial Chamber amount to errors of fact and not errors of law.[181]

101. The Appeals Chamber recalls that the Prosecution, under Sub-grounds 1 (B) and 8 (B), argues that the Trial Chamber erred in identifying the standard of proof beyond reasonable doubt and in applying that standard to the facts at issue. Both alleged errors were characterized as errors of law. We concluded that the Trial Chamber did not err in law in identifying the correct legal standard and must now assess whether the Trial Chamber erred in applying that standard.

102. In doing so, we will assess whether the alleged misapplication of the legal standard to certain facts and items of evidence led to an error of law invalidating the decision. Whether no reasonable trier of fact could have reached the factual conclusions drawn by the Trial Chamber will then be more appropriately addressed in our assessment of the error of fact alleged by the Prosecution under Sub-ground 8 (D) of the Prosecution Appeal Brief.[182]

(a) Whether the Trial Chamber erred in applying the standard of proof beyond reasonable doubt to its findings on mobile phone activity with regard to the making of the videotape and its dissemination

103. The Appeals Chamber will now assess whether the Trial Chamber erred in applying the standard of proof beyond reasonable doubt to the following items of evidence and related issues: (a) the inactivity of the Purple Phones on 16 January 2005; (b) the increased activity of the Green Network mobiles on 12, 14, 15, and 16 January 2005; (c) the calls between Messrs Merhi and Oneissi and the user of Purple 018 on 14 and 15 January 2005; (d) the calls between Messrs Merhi and Ayyash on 6 February 2005; (e) the calls or groups of calls near

[180] Prosecution Appeal Brief, paras 40-42, 416, 418.
[181] Merhi Response Brief, para. 462; Oneissi Response Brief, para. 67.
[182] *See* Sub-ground 8 (D) below.

each of the payphones and the tree on 14 February 2005, including the *modus operandi* of the callers for the payphone calls on 14 February 2005 and whether there was a lookout; and (f) the deactivation of the three Purple Phones on 15–16 February 2005, including the reason the Purple Phone holders would have used their Purple Phones when delivering the false claim.[183]

104 The Appeals Chamber observes that the first four issues relate to the making of the videotape used in the false claim of responsibility, while the last two relate to the dissemination of the false claim.

105 The Trial Chamber held—with respect to the circumstances surrounding the making of the video and, in particular, the disappearance of Mr Abu Adass—that it could not draw a conclusion beyond reasonable doubt concerning the inactivity of the Purple Phones on Sunday, 16 January 2005 or the increased activity of the Green Network mobiles in the morning of that day.[184] The Trial Chamber also found that the calls between Green 071 (attributed by the Prosecution to Mr Merhi) and Mr Badreddine on 12, 14, and 15 January 2005—as well as those between Messrs Merhi and Oneissi and the user of Purple 018 on 14 and 15 January 2005—were devoid of any context, so that speculation as to their content would be needed to find a connection between those calls and any material facts pleaded against the accused—and hence to be satisfied that this was the only reasonable conclusion available from the evidence.[185] The Trial Chamber also declined to find that the only inference reasonably available from a period of "inactivity" of contact between Messrs Merhi and Oneissi's Purple mobiles and Purple 018 in the month after Mr Abu Adass's disappearance was that they were involved in making the video.[186] Similarly, the Trial Chamber could not accept that the only reasonable inference available from calls between Messrs Merhi and Ayyash's personal mobiles on 6 February 2005 was their lack of awareness of each other's Green mobiles or that they were ordered not to use those mobiles to call each other. In the view of the Trial Chamber, these were only possible inferences, and there was no evidence of the reason for their contact on that day.[187]

106 With respect to the circumstances surrounding the dissemination of the false claim of responsibility, the Trial Chamber found that the "mere near contemporaneous presence" in a

[183] Prosecution Appeal Brief, paras 41, 416, 418-419.
[184] Judgment, para. 5466.
[185] Judgment, paras 5470-5473.
[186] Judgment, para. 5529.
[187] Judgment, paras 5536-5537.

predicted cell coverage area does not establish beyond reasonable doubt that the user of Purple 018 was ever at the payphone near Abou Shaker Square, made the first call to *Reuters*, or observed someone else making it.[188] The Trial Chamber then proceeded to evaluate the evidence of the user of Purple 018's presence near that payphone "in the context of the totality of the other calls that day".[189] It concluded that the evidence of the user of Purple 018's presence near the other payphones was consistent with the user of Purple 018 being able to make the call or to watch someone doing it, but also with him or someone else not doing it.[190] The Trial Chamber also found that the evidence that a mobile at the tree could connect to a cell at least 200 to 500 metres away casts a reasonable doubt on whether Mr Oneissi was watching the tree.[191] Similarly, the Trial Chamber was not persuaded that the only reasonable inference available from the evidence was that Messrs Merhi and Oneissi and the user of Purple 018 made a mistake in using non-network mobiles in the aftermath of the attack and discarded the mobiles after realizing the mistake.[192]

107 The Appeals Chamber notes that the Prosecution offered evidence on mobile phone activity to prove that Messrs Merhi and Oneissi were involved in the disappearance of Mr Abu Adass, dissemination of statements falsely attributing responsibility for the attack, and delivery of the video and a letter to *Al-Jazeera*.[193] The Appeals Chamber has carefully reviewed the impugned findings and finds that the Trial Chamber did not apply the beyond reasonable doubt standard to the mobile phone activity *per se*, but rather assessed whether, as argued by the Prosecution, the only reasonable inference that could be drawn from such activity was that Messrs Merhi and Oneissi were involved in the disappearance of Mr Abu Adass and in the dissemination of statements falsely attributing responsibility for the attack, as well as in the delivery of the video and a letter to *Al-Jazeera*. In this regard, we note that the Trial Chamber found that the circumstances surrounding the disappearance of Mr Abu Adass constituted evidence of material facts pleaded against Messrs Merhi and Oneissi and the user of Purple 018, *i.e.*, their participation in the taping and dissemination of the false claim of

[188] Judgment, para. 5658.
[189] Judgment, para. 5658.
[190] Judgment, paras 5659-5665.
[191] Judgment, para. 5680.
[192] Judgment, paras 5815-5817.
[193] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3813, Notice of Filing of Updated Redacted Version of F2720 "Amended Consolidated Indictment", filed 12 July 2016, 23 January 2020, Annex: Updated Public Redacted Version of Amended Consolidated Indictment ("Amended Consolidated Indictment"), paras 3 (b), 3 (c), 3 (d).

responsibility.[194] The Trial Chamber further held that the four payphone calls on Monday 14 February 2005 and the collection of the video from the tree constituted material facts pleaded against Messrs Merhi and Oneissi and the user of Purple 018.[195]

108 We recall that the facts material to the guilt of an accused *must* be established beyond reasonable doubt. We also hold that inferences must be reasonable and narrowly construed.[196] When inferences as to material facts are themselves based on intermediate inferences, these must be the only reasonable ones to be drawn from the available evidence as well.[197] Contrary to what the Prosecution argues, this way of proceeding does not lead to trials *ad infinitum*, but would simply uphold the *in dubio pro reo* fundamental principle of criminal law. The Appeals Chamber therefore finds that the Prosecution has not demonstrated that the Trial Chamber erred in law. This is without prejudice to our further assessment of: (a) whether the Trial Chamber erred in analyzing evidence in isolation, rather than in its totality;[198] and (b) whether a reasonable trier of fact could have reached the factual conclusions drawn by the Trial Chamber.[199]

109 The Prosecution also contends that the Trial Chamber disregarded the evidence on Messrs Merhi and Ayyash's contacts on their personal mobiles when determining whether the patterns of behaviour of Messrs Merhi and Onesissi and the user of Purple 018 were "so exceptional as to be inexplicable on the basis of chance".[200] The Appeals Chamber will address this argument when dealing with the Prosecution's sub-grounds of appeal that the Trial Chamber analyzed evidence in isolation rather than in its totality.[201]

(b) Whether the Trial Chamber erred in applying the standard of proof beyond reasonable doubt to "things that were not facts at all"[202]

---

[194] Judgment, para. 5330. The Trial Chamber held that "[t]he elements of the crimes with which Merhi, Oneissi, and Purple 018 are charged concern the taping of the claim of responsibility and its dissemination in four payphone calls on Monday 14 February 2005. How Mr Abu Adass came to the location of the video is evidence of the pleaded material facts, rather than a material fact."
[195] Judgment, para. 5646.
[196] *Hadžihasanović and Kubura* Trial Judgment, para. 311.
[197] *See Ntaganda* Appeal Judgment, para. 39, fn. 11. In particular, the ICC Appeals Chamber referred to a decision of the Spanish Superior Court of Justice affirming that convictions based on circumstantial evidence can be sustained if, *inter alia*: (a) the facts or the basic facts are fully proved; and (b) the facts constituting the offence are deduced precisely from the proved basic facts.
[198] *See* Sub-grounds 1 (C) and 8 (A) below.
[199] *See* Sub-ground 8 (D) below.
[200] Prosecution Appeal Brief, para. 41, *referring to* Judgment, paras 5847-5848.
[201] *See* Sub-grounds 1 (C) and 8 (A) below.
[202] Prosecution Appeal Brief, para. 42.

110 The Appeals Chamber will now assess whether the Trial Chamber erred in applying the standard of proof beyond reasonable doubt to: (a) whether two items of evidence corroborated each other; (b) the Trial Chamber's own inability to reach a finding; and (c) facts to which the Trial Chamber recognized that such standard did not apply.[203]

111 First, the Prosecution points to the Trial Chamber's statement that "it is not the only reasonable inference available to the Trial Chamber on the evidence that either Witness 87 or the other witness's evidence corroborates the two Rule 158 witnesses' already somewhat inconsistent hearsay evidence".[204] The Prosecution argues that such a statement shows that the Trial Chamber unduly applied the beyond reasonable doubt standard to whether two items of evidence corroborated each other.[205]

112 The Appeals Chamber agrees with the Prosecution that the formulation of this statement is flawed. The Trial Chamber erroneously applied the standard of proof to an assessment of whether witness evidence corroborates the hearsay evidence of two Rule 158 witnesses on whether Mr Oneissi, posing as "Mohammed", approached both Mr Abu Adass and a witness at the Arab University Mosque ("Mosque") within a few days of each other and asked each to teach him how to pray.[206] The beyond reasonable doubt standard of proof need not be applied to an assessment of whether items of evidence corroborate each other. Whether items of evidence corroborate each other does not constitute a fact material to the guilt of an accused, but rather pertains to the discretionary power that a trier of fact is called to exercise when weighing the evidence before it. We therefore find that the Trial Chamber erred in law by applying the beyond reasonable doubt standard to whether two items of evidence corroborated each other.

113 However, despite this isolated error, it is clear from an examination of the trial record that the Trial Chamber was merely exercising its discretionary prerogatives in weighing evidence. It indeed came to the conclusion that it was not satisfied that witness evidence corroborated the hearsay evidence of two Rule 158 witnesses for the purpose of establishing beyond reasonable doubt a material fact pleaded against Mr Oneissi, *i.e.*, that he posed as "Mohammed" to meet Mr Abu Adass and to convince him to leave his home on 16 January

[203] Prosecution Appeal Brief, para. 42.
[204] Judgment, para. 4989.
[205] Prosecution Appeal Brief, para. 42.
[206] *See* Judgment, paras 4987-4988.

2005.[207] Therefore, we hold that the Prosecution has not demonstrated that this error of law invalidates the Judgment. This is without prejudice to our further assessment of whether a reasonable trier of fact could have reached the factual conclusions drawn by the Trial Chamber.[208]

114 Second, the Prosecution notes the Trial Chamber's statement that "the only reasonable conclusion available from the cell site evidence of the mobile activities is that the Trial Chamber cannot positively find that [Messrs Merhi and Oneissi and the user of Purple 018] were involved in Mr Abu Adass's disappearance on Sunday[,] 16 January 2005".[209] The Prosecution argues that this statement shows that the Trial Chamber unduly applied the beyond reasonable doubt standard to its own inability to reach a finding.[210] The Appeals Chamber does not agree with the Prosecution's submission on this point. Despite the unfortunate formulation of the impugned finding, the Trial Chamber did not apply the beyond reasonable doubt standard to its own inability to make a finding. Rather, the Trial Chamber correctly applied the standard of proof to assess whether cell site evidence of the mobile phone activities could prove beyond reasonable doubt that Messrs Merhi and Oneissi and the user of Purple 018 were involved in the disappearance of Mr Abu Adass, which—as discussed above—was evidence tendered by the Prosecution to prove a material fact, namely, the participation of Messrs Merhi and Oneissi and the user of Purple 018 in the taping and dissemination of the false claim of responsibility. We therefore find that the Prosecution's submission has no merit.

115 Lastly, the Prosecution argues that the Trial Chamber erred in applying the beyond reasonable doubt standard of proof when making negative findings on facts that the Trial Chamber itself recognized did not need to fulfil this standard, namely: (a) whether Mr Abu Adass met a person called "Mohammed" at the Mosque in late December 2004 or early January 2005 and taught him how to pray;[211] (b) whether Mr Abu Adass left his home with "Mohammed" on Sunday, 16 January 2005;[212] and (c) whether, on 4 February 2005, the user of Purple 018 visited the vicinity of the tree where the videotape was later hidden.[213]

---

[207] Judgment, paras 4988-4990.
[208] *See* Sub-ground 8 (D) below.
[209] Prosecution Appeal Brief, para. 42, *citing* Judgment, para. 5483.
[210] Prosecution Appeal Brief, para. 42.
[211] Prosecution Appeal Brief, para. 42, *referring to* Judgment, para. 4990.
[212] Prosecution Appeal Brief, para. 42, *referring to* Judgment, para. 5441.
[213] Prosecution Appeal Brief, para. 42, *referring to* Judgment, para. 5688.

116. The Appeals Chamber recalls that the facts that need to be proved beyond a reasonable doubt are those material to the guilt of the accused. Either a fact is material to the guilt of the accused and hence requires proof beyond reasonable doubt, or it is not, and hence the standard of proof need not be applied to that particular fact. We therefore find that the Trial Chamber erred in applying the beyond reasonable doubt standard of proof to facts that it recognized were not material to the guilt of the accused.

117. However, since the facts at issue are not material facts, as argued by the Prosecution and acknowledged by the Trial Chamber, the Prosecution has not demonstrated that this legal error invalidates the Judgment. This is nevertheless without prejudice to our further assessment of the Prosecution's argument that the Trial Chamber erred in analyzing evidence in isolation, rather than in its totality.[214]

(c) Whether the Trial Chamber erred in applying the beyond reasonable doubt standard of proof to its findings on the purchase of the Canter van

118. Finally, the Appeals Chamber will assess whether the Trial Chamber erred in applying the beyond reasonable doubt standard of proof to its findings on: (a) the exact date the Canter van was purchased;[215] (b) the role of particular network mobile users in purchasing the van or preparing it for use in the attack;[216] and (c) whether the man who purchased the van knew it would be used for a terrorist attack on Mr Hariri.[217]

119. The Appeals Chamber observes that the impugned findings concern facts that the Prosecution pleaded in the Amended Consolidated Indictment against Mr Ayyash to demonstrate his involvement in the crimes with which he was charged.[218] In this regard, we note that the Trial Chamber found that Mr Ayyash's alleged role in purchasing the Canter van was not a material pleaded fact indispensable for his conviction.[219] We recall that only facts material to the guilt of an accused need to be proved beyond a reasonable doubt. The Appeals Chamber therefore finds that the Trial Chamber erred in applying the beyond reasonable doubt standard to facts that are not material to the guilt of an accused. However,

[214] *See* Sub-grounds 1 (C) and 8 (A) below.
[215] Judgment, paras 6604, 6616.
[216] Judgment, paras 4748, 4795.
[217] Judgment, para. 6451.
[218] Amended Consolidated Indictment, paras 3 (a), 19 (a), 26, 32.
[219] Judgment, para. 6749. *See also id.* at para. 6768.

since the impugned findings do not concern a material fact pleaded against Messrs Merhi and Oneissi, the Prosecution has not demonstrated that this legal error invalidates the Judgment.

4. Conclusion

120 We find that the Trial Chamber has not erred in law in adopting the *Halilović* formulation of the scope of application of the beyond reasonable doubt standard of proof. We find that the beyond reasonable doubt standard of proof must be applied to those facts that are material to the elements of the crime and mode of liability charged—*i.e.*, the facts forming, constituting, or underlying the elements of a crime and mode of liability charged—as well as to those facts indispensable for entering a conviction or sentence—*i.e.*, those on which a conviction or the sentence depends.

121 We find that the Trial Chamber has not engaged in an erroneous double-application of the beyond reasonable doubt standard of proof. Furthermore, the Prosecution has not demonstrated that the Trial Chamber erred in law by "excluding" facts and supporting evidence that had not been proved beyond reasonable doubt from consideration when assessing the guilt of the accused.

122 We find that the Trial Chamber has not erred in applying the standard of proof beyond reasonable doubt to its findings on mobile phone activity with regard to preparation of the videotape and its dissemination. Where the Prosecution draws the attention of the Appeals Chamber to specific findings of the Trial Chamber where it is alleged that the Trial Chamber analyzed evidence in isolation, rather than in its totality, those arguments will be further addressed in the section dealing with the Prosecution's sub-ground of appeal challenging the relevant findings.

123 We find that, while the Trial Chamber erred in applying the standard of proof beyond reasonable doubt to whether two items of evidence corroborated each other, the Prosecution has not demonstrated that this error invalidates the Judgment.

124 We find that the Trial Chamber has not erred in applying the standard of proof beyond reasonable doubt to the Chamber's own inability to reach a finding.

175 We find that, while the Trial Chamber erred in applying the beyond reasonable doubt standard to facts to which the Trial Chamber recognized that such a standard did not apply, the Prosecution has not demonstrated that this error invalidates the Judgment.

176 We find that, while the Trial Chamber erred in applying the beyond reasonable doubt standard to its findings on the purchase of the Canter van, the Prosecution has not demonstrated that this error invalidates the Judgment.

177 For the foregoing reasons, Sub-grounds 1 (B) and 8 (B) are dismissed.

178 The above findings are without prejudice to the Appeals Chamber's further assessment of: (a) whether the Trial Chamber erred in analyzing evidence in isolation, rather than in its totality;[220] and (b) whether a reasonable trier of fact could have reached the factual conclusions drawn by the Trial Chamber.[221]

C. Sub-grounds 1 (C) and 8 (A): Whether the Trial Chamber Erred in Law by Considering the Evidence in Isolation, Rather Than in Its Totality

1. Submissions of the Parties and LRV

179 The Prosecution contends that the Trial Chamber "erred in law throughout the Judgment by analysing evidence in isolation rather than considering the totality of the evidence in combination".[222] It argues that this error was central to the acquittals of Messrs Merhi and Oneissi.[223] According to the Prosecution, the Trial Chamber failed to carry out a holistic evaluation and weighing of the totality of the evidence when making its findings.[224] The Prosecution submits that the Trial Chamber "compartmentalised its assessment of the import of calls between the Accused and other network mobile users by artificially restricting the relevant context in which they could be considered".[225] The Prosecution argues that this error affected the Trial Chamber's findings on: (a) the Green Network's role;[226] (b) Mr Merhi's role in the dissemination of the false claim of responsibility;[227] (c) Purple Phone calls during the

[220] *See* Sub-grounds 1 (C) and 8 (A) below.
[221] *See* Sub-ground 8 (D) below.
[222] Prosecution Appeal Brief, para. 46. *See also id.* at para. 391.
[223] Prosecution Appeal Brief, para. 46. *See also id.* at paras 392-393.
[224] Prosecution Appeal Brief, paras 47-48.
[225] Prosecution Appeal Brief, para. 49.
[226] Prosecution Appeal Brief, para. 53, *referring to* Prosecution Appeal Brief, Sub-ground 5 (F).
[227] Prosecution Appeal Brief, para. 54, *referring to, inter alia,* Prosecution Appeal Brief, Grounds 5 and 8.

dissemination of the false claim of responsibility;[228] and (d) pre-assassination calls between Messrs Merhi and Ayyash.[229]

130 The Prosecution also contends that the Trial Chamber erred by evaluating individual items of circumstantial evidence in isolation and assessing whether that evidence alone was sufficient to establish different facts beyond reasonable doubt,[230] thus failing to analyze the evidence in its totality when determining whether Messrs Merhi and Oneissi's participation in the false claim of responsibility was proved beyond reasonable doubt.[231] In particular, the Prosecution submits that the Trial Chamber erroneously evaluated evidence in isolation and failed to combine the totality of evidence with respect to the following issues: (a) Purple Phone users' activity on 14 February 2005; (b) abandonment of the Purple Phones after the attack; (c) the day of Mr Abu Adass's disappearance; (d) the COLA phase;[232] and (e) contact between Messrs Merhi and Ayyash.[233] According to the Prosecution, another example of the Trial Chamber's failure to assess the totality of evidence was its analysis of whether Mr Merhi was a supporter of Hezbollah.[234]

131 The Prosecution requests that the Appeals Chamber find that the Trial Chamber erred in law by applying the beyond reasonable doubt standard of proof to individual items of evidence and by failing to consider the totality of evidence, correct these errors, and consider the evidence and facts set aside by the Trial Chamber when assessing the roles of the Green Network and the Purple Phone users in the conspiracy.[235] In the alternative, the Prosecution requests the Appeals Chamber to clarify the correct law as a matter of general significance to the Tribunal's jurisprudence.[236]

132 Counsel for Mr Merhi argue that the Prosecution's submissions are erroneous because: (a) the Prosecution does not mention which item(s) of evidence should have been considered

---

228 Prosecution Appeal Brief, para. 55, *referring to, inter alia,* Prosecution Appeal Brief, Sub-ground 8 (A) (3). *See also id.* at paras 62, 67.
229 Prosecution Appeal Brief, para. 56.
230 Prosecution Appeal Brief, para. 59. *See also id.* at para. 395.
231 Prosecution Appeal Brief, para. 64. *See also id.* at para. 396.
232 The Prosecution uses the term "COLA phase" to refer to the Purple Phones' activity in the area of COLA1, COLA2, and COLA3 (the "COLA cells") between 29 December 2004 and 7 January 2005. *See* Judgment, para. 5170.
233 Prosecution Appeal Brief, paras 62, 67, 397, 400-408.
234 Prosecution Appeal Brief, para. 409.
235 Prosecution Appeal Brief, para. 69.
236 Prosecution Appeal Brief, para. 69.

by the Trial Chamber and how this would have led to a different outcome;[237] (b) the Prosecution itself relied upon the events occurring in the days of the phone calls in order to place the calls within context;[238] (c) the Prosecution does not address the lack of context of the phone calls and thus fails to fulfil the standard of appellate review;[239] (d) the Trial Chamber scrupulously analyzed the totality of the evidence before it;[240] (e) there is a presumption that a trial chamber analyzed the relevant evidence in its entirety;[241] and (f) when assessing the context of the phone calls, the Trial Chamber did not solely consider the events that occurred on the days they were placed.[242]

133 Counsel for Mr Merhi challenge the Prosecution's submission that the Trial Chamber applied the beyond reasonable doubt standard to the unusual presence of Mr Oneissi and the user of Purple 018 at the Mosque and to their contacts with Mr Merhi.[243] Counsel for Mr Merhi argue that the Trial Chamber applied the beyond reasonable doubt standard to the material fact of Messrs Merhi and Oneissi and the user of Purple 018's implication in the disappearance of Mr Abu Adass.[244] They also contend that: (a) the Trial Chamber did not analyze the activity of the Purple Phone on 14 February 2005 in isolation;[245] (b) there is no evidence that contacts between Messrs Ayyash and Merhi on their personal mobiles concerned the false claim of responsibility;[246] (c) the Trial Chamber considered the evidence relating to the discarding of the Purple Phones and the Purple Phones' inactivity on 16 January 2005 in light of the totality of the evidence;[247] and (d) Mr Merhi was not a Hezbollah supporter.[248]

134 Counsel for Mr Merhi therefore ask the Appeals Chamber to reject the Prosecution's Sub-grounds 1 (C) and 8 (A) because the Prosecution has not demonstrated any error of law invalidating the Judgment.[249]

[237] Merhi Response Brief, para. 75.
[238] Merhi Response Brief, para. 76.
[239] Merhi Response Brief, para. 77.
[240] Merhi Response Brief, para. 78.
[241] Merhi Response Brief, para. 79.
[242] Merhi Response Brief, paras 80-84.
[243] Merhi Response Brief, para. 443.
[244] Merhi Response Brief, para. 443.
[245] Merhi Response Brief, paras 91-93, 95-96, 447-448.
[246] Merhi Response Brief, paras 83-84, 449.
[247] Merhi Response Brief, paras 450-456.
[248] Merhi Response Brief, paras 457-460.
[249] Merhi Response Brief, paras 97, 461.

135 Counsel for Mr Oneissi argue that the Prosecution has failed to show both how the alleged error of law has met the standard of appellate review and how the alleged error has materially affected the Trial Chamber's decision to acquit Mr Oneissi.[250] Counsel for Mr Oneissi claim that the Prosecution's assertions of errors of law are, in fact, allegations of errors of fact.[251] Moreover, Counsel for Mr Oneissi submit that the Trial Chamber considered the totality of the evidence, in isolation and in combination, for all the facts pleaded against Mr Oneissi and concluded that his participation in the false claim of responsibility was not proved beyond a reasonable doubt.[252]

136 Counsel for Mr Oneissi therefore request that the Appeals Chamber reject the Prosecution's Sub-grounds 1 (C) and 8 (A), as the Trial Chamber considered the evidence in isolation and in its totality before finding that the evidence on mobile phone activity did not establish Mr Oneissi's participation in the false claim of responsibility.[253]

137 The Prosecution replies that the Trial Chamber assessed individual items of evidence under the beyond reasonable doubt standard *after* holding that individual items of circumstantial evidence could not prove a fact beyond reasonable doubt.[254] The Prosecution argues that it is in the nature of a circumstantial case that items of evidence may have low probative value when viewed in isolation, "but may conclusively prove something when viewed in combination".[255] It reiterates that the Trial Chamber erroneously assessed evidence in isolation and failed to combine the totality of evidence with respect to the following issues: (a) the COLA phase;[256] (b) Mr Merhi's contact with Mr Ayyash;[257] (c) the simultaneous discarding of the Purple Phones;[258] and (d) whether Mr Merhi was a Hezbollah supporter.[259]

138 The LRV argues that the Trial Chamber did not need to find context in relation to every single phone call among members of the Green Network and Purple mobiles to be satisfied that the only reasonable conclusion available from the evidence was the connection of

[250] Oneissi Response Brief, paras 86-87.
[251] Oneissi Response Brief, paras 90-91.
[252] Oneissi Response Brief, paras 92, 224-231.
[253] Oneissi Response Brief, paras 93, 233.
[254] Prosecution Reply Brief, para. 34.
[255] Prosecution Reply Brief, para. 35.
[256] Prosecution Reply Brief, paras 132-133.
[257] Prosecution Reply Brief, para. 134.
[258] Prosecution Reply Brief, para. 135.
[259] Prosecution Reply Brief, para. 136.

Messrs Merhi and Oneissi and the user of Purple 018.[260] The LRV argues that the Trial Chamber, at times, segmented its evaluation of the evidence and limited its analysis to individualized contextual elements, without testing them against the whole of the circumstantial evidence.[261]

139 Counsel for Mr Merhi challenge the LRV's arguments that the Trial Chamber did not need to find context for every phone call between Green Network mobiles or Purple Phones in order to conclude that the only reasonable inference available from the evidence was the connection of Messrs Merhi and Oneissi and the user of Purple 018.[262] Counsel for Mr Merhi also reject the LRV's submission that the Trial Chamber, while mindful of its obligation to assess the evidence in its totality, failed to meet it.[263]

2. Trial Chamber Findings

140 The Trial Chamber stated that, "[i]n its deliberations, for each relevant fact, a trial chamber must evaluate and weigh each piece of evidence against other relevant pieces of evidence."[264] It found that "[a] chamber cannot evaluate evidence in a 'piecemeal' fashion",[265] as "[t]he quality of a piece of evidence may not be evident when it is viewed in isolation."[266] The Trial Chamber held that "assess[ing] each piece of evidence in the context of all related evidence"[267] was important in evaluating the telecommunication evidence presented by the Prosecution, as the evidence before it was nearly entirely circumstantial.[268] The Trial Chamber considered that, by reviewing relevant facts in their entirety, it could identify "patterns that *could potentially* emerge from which conclusions could be drawn" that were "so striking as to be beyond coincidence".[269] In the Trial Chamber's view, conclusions arising from these patterns in circumstantial evidence could provide proof beyond reasonable doubt and support a conviction.[270] Accordingly, the Trial Chamber recalled on numerous occasions that it

260 LRV Observations, para. 50.
261 LRV Observations, paras 54-56.
262 Merhi Response to LRV Observations, paras 44-54.
263 Merhi Response to LRV Observations, para. 65.
264 Judgment, para. 230.
265 Judgment, para. 232 (footnote omitted).
266 Judgment, para. 230.
267 Judgment, para. 253.
268 Judgment, para. 253.
269 Judgment, para. 253 (emphasis in the original).
270 Judgment, para. 253.

assessed each item of circumstantial evidence both individually and in totality with all other relevant evidence when determining whether the Prosecution met its burden of proof.[271]

3. <u>Discussion</u>

a. Applicable Law

141 In the *Al Jadeed* contempt case, the STL Appeals Panel stated that:

> [A] trier of fact is required to carry out a holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue. This holistic approach is necessary because the apparent quality of an individual piece of evidence, when 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.[272]

142 We note that a trial chamber may not look at an item of evidence as if it existed in a "hermetically sealed compartment".[273] Rather, the "cumulative effect"—or totality—of the evidence must be considered.[274] For the assessment of an item of evidence in a vacuum might fail to establish an essential matter, which can be proved beyond reasonable doubt when all relevant evidence is weighed together.[275] We thus hold that individual items of evidence must be considered in relation to other relevant evidence in order to establish whether the totality of the relevant evidence proves that fact beyond a reasonable doubt.[276]

143 It is settled jurisprudence that a trial chamber need not refer to every item of evidence on the trial record, as long as there is no indication that it completely disregarded a particular item of evidence in its deliberations.[277] There is a presumption that a trier of fact has evaluated all the evidence before it when reaching its factual conclusions.[278]

---

[271] Judgment, para. 274. *See, e.g., id.* at paras 221, 232, 4805, 5264, 5276-5277, 5312, 5844, 6539.
[272] *Al Jadeed* Appeal Judgment, para. 56 (footnotes omitted). *See, e.g., Lubanga* Appeal Judgment, para. 22; *Popović et al.* Appeal Judgment, para. 1150.
[273] *Musema* Appeal Judgment, para. 134.
[274] *Limaj* Appeal Judgment, para. 153.
[275] *Popović et al.* Appeal Judgment, para. 1103. *See, e.g., Martić* Appeal Judgment, para. 233.
[276] *Popović et al.* Appeal Judgment, para. 1103. *See, e.g., Karadžić* Appeal Judgment, para. 128; *Ngirabatware* Appeal Judgment, para. 86; *Taylor* Appeal Judgment, para. 235, *citing Halilović* Appeal Judgment, para. 128; *Limaj* Appeal Judgment, para. 153.
[277] *Kvočka et al.* Appeal Judgment, para. 23; *Halilović* Appeal Judgment, para. 121; *Čelebići* Appeal Judgment, para. 498; *Kordić and Čerkez* Appeal Judgment, para. 382.
[278] *See, e.g., Halilović* Appeal Judgment, para. 121; *Blagojević and Jokić* Appeal Judgment, para. 227; *Kvočka et al.* Appeal Judgment, para. 23; *Musema* Appeal Judgment, paras 19-20.

b. Analysis of Trial Chamber Findings

i. Whether the Trial Chamber Erred in Restricting the Relevant Context for the Phone Calls to Events of Interest Occurring on the Same Day

144 The Prosecution challenges the Trial Chamber's assessment of the telecommunication evidence offered to prove the involvement of Messrs Merhi and Oneissi and the user of Purple 018 in the false claim of responsibility.[279] The Prosecution argues that the Trial Chamber artificially restricted the relevant context for the phone calls to events of interest occurring on the same day.[280] In doing so, according to the Prosecution, the Trial Chamber failed to assess evidence in its totality.[281]

145 The Trial Chamber found that, "[w]ithout context anchoring [phone calls] to some evidence, it is no more than meaningless metadata."[282] For this reason, the Trial Chamber carried out a detailed analysis of the context surrounding the phone calls that the Prosecution relied upon to prove the role of the Green Network in the preparation and coordination of the attack, as well as the role of Messrs Merhi and Oneissi and the user of Purple 018 in the dissemination of the false claim of responsibility. In the impugned findings, the Trial Chamber held that it was unable to find a connection between the evidence on mobile phone activity and relevant events pleaded by the Prosecution in the Amended Consolidated Indictment.[283]

146 The Appeals Chamber recalls that the Trial Chamber correctly held that "a trial chamber must evaluate and weigh each piece of evidence against other relevant pieces of evidence"[284] and "cannot evaluate evidence in a 'piecemeal' fashion".[285] It also stated that it assessed each item of evidence in the context of all related evidence and that such an approach was particularly important in evaluating the telecommunication evidence presented by the Prosecution.[286] The Trial Chamber held that "[phone calls] must be viewed in the context of the other available evidence, namely, what was happening and what the calls could be connected to".[287] Similarly, the Trial Chamber stated that, to provide both context and a reason

279 Prosecution Appeal Brief, paras 49, 51-56, 62, 67.
280 Prosecution Appeal Brief, paras 49, 51-52, 401.
281 Prosecution Appeal Brief, paras 46, 59, 64.
282 Judgment, para. 6513.
283 *See* Judgment, paras 5470-5474, 5537, 5658-5659, 5857, 6513-6520, 6533-6543, 6577-6582, 6602-6620.
284 Judgment, para. 230.
285 Judgment, para. 232 (footnote omitted).
286 Judgment, para. 253. *See also id.* at para. 274.
287 Judgment, para. 6513.

for the calls, it had to connect each of the calls—individually and together—to evidence regarding what was occurring when the calls were made.[288]

147 The Appeals Chamber agrees with the Trial Chamber and the Prosecution that the context of a phone call is relevant to its interpretation and that this context can be provided by a call's connection with other evidence offered at trial. The Appeals Chamber also agrees with the Prosecution that this does not mean that the only evidence capable of providing the context for a phone call is an event occurring on the same day. The importance of providing such context is all the more compelling when the mobile phone activity is offered as evidence to prove material facts pleaded against an accused in an indictment.

148 Having carefully reviewed the impugned findings, we find that, contrary to the Prosecution's argument, the Trial Chamber did not explicitly limit its assessment of the phone calls' context to events occurring exclusively on the *same* day. Rather, the Trial Chamber assessed each phone call in light of other calls, as well as in the context of the *contemporaneous* events that the Prosecution alleged occurred when each call was made.

149 The Prosecution offered evidence on mobile phone activity to prove the participation of Messrs Merhi and Oneissi and the user of Purple 018 in certain events underlying the material facts pleaded against them, namely their involvement in the preparation of the video and the dissemination of the false claim of responsibility. We are therefore of the view that the Trial Chamber had to assess whether the Prosecution proved a link between the mobile phone activity and the events that underpinned the pleaded material facts and in which Messrs Merhi and Oneissi and the user of Purple 018 allegedly participated.

150 The Appeals Chamber holds that the Trial Chamber's approach to the evidence on mobile phone activity was correct. The Trial Chamber did not err in assessing each phone call in light of other calls, nor in contextualizing phone calls with the aim of assessing whether the totality of the evidence presented—the evidence on mobile phone activity in connection with that of contemporaneous events—proved beyond reasonable doubt the material facts pleaded by the Prosecution against Messrs Merhi and Oneissi and the user of Purple 018. This is without prejudice to the Appeals Chamber's further assessment of: (a) whether the Trial Chamber erred in analyzing specific items of evidence in isolation, rather than in their

[288] Judgment, paras 6592-6593, 6595.

totality and (b) whether a reasonable trier of fact could have reached the factual conclusions drawn by the Trial Chamber.[289]

ii. Whether the Trial Chamber Erred by Evaluating Individual Items of Circumstantial Evidence in Isolation and by Failing to Combine the Totality of Evidence

151 The Prosecution submits that the Trial Chamber mistakenly evaluated items of evidence in isolation and assessed whether individual items of evidence were sufficient to establish beyond reasonable doubt different facts relating to: (a) the COLA phase; (b) the day of Mr Abu Adass's disappearance; (c) the direct contact between Messrs Merhi and Ayyash; (d) the activity of the Purple Phones on 14 February 2005; and (e) the abandonment of the Purple Phones after the attack.[290]

152 The Appeals Chamber recalls that the above issues constitute intermediate inferences whose proof was offered by the Prosecution as a basis for a conclusion that the only reasonable inference was that Messrs Merhi and Oneissi and the user of Purple 018 participated in the preparation and dissemination of the false claim of responsibility. The Appeals Chamber has already found that the Trial Chamber did not err in law by doing so.[291] For the same reasons, we reject the Prosecution's argument that the Trial Chamber erred in its evaluation of the evidence when assessing mobile phone activity.

153 The Prosecution further argues that the Trial Chamber did not assess the mobile phone activity on 14 February 2005 in light of the totality of the evidence[292] and failed to combine the totality of the evidence with respect to whether Mr Merhi was a supporter of Hezbollah.[293]

154 The Appeals Chamber has carefully assessed the impugned findings against the entirety of the Judgment and recalls that the Trial Chamber, as acknowledged by the Prosecution, repeatedly stated that it "has examined the evidence holistically, in its totality, by examining each piece of evidence separately [and] it has also connected these pieces together and re-examined them as a whole".[294] In addition, the Trial Chamber held that: (a) there was no

---

[289] *See* Sub-ground 8 (D) below.
[290] Prosecution Appeal Brief, paras 61-62, 67, 397, 400-408, 411-412.
[291] *See* above Sub-grounds 1 (B) and 8 (B).
[292] Prosecution Appeal Brief, paras 401-408.
[293] Prosecution Appeal Brief, para. 409.
[294] Judgment, para. 6450. *See also id.* at paras 221, 232, 4805, 4970, 5264, 5276-5277, 5312, 5844, 6539.

evidence connecting the mobile phone activity of Messrs Merhi and Oneissi and the user of Purple 018 "with anything related to Mr Abu Adass, the Mosque, anyone called 'Mohammed', Mr Abu Adass's disappearance, the video or its making or its broadcast";[295] (b) the "suspicious" movements and communications of the Purple Phones with each other on the day of the attack and in the preceding weeks were insufficient to prove beyond a reasonable doubt the involvement of Messrs Merhi and Oneissi and the user of Purple 018 in the false claim of responsibility;[296] and (c) the discarding of the Purple Phones after the attack constituted "the single most (proven) incriminating [item] of evidence"; but, together with the evidence of other established pleaded facts, did not prove the guilt of Messrs Merhi and Oneissi beyond a reasonable doubt.[297] The Trial Chamber also recounted the evidence about Mr Merhi being a Hezbollah supporter and subsequently held that the evidence was insufficient.[298]

155. The Appeals Chamber recalls that there is a presumption that a trier of fact has evaluated all the evidence before it when reaching its factual conclusions. A trial chamber need not refer to every item of evidence on the trial record, as long as there is no indication that it completely disregarded a particular item of evidence. The Appeals Chamber can conclude, in the current circumstances, that the Trial Chamber analyzed and combined the totality of the evidence that the Prosecution offered to prove both that Messrs Merhi and Oneissi and the user of Purple 018 were involved in the false claim of responsibility and that Mr Merhi was a Hezbollah supporter. Nonetheless, the Trial Chamber could have analyzed the evidence in its totality more precisely and could have better articulated it throughout the Judgment. However, the Trial Chamber's analysis was sufficient from a legal perspective.

156. The Appeals Chamber therefore finds that the Prosecution has not demonstrated that the Trial Chamber erred by failing to combine the totality of the evidence offered by the Prosecution to prove the criminal responsibility of Messrs Merhi and Oneissi and the user of Purple 018. This is without prejudice to the Appeals Chamber's further assessment of whether a reasonable trier of fact could have reached the factual conclusions drawn by the Trial Chamber, which will be examined later in the present Judgment.[299]

---

[295] Judgment, para. 5315. *See also id.* at paras 4996, 5255-5258, 5263-5264, 5267, 5269, 5307, 5312, 5316, 5466-5468, 5483-5484, 5529-5530, 5535-5538, 5847-5849, 5851, 6519, 6515-6543, 6886.
[296] Judgment, para. 5689. *See also id.* at paras 5645-5648, 5677-5681, 5691, 5851-5852, 5854-5859, 6544-6551, 6886, 6890.
[297] *See, e.g.,* Judgment, para. 6861. *See also id.* at paras 5815-5818.
[298] *See, e.g.,* Judgment, paras 756-759, 762, 2483.
[299] *See* Sub-ground 8 (D) below.

4. Conclusion

157 We find that the Trial Chamber has not committed an error of law by restricting the relevant context for the phone calls to events of interest occurring on the same day.

158 We find that the Trial Chamber has not committed an error of law by evaluating individual items of circumstantial evidence in isolation and by failing to combine the totality of evidence.

159 For the foregoing reasons, Sub-grounds 1 (C) and 8 (A) are dismissed.

160 The above findings are without prejudice to the Appeals Chamber's further assessment of whether a reasonable trier of fact could have reached the factual conclusions drawn by the Trial Chamber.[300]

D. Sub-grounds 1 (D), 5 (E), and 8 (C): Whether the Trial Chamber Erred in Law by Failing to Assess Whether Alternative Inferences Arising from Circumstantial Evidence Were Reasonable in Light of the Totality of the Evidence, Including Failing to Adequately Identify the Alternative Inferences It Relied Upon

1. Submissions of the Parties and LRV

161 The Prosecution alleges that the Trial Chamber at multiple points failed to identify alternative inferences on which it relied or failed to assess the reasonableness of the alternative inferences it did identify, thereby failing to ensure those alternative inferences were not merely speculative.[301] The Prosecution argues that the Trial Chamber, by failing to adequately identify alternative inferences on which it relied, "deprived both the Parties and the Appeals Chamber of the ability to meaningfully assess its reasoning".[302] In particular, the Prosecution challenges (a) the Trial Chamber's findings on the role of the Green Network in the preparation and coordination of the attack;[303] (b) the role of Mr Badreddine in the conspiracy;[304] (c) the

[300] *See* Sub-ground 8 (D) below.
[301] Prosecution Appeal Brief, paras 77, 79, 82.
[302] Prosecution Appeal Brief, para. 78.
[303] Prosecution Appeal Brief, para. 337.
[304] Prosecution Appeal Brief, paras 341, 344.

participation of Messrs Merhi and Oneissi and the user of Purple 018 in the dissemination of the false claim of responsibility;[305] and (d) their advance knowledge of the assassination.[306]

162. The Prosecution also alleges that the Trial Chamber failed to consider the totality of the evidence when asking whether reasonable alternative inferences were available from individual items of evidence.[307] Because of this erroneous approach in the assessment of evidence, the Prosecution claims that the Trial Chamber "repeatedly credited alternative inferences that would have been discarded as 'unreasonable' had the totality of the evidence been considered".[308] In particular, the Prosecution submits that the Trial Chamber erroneously concluded that alternative inferences were available from the following individual items of evidence: (a) the COLA phase activations; (b) the inactivity of the Purple Phones on the day Mr Abu Adass disappeared; (c) individual cell activations on 14 February 2005; and (d) the discarding of the Purple Phones.[309]

163. Based on the errors alleged above, the Prosecution requests that the Appeals Chamber find that the Trial Chamber erred in law, correct the errors, and consider any inferences wrongly rejected as a result of the errors when assessing Grounds 5 and 8.[310]

164. Counsel for Mr Merhi respond that the error alleged by the Prosecution is an error of fact.[311] They contend that the Trial Chamber has sufficiently identified alternative inferences[312] and analyzed their reasonableness.[313] They argue that the principle according to which a trial chamber must specifically identify reasonable alternative inferences applies when alterative inferences are raised by the defence.[314] However, they submit that this does not apply to the present case, as the Prosecution has simply failed to prove that the inference he asked the Trial Chamber to draw was the only reasonable one available from the evidence.[315] Counsel for Mr Merhi note that an accused is not required to present alternative inferences, let alone

[305] Prosecution Appeal Brief, paras 427-430.
[306] Prosecution Appeal Brief, paras 427, 431-440.
[307] Prosecution Appeal Brief, paras 79-86, 423.
[308] Prosecution Appeal Brief, paras 86-90.
[309] Prosecution Appeal Brief, para. 425.
[310] Prosecution Appeal Brief, para. 91.
[311] Merhi Response Brief, paras 98, 374, 501.
[312] Merhi Response Brief, paras 110, 117.
[313] Merhi Response Brief, p. 30. *See also id.* at paras 118-122.
[314] Merhi Response Brief, paras 100-101, 375-376.
[315] Merhi Response Brief, paras 102, 375-376, 385.

reasonable ones, to prove his or her innocence.[316] They argue that, in any event, the Trial Chamber meticulously detailed its reasoning that the Prosecution's inferences were not the only reasonable ones.[317] They also challenge the Prosecution's submission that the Trial Chamber did not analyze the totality of the evidence.[318]

165 Counsel for Mr Merhi submit that the Trial Chamber drew reasonable alternative inferences with respect to: (a) the Green Network's role in the preparation and coordination of the attack;[319] (b) Mr Badreddine's role in the conspiracy;[320] (c) the mobile phone activity on 14 February 2005;[321] (d) Messrs Merhi and Oneissi's lack of advance knowledge of the attack;[322] and (e) Mr Merhi's role in the false claim of responsibility.[323] They therefore request that the Appeals Chamber reject the Prosecution's Sub-grounds 1 (D), 5 (E), and 8 (C).[324]

166 Counsel for Mr Oneissi respond that: (a) the Prosecution has not addressed why or how the alleged error of law invalidates the Judgment;[325] (b) the Prosecution has taken the Trial Chamber's findings out of context in respect of the involvement of Mr Oneissi and the user of Purple 018 in the false claim of responsibility;[326] (c) the Prosecution has not discharged its burden of proof in establishing facts material to the guilt of Mr Oneissi beyond reasonable doubt;[327] and (d) the Trial Chamber does not need to identify every single alternative inference available on the evidence, nor is it required to articulate every step of its reasoning while drawing an inference.[328]

167 Counsel for Mr Oneissi submit that Sub-ground 5 (E) should be summarily dismissed because the errors alleged by the Prosecution did not occasion a miscarriage of justice, as the outcome of this sub-ground would have no bearing on the acquittal of Mr Oneissi.[329]

---

[316] Merhi Response Brief, paras 103, 377.
[317] Merhi Response Brief, paras 113-117, 119-121, 378, 380.
[318] Merhi Response Brief, paras 124, 502, 517.
[319] Merhi Response Brief, para. 378.
[320] Merhi Response Brief, paras 380-385.
[321] Merhi Response Brief, paras 503, 508-509.
[322] Merhi Response Brief, paras 511-514, 518.
[323] Merhi Response Brief, paras 515-516.
[324] Merhi Response Brief, paras 109, 387, 502.
[325] Oneissi Response Brief, para. 94.
[326] Oneissi Response Brief, para. 99.
[327] Oneissi Response Brief, paras 100, 249, 253-254, 258-263.
[328] Oneissi Response Brief, paras 100-101, 271.
[329] Oneissi Response Brief, paras 154-156.

168. Counsel for Mr Oneissi further argue that the Prosecution, in its argument under Sub-ground 8 (C), has regularly confused evidence and facts. They also argue that the Prosecution alleges errors of law when in fact it is seeking appellate review of factual findings.[330] Counsel for Mr Oneissi therefore request the Appeals Chamber to consider Sub-ground 8 (C) against the standard of review for errors of fact.[331] Counsel for Mr Oneissi also contend that Sub-ground 8 (C) should be summarily dismissed because the Prosecution is effectively seeking a *de novo* trial[332] and "recycles failed arguments made at trial, ignores critically relevant adverse factual findings, and fails to demonstrate any error on the part of the Trial Chamber".[333]

169. Counsel for Mr Oneissi submit that the Prosecution has failed to demonstrate any error in the Trial Chamber's assessment of the evidence supporting the alleged facts or how the alleged error could have led to a different decision.[334] Similarly, they argue that the Prosecution has not demonstrated that no reasonable trial chamber could have failed to find that the only reasonable inference was that Mr Oneissi possessed the requisite *mens rea*.[335] Counsel for Mr Oneissi therefore request that the Appeals Chamber reject the Prosecution's Sub-grounds 1 (D) and 8 (C).[336]

170. The Prosecution replies that the Trial Chamber must identify and assess the reasonableness of alternative inferences upon which it relies[337] and that failure to do so is an error of law.[338] In the Prosecution's view, the Trial Chamber's failure to do so deprived the Parties and the Appeals Chamber of the opportunity to meaningfully assess the Trial Chamber's reasoning.[339] The Prosecution argues that it is entitled to a reasoned opinion.[340] The Prosecution also submits that the Trial Chamber's failure to be transparent in its reasoning has led to "a litany of underlying errors" that would have been exposed had the available evidence been considered in its totality.[341] The Prosecution thus contends that the Trial Chamber erred by assessing the availability of alternative inferences based on individual items of evidence.[342]

---

330 Oneissi Response Brief, paras 244-245, 248-249.
331 Oneissi Response Brief, para. 246.
332 Oneissi Response Brief, paras 251-252, 273.
333 Oneissi Response Brief, para. 274.
334 Oneissi Response Brief, para. 255.
335 Oneissi Response Brief, paras 275, 284-285.
336 Oneissi Response Brief, paras 102, 247, 256, 265, 273-274.
337 Prosecution Reply Brief, paras 37, 143.
338 Prosecution Reply Brief, paras 37, 94.
339 Prosecution Reply Brief, paras 38, 142.
340 Prosecution Reply Brief, para. 39.
341 Prosecution Reply Brief, para. 40.
342 Prosecution Reply Brief, para. 41.

171 The Prosecution reiterates that the Trial Chamber erred in applying the "only reasonable inference" standard to findings other than the elements of crimes.[343] It also argues that the Trial Chamber erred in its analysis of the *mens rea* of Messrs Merhi and Oneissi and the user of Purple 018.[344]

172 The LRV observes that it is a principle of international criminal jurisprudence that, in cases featuring circumstantial evidence, the conclusion pointing to the guilt of an accused must be the only reasonable conclusion available from the totality of the evidence.[345] The LRV argues that alternative inferences regarding the conduct of an accused must be clearly and logically articulated by a trier of fact.[346] The LRV notes that the Trial Chamber, on several occasions, failed to identify the alternative inferences on which it relied.[347] The LRV also argues that the Trial Chamber did not draw reasonable alternative inferences with respect to Mr Badreddine's role in the conspiracy.[348]

173 Counsel for Mr Merhi respond that the LRV's arguments reiterate those of the Prosecution and violate the presumption of innocence of an accused.[349] Counsel for Mr Merhi state that they will not respond to submissions by the LRV where there is no link to the personal interests of the victims.[350] They therefore request the Appeals Chamber to reject arguments that do not concern the personal interests of the victims.[351]

2. Trial Chamber Findings

174 The Trial Chamber held that, "when the Prosecution relies by inference upon circumstantial evidence to prove the facts constituting the elements of an offence, or those indispensable for a conviction, that inference must be the only reasonable conclusion available from the evidence".[352] It stated that, if a reasonable inference—other than that put forward by the Prosecution—is available, then those facts are not proved beyond a reasonable doubt and

343 Prosecution Reply Brief, para. 144.
344 Prosecution Reply Brief, paras 97, 145-147.
345 LRV Observations, paras 57-59.
346 LRV Observations, para. 59.
347 LRV Observations, paras 60-61.
348 LRV Observations, para. 73.
349 Merhi Response to LRV Observations, para. 67.
350 Merhi Response to LRV Observations, para. 21.
351 Merhi Response to LRV Observations, para. 21.
352 Judgment, para. 257.

under the principle of *in dubio pro reo* the Trial Chamber must acquit the accused.[353] The Trial Chamber also held that, "[i]n assessing the evidence to draw a conclusion on a particular indispensable fact, the Trial Chamber has considered any alternative reasonable conclusion available from the admitted evidence."[354] Following such approach, the Trial Chamber was unable to find that several inferences that the Prosecution asked it to draw from the available evidence were the only reasonable ones.[355]

3. Discussion

a. Applicable Law

175. The Appeals Chamber notes that, when the Prosecution relies on circumstantial evidence to prove facts constituting the elements of an offence, the inference that the elements have been proved must be the only reasonable conclusion from the evidence.[356] If another reasonable inference could have been drawn from the totality of the available circumstantial evidence, it necessarily follows that the facts in question were not proved beyond reasonable doubt.[357] An alternative inference must be reasonable and based on the evidence on the record.[358]

176. We further observe that a trial chamber, when drawing an inference, is not required to articulate every step of its reasoning but should explain the inference and indicate the basis for it.[359] Similarly, while a trial chamber has an obligation to provide a reasoned opinion, it is not required to individually set out each and every factor that it considered, provided that it indicates with sufficient clarity the basis of its decision.[360] However, when an inference is made to reach an essential finding concerning, for example, the elements of the offences or modes of liability, a trial chamber must explain in more detail how it reached the factual conclusion in question.[361]

---

[353] Judgment, para. 257.
[354] Judgment, para. 260.
[355] *See, e.g.,* Judgment, paras 4743, 5307, 5467-5468, 5663-5664, 5666, 5816, 6621-6622, 6858-6859, 6873.
[356] *Čelebići* Appeal Judgment, para. 458; *Bemba et al.* Appeal Judgment, para. 868.
[357] *Al Jadeed* Appeal Judgment, para. 169; *Bemba et al.* Appeal Judgment, para. 868; *Fofana and Kondewa* Appeal Judgment, para. 200; *Taylor* Appeal Judgment, para. 180; *Martić* Appeal Judgment, para. 59.
[358] *Bagosora and Nsengiyumva* Appeal Judgment, para. 562.
[359] *Bemba et al.* Appeal Judgment, para. 870; *Blaškić* Appeal Judgment, para. 519.
[360] *Bemba et al.* Appeal Judgment, para. 1049.
[361] *Bemba et al.* Appeal Judgment, para. 870.

b. Analysis of Trial Chamber Findings

177 The Appeals Chamber has already found that the Trial Chamber did not err in applying the beyond reasonable doubt standard,[362] nor did it fail to assess the totality of the evidence.[363] For the same reasons, we reject the Prosecution's arguments that the Trial Chamber failed to consider the totality of the evidence when assessing the reasonableness of alternative inferences.

178 The Prosecution argues that the Trial Chamber committed errors of law invalidating the Judgment by failing to identify the alternative inferences on which it relied or to assess the reasonableness of the alternative inferences it did identify. The Appeals Chamber holds that a challenge to the reasonableness of a trial chamber's finding based on inference constitutes an alleged error of fact requiring the Appeals Chamber to assess whether no reasonable trier of fact could have excluded an inference as being the only reasonable one available from the evidence.[364] The Appeals Chamber will therefore limit its assessment of Sub-grounds 1 (D), 5 (E), and 8 (C) to the alleged failure on the part of the Trial Chamber to identify the alternative inferences on which it relied. The Appeals Chamber will assess the reasonableness of the Trial Chamber's alternative inferences under Sub-grounds 5 (C), 5 (D), and 8 (D).

179 Having carefully reviewed the impugned findings, we hold that, contrary to the Prosecution's submissions, the Trial Chamber did identify the alternative inferences on which it relied and indicated with sufficient clarity the basis of its decision to reject the Prosecution's inferences as being the only reasonable ones. In particular, the Trial Chamber found that: (a) the Green Network was not necessarily at the apex of all other networks;[365] (b) Mr Badreddine might have been "doing something unrelated to the explosion" or might have had "a far more passive role" as a conduit for passing information to someone else;[366] (c) Messrs Merhi and Oneissi and the user of Purple 018 may have been doing "something else" other than participating in the dissemination of the false claim;[367] and (d) Messrs Merhi

[362] *See* above Sub-grounds 1 (B) and 8 (B).
[363] *See* above Sub-grounds 1 (C) and 8 (A).
[364] *See, e.g., Ntagerura et al.* Appeal Judgment, paras 304-306; *Stakić* Appeal Judgment, paras 219-220; *Čelebići* Appeal Judgment, para. 458.
[365] Judgment, para. 4743.
[366] Judgment, para. 6622.
[367] Judgment, paras 5467, 5663-5664, 5666.

and Oneissi and the user of Purple 018 may have disseminated the false claim without advance knowledge of the assassination.[368]

180 We therefore find that the Trial Chamber fulfilled its obligation to provide a reasoned opinion. The Prosecution's argument—that the Trial Chamber deprived the Parties and the Appeals Chamber of the opportunity to meaningfully assess the Trial Chamber's reasoning—cannot be sustained. It is therefore not necessary for the Appeals Chamber to address the theoretical question regarding whether a trial chamber is obliged to articulate an alternative inference when acquitting an accused.

181 The Prosecution's argument that the Trial Chamber failed to identify the alternative inferences on which it relied is accordingly dismissed, without prejudice to the Appeals Chamber's further assessment of the reasonableness of the alternative inferences drawn by the Trial Chamber.

4. Conclusion

182 We find, by majority, that the Trial Chamber has not committed an error of law by failing to identify the alternative inferences on which it relied.

183 For the foregoing reasons, Sub-grounds 1 (D), 5 (E), and 8 (C) are dismissed.

184 This is without prejudice to the Appeals Chamber's further assessment of the reasonableness of the alternative inferences drawn by the Trial Chamber.[369]

E. Sub-ground 1 (E): Whether the Trial Chamber Erred in Law by Holding That Rule 158 Evidence on Contested Matters Could Be Given No Weight Unless Corroborated by Tested Evidence

1. Submissions of the Parties and LRV

185 The Prosecution submits that the Trial Chamber erred by "effectively excluding contested evidence from unavailable witnesses."[370] In particular, the Prosecution submits that the Trial Chamber automatically considered Rule 158 evidence to be unreliable, if challenged,

[368] Judgment, paras 5815-5816, 6858-6859.
[369] *See* Sub-grounds 4 (E), 5 (C), 5 (D), and 8 (D) below.
[370] Prosecution Appeal Brief, para. 14. *See also id.* at paras 92, 94.

and did not allow contested Rule 158 evidence to be corroborated by other Rule 158 evidence.[371]

186. The Prosecution contends that the Trial Chamber's treatment of contested Rule 158 evidence is contrary to the purpose of the rule and to the interests of justice[372] because it encourages parties to challenge all Rule 158 evidence and results in its rejection "regardless of its credibility, reliability or probative value".[373] According to the Prosecution, such treatment deviates from the aim of Rule 158, namely, "the use of evidence from unavailable witnesses, so long as the fairness of the proceedings is protected".[374] In the Prosecution's view, the Trial Chamber exercised its discretion in a "flawed manner" by requiring corroboration regardless of the consistency and reliability of the contested Rule 158 evidence.[375]As argued by the Prosecution, "Rule 158 evidence can corroborate other Rule 158 evidence unless it would form the sole or decisive basis for a conviction".[376]

187. The Prosecution requests that the Appeals Chamber correct the Trial Chamber's alleged legal errors stemming from its exclusion of contested Rule 158 evidence, including that of Mr Al-Hassan's testimony pertaining to the Green Network, and to set out the proper legal standard for weighing contested Rule 158 evidence.[377]

188. Counsel for Mr Merhi respond that the Prosecution did not explain at trial why the Rule 158 evidence it offered was to be deemed reliable or how it should have been treated by the Trial Chamber.[378] They therefore request that the Appeals Chamber summarily dismiss this sub-ground of appeal.[379] Moreover, they argue that the error alleged by the Prosecution is an error of fact.[380] Counsel for Mr Merhi contend that the Trial Chamber meticulously analyzed the evidence offered pursuant to Rule 158 and did not simply reject evidence contested by the Defence.[381] They argue that, with the exception of the arguments raised under Sub-ground 5 (D) with respect to Mr Al-Hassan's testimony pertaining to the Green Network,

---

[371] Prosecution Appeal Brief, paras 94, 102.
[372] Prosecution Appeal Brief, paras 92, 100-101, 103.
[373] Prosecution Appeal Brief, para. 105.
[374] Prosecution Appeal Brief, para. 104 (footnote omitted).
[375] Prosecution Appeal Brief, paras 99, 102.
[376] Prosecution Appeal Brief, para. 101 (footnote omitted).
[377] Prosecution Appeal Brief, para. 106.
[378] Merhi Response Brief, para. 127. *See also id.* at paras 137, 146.
[379] Merhi Response Brief, para. 127. *See also id.* at para. 136.
[380] Merhi Response Brief, para. 129.
[381] Merhi Response Brief, paras 131, 133-135, 147-149.

the Prosecution does not point to any specific evidence that could corroborate other untested evidence that could have represented the sole or decisive basis for a conviction.[382] Moreover, Counsel for Mr Merhi submit that the Trial Chamber was justified in exercising caution before using untested Rule 158 evidence for corroboration of other pivotal untested Rule 158 evidence.[383] Counsel for Mr Merhi therefore request that the Appeals Chamber reject Sub-ground 1 (E), as the alleged error did not invalidate the Judgment.[384]

189 Counsel for Mr Oneissi respond that the alleged error of law does not meet the standard of appellate review, as the Prosecution fails to identify how the inclusion of unidentified Rule 158 evidence would have invalidated the Judgment.[385] Counsel for Mr Oneissi argue that there is a paradox between the Prosecution's contention that the evidence in question does not constitute the sole or decisive basis for a conviction and the Prosecution's contention that the error in question occasioned a miscarriage of justice regarding Mr Oneissi's acquittal.[386] Counsel for Mr Oneissi argue that the Trial Chamber did not err in requiring corroboration for Rule 158 evidence that was relevant to key allegations against Mr Oneissi.[387] They therefore request the Appeals Chamber to dismiss Sub-ground 1 (E).[388]

190 In reply, the Prosecution reiterates that the Trial Chamber erred in imposing a categorical rule for Rule 158 evidence, according to which contested Rule 158 evidence required tested corroboration, regardless of its probative value to the case.[389] The Prosecution submits that a "blanket requirement for tested corroboration" is not necessary, particularly if such evidence is not the sole or decisive basis for a conviction.[390]

191 The LRV contends that the Trial Chamber erred in law by "categorically holding that Rule 158 evidence on contested matters could be given no weight unless corroborated by tested evidence."[391] The LRV argues that the Trial Chamber's reasoning may offend the principle of *audi alteram partem* by treating challenges to Rule 158 evidence as though they automatically

[382] Merhi Response Brief, para. 141.
[383] Merhi Response Brief, paras 143-145.
[384] Merhi Response Brief, para. 142.
[385] Oneissi Response Brief, paras 104-107.
[386] Oneissi Response Brief, para. 108.
[387] Oneissi Response Brief, paras 110-112, 114-115.
[388] Oneissi Response Brief, paras 109, 113.
[389] Prosecution Reply Brief, paras 42-43, 46.
[390] Prosecution Reply Brief, para. 47.
[391] LRV Observations, para. 62 (footnote omitted).

render the evidence unreliable.[392] The LRV observes that the relevant Rule 158 evidence of Mr Al-Hassan was supported by several items of circumstantial evidence.[393] The LRV argues that the Trial Chamber erred by not allowing contested Rule 158 evidence to be corroborated by other Rule 158 evidence.[394]

192. Counsel for Mr Merhi reiterate that the Trial Chamber did not find that Rule 158 evidence was unreliable on the sole basis that it was contested, nor did it err in requiring corroboration of untested evidence.[395] Counsel for Mr Merhi challenge the LRV's submission that Mr Al-Hassan's Rule 158 evidence on the Green Network was corroborated by several items of circumstantial evidence.[396]

2. Trial Chamber Findings

193. The Trial Chamber stated that it did not rely on Rule 158 evidence that was contested by the Defence and not corroborated by evidence that the Defence could challenge in court.[397] Following this approach, the Trial Chamber gave little to no weight to the written statements of Messrs Al-Hassan, Abbas Mohammed Alaaeddine, Ziad Ramadan, and Taysir Abu Adass, and Witness PRH056[398] due to the contested nature of their evidence and the lack of corroboration by tested evidence.[399]

194. In particular, the Appeals Chamber notes that the Trial Chamber held that, "[w]here the Defence has contested [Rule 158] evidence *and or* where it goes to proof of a fact that is necessary to establish guilt beyond reasonable doubt, and it has not been corroborated by evidence that the Defence could challenge in court, the Trial Chamber has not relied on it."[400] The fact that the Trial Chamber articulated the above finding both conjunctively and disjunctively will be relevant to the reasoning set forth below.

[392] LRV Observations, para. 63.
[393] LRV Observations, para. 64.
[394] LRV Observations, para. 65.
[395] Merhi Response to LRV Observations, para. 70.
[396] Merhi Response to LRV Observations, paras 73-81.
[397] Judgment, paras 287, 352.
[398] The Trial Chamber and the Prosecution also refer to Witness PRH056 as "Witness 56".
[399] *See, e.g.,* Judgment, paras 287, 2243, 3868, 3982, 4819, 5436, 5528, 5730, 5760, 6516, 6526.
[400] Judgment, para. 287 (emphasis added).

3. Discussion

a. Applicable Law

195 The Appeals Chamber notes that Rule 158 governs the admission of evidence obtained from unavailable persons.[401] It reads as follows:

> (A) Evidence in the form of a written statement, any other reliable record of what a person has said, written or otherwise expressed, or transcript of a statement by a person who has died, who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rules 93, 123, 155, 156 and 157 if the Trial Chamber:
>
> (i) is satisfied of the person's unavailability; and
>
> (ii) finds that the statement, the record or the transcript is reliable, taking into account how it was made and maintained.
>
> (B) In considering the application of Rule 149 (D) to this Rule, the Chamber shall take into account whether the evidence in question goes to proof of acts and conduct of the accused as charged in the indictment.

196 We note that it is settled jurisprudence that evidence by a witness who was not cross-examined under oath is not in itself unreliable or devoid of probative value.[402] The circumstances in which a written statement was made and recorded, its precise character, and the fact that other evidence corroborates it are among the relevant criteria that a trial chamber takes into account in assessing its weight or probative value.[403] Furthermore, we note that evidence from unavailable witnesses that goes to the acts and conduct of the accused or is pivotal to the Prosecution's case requires corroboration if it is used to establish a conviction.[404] A conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused had no opportunity to examine either during the investigation or at trial.[405]

---

[401] The Appeals Chamber observes that the content of Rule 158 is similar to that of the relevant rules of procedure and evidence on unavailable witnesses at the ICTY, SCSL, ICC, and Kosovo Specialist Chambers ("KSC"). *See* ICTY RPE, Rule 92 *quater*; SCSL RPE, Rule 92 *quater*; ICC RPE, Rule 68 (2) (c); KSC RPE, Rule 155.

[402] *Ngudjolo* Appeal Judgment, para. 226; *Bizimungu* Appeal Judgment, para. 180; *Karera* Appeal Judgment, para. 39; *Nahimana et al.* Appeal Judgment, para. 215; *Aleksovski* Decision on Appeal on Admissibility of Evidence, para. 15; *Semanza* Appeal Judgment, para. 159.

[403] *Lukić and Lukić* Appeal Judgment, para. 566, fn. 1633; *Karera* Appeal Judgment, para. 39; *Nahimana et al.* Appeal Judgment, para. 831; *Ndindabahizi* Appeal Judgment, para. 115; *Rutaganda* Appeal Judgment, paras 154, 156, 159.

[404] *Lukić and Lukić* Appeal Judgment, para. 570; *Haradinaj et al.* Appeal Judgment, para. 101, fn. 252; *Martić* Decision on Appeal on Admissibility of Evidence, para. 20; *Galić* Decision on Appeal Concerning Rule 92 *bis* (C), para. 12, fn. 34.

[405] *Popović et al.* Appeal Judgment, para. 96; *Đorđević* Appeal Judgment, para. 807.

b. Analysis of Trial Chamber Findings

i. Whether the Trial Chamber Erred by Automatically Considering Rule 158 Evidence to be Unreliable, if Challenged

197 The Prosecution submits that the Trial Chamber erred in automatically considering as unreliable the written statements of Messrs Al-Hassan, Alaaeddine, Ramadan, and Taysir Abu Adass, and Witness PRH056 because they were challenged by the Defence.[406] The Appeals Chamber recalls that the Trial Chamber, in describing its treatment of Rule 158 evidence, twice stated that, "[w]here the Defence has contested [Rule 158] evidence *and or* where it goes to proof of a fact that is necessary to establish guilt beyond reasonable doubt, and it has not been corroborated by evidence that the Defence could challenge in court, the Trial Chamber has not relied on it."[407] In the Appeals Chamber's view, these statements indicate that the Trial Chamber decided that contested Rule 158 evidence was presumptively unreliable and required corroboration regardless of whether it went to proof of a fact that is necessary to establish guilt beyond reasonable doubt.

198 The Appeals Chamber finds that this approach to Rule 158 evidence is erroneous because it runs counter to the plain text of the Rule. The Trial Chamber's application of the rule is also inconsistent with how other international courts and tribunals have applied their versions of Rule 158, which possess the same or similar text. According to this persuasive jurisprudence, evidence from unavailable witnesses is not inherently unreliable. It follows that such evidence is not rendered unreliable merely by a party's decision to object to it.

199 The Trial Chamber states that it carefully assessed all Rule 158 statements when determining their probative value.[408] Nonetheless, given the Trial Chamber's other statements, we find that it assessed the probative value of such evidence based on whether this evidence was contested, rather than based on the content of the evidence and the credibility of its source.

200 We therefore hold that the Trial Chamber erred in law in treating challenges to Rule 158 evidence as automatically rendering the evidence unreliable. However, we recall that a party alleging an error of law must identify the error and explain how it invalidates the decision.

---

[406] Prosecution Appeal Brief, paras 94-95.
[407] Judgment, para. 287 (emphasis added). *See also id.* at para. 352.
[408] Judgment, para. 352.

We note that the Prosecution explains how the error of law it alleges invalidates the Judgment only with respect to the Trial Chamber's assessment of the untested and contested written statements of Mr Al-Hassan, referring to Sub-ground 5 (D).[409] Whether this error has the potential to invalidate the Judgment and hence meets the standard of appellate review will therefore be assessed when addressing the arguments raised by the Prosecution under Sub-ground 5 (D).

201 Conversely, the Prosecution did not explain how the Trial Chamber's error in respect of the written statements of Messrs Alaaeddine, Ramadan, and Taysir Abu Adass, and Witness PRH056 affected the outcome of the Judgment. The Prosecution acknowledged that "the various Rule 158 evidence at issue did not go 'directly to proof of acts or conduct of the accused'".[410] We therefore find that the Prosecution has not demonstrated how the Trial Chamber's error in respect of the evidence of Messrs Alaaeddine, Ramadan, and Taysir Abu Adass, and Witness PRH056 invalidated the Judgment.

ii. Whether the Trial Chamber Erred by Not Allowing Contested Rule 158 Evidence to be Corroborated by Other Rule 158 Evidence

202 The Prosecution submits that the Trial Chamber erred in requiring corroboration of the written statements of Messrs Ramadan and Taysir Abu Adass and Witness PRH056 with tested evidence.[411] We recall that the Trial Chamber stated that it did not rely on Rule 158 evidence for corroboration of other Rule 158 evidence.[412] We also recall that a conviction may not rest solely, or in a decisive manner, on untested evidence. When Rule 158 evidence that goes to the acts and conduct of the accused or is pivotal to the Prosecution's case is used to establish a conviction, it requires corroboration. Allowing untested evidence to corroborate other untested evidence that is used to establish a conviction all by itself would run afoul of the principle that findings indispensable for a conviction may not rest solely or decisively on untested evidence.[413] We therefore hold that untested evidence that is indispensable for a conviction must be corroborated by tested evidence.

---

409 Prosecution Appeal Brief, paras 99, 106.
410 Prosecution Appeal Brief, para. 99 (footnote omitted).
411 Prosecution Appeal Brief, paras 94, 101.
412 Judgment, para. 352.
413 *See Popović et al.* Appeal Judgment, para. 1226.

203. However, we note that the Trial Chamber required that Rule 158 evidence be corroborated by tested evidence not only when it is indispensable for a conviction but also when it is merely challenged by the Defence. We reiterate that challenges to Rule 158 evidence do not automatically render it unreliable, nor trigger the need for corroboration by tested evidence. Therefore, the Trial Chamber erred when it refused to allow contested Rule 158 evidence to be corroborated by other Rule 158 evidence, regardless of its decisive nature for a conviction.

204. The Appeals Chamber therefore holds that the Trial Chamber erred in law in refusing to consider corroboration of Rule 158 evidence available from other Rule 158 evidence, based only on the fact that the evidence was contested by the Defence. However, we note that the Prosecution did not explain how the Trial Chamber's error in requiring corroboration (with tested evidence) of the written statements of Messrs Ramadan and Taysir Abu Adass and Witness PRH056 affected the outcome of the Judgment. We recall that the Prosecution acknowledged that the Rule 158 evidence at issue did not go directly to proof of acts or conduct of the accused. We therefore find that the Prosecution has not demonstrated how the Trial Chamber's error in assessing Messrs Ramadan and Taysir Abu Adass and Witness PRH056's Rule 158 evidence invalidated the Judgment.

4. <u>Conclusion</u>

205. We find that, while the Trial Chamber erred by automatically considering Rule 158 evidence to be unreliable, if challenged, the Prosecution has not demonstrated that this error invalidates the Judgment. This finding is without prejudice to the Appeals Chamber's further assessment of whether the Trial Chamber's error in assessing Mr Al-Hassan's Rule 158 evidence invalidates the Judgment.[414]

206. We also find that, while the Trial Chamber erred by not allowing contested Rule 158 evidence to be corroborated by other Rule 158 evidence, the Prosecution has not demonstrated that this error invalidates the Judgment.

207. Sub-ground 1 (E) is therefore dismissed.

---

[414] *See* Sub-ground 5 (D) below.

F. Conclusion

208 For the foregoing reasons, we find, unanimously, that the Trial Chamber has not committed an error of law invalidating the Judgment with respect to Sub-grounds 1 (A)–(C), and 8 (A)–(B). We further find, by majority, that the Trial Chamber has not committed an error of law invalidating the Judgment with respect to Sub-grounds 1 (D), 5 (E), and 8 (C).

209 We also find that the Trial Chamber has not committed an error of law invalidating the Judgment under Sub-ground 1 (E) with respect to the written statements of Messrs Ramadan, and Taysir Abu Adass, and Witness PRH056. We will assess whether the error of law alleged by the Prosecution in Sub-ground 1 (E) with respect to Mr Al-Hassan's Rule 158 evidence has the potential to invalidate the Judgment when addressing the arguments raised by the Prosecution under Sub-ground 5 (D).

210 The above findings are without prejudice to the Appeals Chamber's further assessment of whether a reasonable trier of fact could have reached the factual conclusions drawn by the Trial Chamber.[415]

[415] *See* Sub-ground 8 (D) below.

V. GROUND 4: WHETHER THE TRIAL CHAMBER ERRED IN FAILING TO FIND THAT MERHI USED GREEN 071

211 Ground 4 of the Prosecution Appeal Brief alleges errors of law and errors of fact on the part of the Trial Chamber for declining to attribute Green 071 to Mr Merhi, *i.e.*, to find that Mr Merhi was the user of Green 071. The term "attribution" is used by the Prosecution to indicate that "a SIM card (telephone number) was used by a specific person (the phone user) during a particular time period".[416]

212 The Appeals Chamber will assess each sub-ground in turn.

A. Sub-ground 4 (A): Whether the Trial Chamber Erred in Law by Establishing a Minimum Threshold of Calls Required for Attribution Without Any Evidentiary Basis

1. Submissions of the Parties

213 The Prosecution submits that the Trial Chamber erred in law by establishing a minimum threshold of calls required for attribution[417] and by stating that the number of Green 071 co-location candidate calls was "inadequate".[418] The Prosecution argues that this approach is at odds with Mr John Edward Philips's expert evidence, according to which what matters is not merely the quantity of phone calls but also the quality of what the calls show.[419] The Prosecution further claims that the Trial Chamber erroneously rejected Mr Philips's conclusions on the basis that he testified that Green 071 *could* have been used by Mr Merhi.[420] According to the Prosecution, Mr Philips used the same method for all phone users, and thus his use of the word "could" had no special significance with respect to Green 071.[421] Finally, the Prosecution challenges the Trial Chamber's comparison between the number of co-location candidate calls for Green 071, on the one hand, and for Green 300 and Green 023, on the other hand, stating that "there is no reason to assume that the attribution of those phones was the numerical minimum to meet the requisite standard".[422]

---

[416] Amended Consolidated Indictment, para. 14.
[417] Prosecution Appeal Brief, p. 61.
[418] Prosecution Appeal Brief, para. 171, *referring to* Judgment, para. 3666.
[419] Prosecution Appeal Brief, para. 172.
[420] Prosecution Appeal Brief, para. 175.
[421] Prosecution Appeal Brief, para. 175.
[422] Prosecution Appeal Brief, para. 176.

214 Counsel for Mr Merhi and Counsel for Mr Oneissi contend that the error alleged by the Prosecution pertains to an error of fact rather than an error of law and that the standard of appellate review related to errors of fact should accordingly be applied.[423]

215 Regardless of this, Counsel for Mr Merhi argue that the Trial Chamber did not establish a threshold of minimum calls for attributing Green 071.[424] Rather, according to Counsel for Mr Merhi, the Trial Chamber analyzed the calls from Green 071 and correctly exercised its discretion in concluding that the evidence was insufficient to attribute Green 071 to Mr Merhi.[425] Furthermore, Counsel for Mr Merhi claim that the Prosecution is reiterating arguments that failed at trial and expressing his disagreement with the conclusions of the Trial Chamber, whereas the analysis of the Trial Chamber was reasonable and based on the evidence, which shows that the number of calls is indeed relevant.[426] Regarding Mr Philips's use of the word "could", Counsel for Mr Merhi posit that the Trial Chamber was correct in recognizing that this language—and the evidence in general—did not meet the high standard of beyond reasonable doubt required to attribute Green 071 to Mr Merhi.[427] Finally, concerning the comparison between Green 300, Green 023, and Green 071, Counsel for Mr Merhi submit that the Trial Chamber did not create a threshold on the basis of the comparison, but rather illustrated the reasons the evidence concerning Green 071 was lacking.[428]

216 Counsel for Mr Oneissi observe that the Prosecution is seeking a reversal of Mr Oneissi's acquittal on the basis of all the grounds of appeal and submit that Ground 4 must consequently meet the standard of appellate review with respect to Mr Oneissi.[429] However, according to Counsel for Mr Oneissi, Ground 4 should be summarily dismissed because the Prosecution's submissions are "obscure and vague" with respect to the impact of Grounds 4 and 5 on the acquittal of Mr Oneissi.[430] Counsel for Mr Oneissi add that it cannot be reasonably argued that the findings impugned in Ground 4 had any bearing on the Trial Chamber's decision to acquit Mr Oneissi because his acquittal was not based on the attribution of

[423] Merhi Response Brief, paras 182, 183; Oneissi Response Brief, para. 152.
[424] Merhi Response Brief, para. 184.
[425] Merhi Response Brief, para. 185.
[426] Merhi Response Brief, paras 187, 188.
[427] Merhi Response Brief, paras 189-191.
[428] Merhi Response Brief, para. 192.
[429] Oneissi Response Brief, paras 153-154. The Appeals Chamber takes this opportunity to note that the submissions of Counsel for Mr Oneissi have been taken into account in respect of all the sub-grounds of Ground 4.
[430] Oneissi Response Brief, paras 155-156.

Green 071 to Mr Merhi.[431] Based on the foregoing, Counsel for Mr Oneissi conclude that the impugned findings cannot constitute a miscarriage of justice and therefore must be dismissed as not meeting the requisite standard of appellate review.[432]

217 In its Reply, the Prosecution refutes Counsel for Mr Merhi and Counsel for Mr Oneissi's submission that Sub-ground 4 (A) amounts to an error of fact, stating that the Trial Chamber did establish a minimum threshold for calls without providing any evidentiary basis.[433] The Prosecution also contends that the Trial Chamber's comparison between Green 071, Green 300, and Green 023 "was not merely illustrative", as the Trial Chamber relied on those comparisons to conclude that the evidence regarding Green 071 was insufficient, whereas attribution can only be made on the basis of a phone's unique calling characteristics and not in comparison with other phones.[434]

2. Trial Chamber Findings

218 The Trial Chamber found that "[t]he Alfa subscription records do not assist in attributing Green 071 because it was subscribed using a false identity document."[435] As a consequence, the Trial Chamber deduced that "[w]hether Mr Merhi was using Green 071 rests solely upon its co-location with Purple 231 and the Grey mobile."[436] The Trial Chamber observed that determining whether Mr Merhi was the single user of Green 071 was challenging due to the "extremely limited number of Green mobile calls" and the even "smaller number of calls within the indictment period itself".[437]

219 The Trial Chamber eventually concluded that there was "an inadequate number of calls, and significantly, a lack of movement" from which it could conclude beyond reasonable doubt that Mr Merhi was the user of Green 071.[438]

---

431 Oneissi Response Brief, paras 157-158.
432 Oneissi Response Brief, para. 160.
433 Prosecution Reply Brief, para. 51.
434 Prosecution Reply Brief, para. 54.
435 Judgment, para. 3618.
436 Judgment, para. 3619.
437 Judgment, para. 3620.
438 Judgment, paras 3666, 3671.

3. Discussion

220 The Prosecution argues that the Trial Chamber erred in law by creating "a minimum threshold for an 'adequate' number of calls for co-location".[439] However, we note that the Trial Chamber did not explicitly establish a threshold nor require a specific amount of calls in any of the excerpts of the Judgment referred to by the Prosecution. We further note that, in the paragraph of the Judgment referred to by the Prosecution, the Trial Chamber did not set an "adequate" number of calls for attribution, but rather characterized as "inadequate" the number of calls tendered to attribute Green 071 to Mr Merhi.[440] In so doing, the Trial Chamber was merely assessing the quality of the evidence before it—as it should in accordance with its role as trier of fact—and was noting that, in the view of the Trial Chamber, the evidence on Green 071 was scarce.

221 Similarly, the Appeals Chamber is not persuaded that the comparison of the Trial Chamber between the evidence related to Green 071 and the evidence related to Green 300 and Green 023 amounted to establishing a minimum threshold of calls for attribution. We agree with Counsel for Mr Merhi that the comparison was merely illustrative and served to explain the reason why the Trial Chamber could attribute the other two Green Network mobiles and not Green 071. We also note that the comparison was not limited to the number of calls, but also encompassed the movements of the mobiles. It is the combination of these two elements that led the Trial Chamber to identify a "qualitative difference"[441] and to find that the evidence was insufficient with respect to Mr Merhi and Green 071, while, for Messrs Ayyash and Badreddine, the evidence was more convincing.

222 Moreover, the Prosecution impugns the Trial Chamber's emphasis on Mr Philips's conclusion that Green 071 and Mr Merhi's mobiles *could* have been used by a single user and his inability to state conclusively that they *were* employed by a single user. While we agree that the emphasis was unnecessary, we do not find that the Trial Chamber unduly relied upon this distinction. On the contrary, the Trial Chamber observed that "Mr Philips, unlike Mr [Andrew] Donaldson, would never categorically state, based on cell site evidence alone, that two or more mobiles *had* a single user".[442] The Trial Chamber then added, correctly, that

[439] Prosecution Appeal Brief, para. 171 (footnote omitted).
[440] *See* Judgment, para. 3666.
[441] Judgment, para. 3662.
[442] Judgment, para. 3621 (emphasis in the original).

reaching such a conclusion was the role of the fact-finder.[443] The Prosecution's argument is therefore without merit.

223 While it is true that Mr Philips valued the quality of the calls, his testimony also evidenced that the quantity is a relevant factor.[444] Therefore, we find that the Trial Chamber did not err in taking into account, among other things, the number of candidate calls for co-location to determine whether Mr Merhi was the user of Green 071.

224 The Trial Chamber, when making the findings impugned in Ground 4, was carrying out its duty to assess and weigh the evidence before it. The Prosecution has therefore not demonstrated an error of law on the part of the Trial Chamber.

4. Conclusion

225 We hold that the Prosecution has not demonstrated that the Trial Chamber established a minimum threshold of calls for attributing a phone to a user. Nor did the Trial Chamber otherwise err in law in making the impugned finding.

226 For the foregoing reasons, Sub-ground 4 (A) is dismissed.

227 This conclusion is without prejudice to the Appeals Chamber's further assessment as to whether the Trial Chamber made an error of fact on this issue.

B. Sub-ground 4 (B): Whether the Trial Chamber Erred in Law by Focusing on the Number of Calls in the Indictment Period

1. Submissions of the Parties

228 The Prosecution claims that the Trial Chamber erred in law by focusing on an irrelevant consideration, *i.e.*, the sample size of Green 071 calls during the indictment period, as opposed to the number of calls in the longer period (the attribution period) used to analyze the activity of Green 071 and to determine who used it.[445] According to the Prosecution, there was "no

[443] Judgment, para. 3621.
[444] *See* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 20 August 2015, pp. 61- 62, 117; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 21 August 2015, pp. 83-84; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 25 August 2015, p. 78; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 20 April 2017, p. 60.
[445] Prosecution Appeal Brief, para. 178.

basis in logic or in the evidence" for the Trial Chamber to focus on the indictment period as Mr Philips's analysis and conclusions related to the entire attribution period.[446] The Prosecution further states that the shorter indictment period was nothing more than the range of dates during which Messrs Ayyash, Merhi, and Badreddine allegedly formed their agreement to assassinate Mr Hariri.[447] For these reasons, the Prosecution submits that the Trial Chamber, by focusing on the irrelevant fact that a smaller number of calls fell within the indictment period, failed to appreciate the strength of the co-location evidence and, in turn, to attribute Green 071 to Mr Merhi.[448]

229 As submitted in response to Sub-ground 4 (A), Counsel for Mr Merhi argue that the Prosecution alleges an error of fact rather than an error of law.[449] In any event, Counsel for Mr Merhi posit that the Prosecution misrepresents the Judgment and that Sub-ground 4 (B) should be summarily dismissed.[450] Counsel for Mr Merhi emphasize that the rare instances in which the Trial Chamber mentioned the shorter indictment period did not constitute a basis for its analysis related to the attribution of Green 071.[451]

230 The Prosecution replies that Counsel for Mr Merhi has failed to provide a justification for the Trial Chamber's repeated reference to the number of calls in the indictment period.[452]

2. <u>Trial Chamber Findings</u>

231 In order to attribute Green 071 to Mr Merhi, the Trial Chamber had to determine whether Green 071 co-located with Mr Merhi's two other mobiles—Purple 231 and the Grey Mobile—in a way that the three mobiles had a single user.[453] The Trial Chamber held that it was a challenge to determine this "based on the extremely limited number of Green mobile calls".[454] The Trial Chamber also noted that the smaller number of calls within the indictment period itself complicated the matter.[455]

---

[446] Prosecution Appeal Brief, para. 179.
[447] Prosecution Appeal Brief, para. 180.
[448] Prosecution Appeal Brief, paras 181, 182.
[449] Merhi Response Brief, para. 193.
[450] Merhi Response Brief, para. 194.
[451] Merhi Response Brief, para. 195.
[452] Prosecution Reply Brief, para. 55.
[453] Judgment, paras 3619, 3620.
[454] Judgment, para. 3620.
[455] Judgment, para. 3620.

232 In analyzing the evidence related to the attribution of Green 071, the Trial Chamber observed that Mr Philips had identified 40 examples of possible co-locations over the wider attribution period of 24 September 2004 to 7 February 2005.[456] However, during the more confined indictment period of 11 November 2004 to 14 February 2005, Mr Philips found only fourteen.[457] The Trial Chamber noted that "[t]he sample size in the indictment period was tiny".[458]

3. Discussion

233 Despite the impugned remarks, the Trial Chamber did not limit its assessment to the calls within the indictment period, but rather assessed the evidence related to Green 071 spanning over the entire attribution period.[459] The Prosecution's argument in this respect is without merit.

4. Conclusion

234 For the foregoing reasons, Sub-ground 4 (B) is dismissed.

C. Sub-ground 4 (C): Whether the Trial Chamber Erred in Law by Failing to Take into Account Relevant Evidence That Mr Merhi Used Green 071

1. Submissions of the Parties and LRV

235 The Prosecution submits that the Trial Chamber erred in law by failing to take into account relevant evidence regarding: (a) the simultaneous movement of Mr Merhi's Purple 231 with Green 071 on 15 January 2005; (b) Mr Merhi's connections to the conspiracy; and (c) the common origin and function of the Green Network mobiles.[460]

236 With respect to the first issue, the Prosecution claims that the Trial Chamber "failed to consider one of the two instances when Green 071 moved outside of south Beirut, and co-located with Merhi's Purple 231".[461] The Prosecution argues that the Trial Chamber noted the co-location on 15 January 2005 in the suburb of Sin El Fil, but "disregarded the fact that this

[456] Judgment, para. 3643.
[457] Judgment, para. 3644.
[458] Judgment, para. 3645.
[459] Judgment, paras 3627, 3636, 3641, 3642, 3649-3652, 3656, 3659, 3660.
[460] Prosecution Appeal Brief, para. 183.
[461] Prosecution Appeal Brief, para. 185.

too was an instance of movement outside south Beirut".[462] According to the Prosecution, evidence of this co-location was not only relevant, but also supportive of attribution, and the Trial Chamber's omission of this fact—even through inadvertence—led it to disregard the most significant feature of this evidence, *i.e.*, movement.[463]

737 Regarding the second issue, the Prosecution alleges that the Trial Chamber erroneously failed to take into account Mr Merhi's connections to the conspiracy when stating that the fact that Green 071 was contacting Mr Badreddine's Green mobile, which was in turn contacting Mr Ayyash's Green mobile, could not be used to prove that Mr Merhi was using Green 071.[464] The Prosecution emphasizes that circumstantial evidence must be assessed in its context and with regard to the totality of the evidence and that Mr Merhi's contacts with conspirators should have been considered for the purpose of eliminating coincidence and excluding the Trial Chamber's alternative inference.[465]

738 In relation to the third issue, the Prosecution contends that the Trial Chamber failed to take into account its own findings and the evidence about the common origins and function of the Green Network mobiles.[466] In particular, the Prosecution claims that the Trial Chamber "should have considered the similarities between the start of the attribution of the other two Green [Network mobiles] alongside the evidence of Green 071".[467] In the Prosecution's view, those similarities—the timing, the change in contact profile, and the handset usage—show that the Green Network mobiles had a common mission and that Green 071 started being used by a new person from 24 September 2004 onwards.[468]

739 The Prosecution claims that, if not for these errors, either on their own or in combination with each other, the Trial Chamber would have attributed Green 071 to Mr Merhi.[469]

740 Counsel for Mr Merhi contend that all the arguments contained in Sub-ground 4 (C) pertain to errors of fact.[470]

---

[462] Prosecution Appeal Brief, para. 187.
[463] Prosecution Appeal Brief, paras 185, 188, 190.
[464] Prosecution Appeal Brief, paras 194, 200-201.
[465] Prosecution Appeal Brief, paras 195-201.
[466] Prosecution Appeal Brief, para. 203.
[467] Prosecution Appeal Brief, para. 206.
[468] Prosecution Appeal Brief, paras 207-212.
[469] Prosecution Appeal Brief, paras 193, 202, 213.
[470] Merhi Response Brief, paras 197, 212, 227.

241 In relation to the first argument, Counsel for Mr Merhi respond that the Trial Chamber did not omit the evidence of Green 071's activity on 15 January 2005 since it was mentioned in several instances throughout the Judgment.[471] Counsel for Mr Merhi specifically point to a paragraph of the Judgment in which the Trial Chamber assessed the entirety of the evidence of Green 071's activity, arguing that, in any event, it must be presumed that the Trial Chamber has evaluated all the evidence before it.[472] Moreover, Counsel for Mr Merhi contend that it was reasonable for the Trial Chamber to consider that the activity of Green 071 on 15 January 2005 did not represent an instance of common movement.[473] They add that this conclusion is also consistent with the Prosecution's own position, evidenced by the absence of reference to this event from its final trial brief.[474]

242 Regarding the Trial Chamber's conclusion impugned in the second argument, Counsel for Mr Merhi state that the Prosecution argues for the first time on appeal that Mr Merhi's contacts with the conspiracy should have been considered in relation to the attribution of Green 071.[475] Counsel for Mr Merhi contend that, in any event, the Trial Chamber did cite the evidence on Mr Merhi's contacts with Mr Ayyash and Mr Badreddine and that it must be presumed that the Trial Chamber took that evidence into account.[476] Moreover, Counsel for Mr Merhi claim that a person's contact with other persons, devoid of content and context, cannot reasonably be used to prove or support that a phone belonged to a specific individual.[477] Finally, Counsel for Mr Merhi submit that the Prosecution's argument that Mr Merhi's alleged contacts with Hezbollah or its members reinforce his involvement in the attack is contrary to the principle prohibiting guilt by association and that these contacts can be explained in many different ways.[478]

243 In relation to the third argument, Counsel for Mr Merhi point out that the Prosecution is challenging the Trial Chamber's conclusion that the user of Green 071 did not change on 24 September 2004 and that this challenge is not in the Notice of Appeal.[479] As they did in response to the second argument, Counsel for Mr Merhi maintain that the Prosecution has not

[471] Merhi Response Brief, para. 200, *referring to* Judgment, paras 3522, 3541, 3658, 5349-5356, 5469-5470, 5473.
[472] Merhi Response Brief, para. 201.
[473] Merhi Response Brief, paras 202-204.
[474] Merhi Response Brief, para. 205.
[475] Merhi Response Brief, paras 213-218.
[476] Merhi Response Brief, paras 219-220, 224.
[477] Merhi Response Brief, paras 221-223.
[478] Merhi Response Brief, paras 225-226.
[479] Merhi Response Brief, para. 228.

pleaded the similarities of the Green Network mobiles in support of the attribution of Green 071, that those similarities do not prove that Green 071 was attributable to Mr Merhi, and that, in any event, the Trial Chamber did take into account this evidence.[480]

244 On the impact, Counsel for Mr Merhi argue that, even if the Appeals Chamber were to find errors in this sub-ground, none of them would change the outcome of the Judgment.[481]

245 The Prosecution replies that the three explanations advanced by Counsel for Mr Merhi for the Trial Chamber's failure to assess the instance of movement of 15 January 2005 are not consistent with either the Judgment or the evidence.[482] The Prosecution submits that the responses of Counsel for Mr Merhi to the second argument are partly-contradictory and without merit.[483] Regarding the third argument, the Prosecution replies that it provided adequate notice in its Notice of Appeal.[484]

246 The LRV contends that the evidence provided through Messrs Philips and Donaldson, Mr Merhi's connections to "proven conspirators", and the similarities among the three Green Network mobiles "all corroborate the overwhelming telecommunication evidence pointing to the attribution of Green 071 to Mr Merhi".[485]

247 In response, Counsel for Mr Merhi opine that this argument is problematic for the following reasons: (a) the LRV's observations are limited to the Prosecution Appeal Brief and ignore the arguments raised by Counsel for Mr Merhi; (b) the LRV merely expresses a disagreement with the Trial Chamber's conclusion that the evidence on Green 071 being attributable to Mr Merhi was weak and overall insufficient; (c) the LRV overlooks the fact that the Trial Chamber meticulously analyzed the evidence of Messrs Philips and Donaldson; (d) the LRV does not explain who were the "proven conspirators" with whom Mr Merhi was supposed to be in contact nor how those contacts are relevant for the attribution of Green 071 to Mr Merhi; and (e) the LRV simply endorses the arguments of the Prosecution regarding the similarities between the Green Network mobiles and ignores the response of Counsel for Mr Merhi.[486]

---

[480] Merhi Response Brief, paras 229-231.
[481] Merhi Response Brief, paras 209, 226, 232.
[482] Prosecution Reply Brief, para. 57.
[483] Prosecution Reply Brief, para. 62.
[484] Prosecution Reply Brief, para. 67.
[485] LRV Observations, para. 36.
[486] Merhi Response to LRV Observations, paras 28-35.

2. Trial Chamber Findings

248. The Trial Chamber held that "[t]he attribution of Green 071 to Mr Merhi rests primarily on Mr Philips's analysis of Green 071's co-location with Purple 231 and its co-location with the Grey mobile."[487] The Trial Chamber added that it had received evidence from Mr Donaldson in relation to Green 071's geographical profile, on the basis of which Mr Donaldson concluded that Mr Merhi was the user of Green 071 and that it was co-locating with Purple 231.[488] The Trial Chamber concluded that the evidence of the geographical profile and cell activations of Purple 231 and Green 071, even in addition to the data on the Grey Mobile, was insufficient to establish beyond reasonable doubt that Mr Merhi was using Green 071 because of the small sample of calls and the lack of common movement between Green 071 and the other two mobiles.[489]

3. Discussion

a. Applicable Law

249. The Appeals Chamber recalls that the Trial Chamber must "independently assess the totality of the evidence before it".[490] Despite this, the Trial Chamber retains "the discretion to determine the evidence on which it will ultimately rely and the weight to be assigned thereto".[491] The Trial Chamber is not obliged to detail each step of its reasoning in relation to every finding,[492] nor is it required in its Judgment to "refer to the testimony of every witness or every piece of evidence on the trial record".[493]

250. The Appeals Chamber will not reach the conclusion lightly that the Trial Chamber failed to consider particular evidence[494] or, as the Prosecution argues in this instance, that the Trial Chamber failed to consider evidence relevant to the attribution of Green 071 to Mr Merhi.

[487] Judgment, para. 3512.
[488] Judgment, para. 3512.
[489] Judgment, para. 3671.
[490] *Tolimir* Appeal Judgment, para. 26. *See also Galić* Appeal Judgment, para. 256; *Lukić and Lukić* Appeal Judgment, para. 262; *Ngirabatware* Appeal Judgment, para. 86.
[491] *Tolimir* Appeal Judgment, para. 26. *See also Ngirabatware* Appeal Judgment, para. 86; *Kvočka et al.* Appeal Judgment, para. 375.
[492] *Ntabakuze* Appeal Judgment, para. 161; *Krajišnik* Appeal Judgment, para. 139.
[493] *Kvočka et al.* Appeal Judgment, para. 23. *See also Ntabakuze* Appeal Judgment, para. 161; *Halilović* Appeal Judgment, para. 121; *Đorđević* Appeal Judgment, para. 286, fn. 940; *Ngirabatware* Appeal Judgment, para. 269; *Munyakazi* Appeal Judgment, para. 174.
[494] *See Ngirabatware* Appeal Judgment, para. 202.

A presumption exists that the Trial Chamber "evaluated all the evidence presented to it",[495] and this presumption stands "as long as there is no indication that the trial chamber completely disregarded any particular piece of evidence".[496] It must also be presumed that the Trial Chamber was aware of its own factual findings in reaching conclusions, but that it found them insufficient to establish certain facts.[497]

251 Even if evidence that has not been referred to by the Trial Chamber contradicts a finding of the Trial Chamber, there is a presumption that the Trial Chamber did assess and weigh that evidence, but found that the evidence did not prevent it from arriving at the finding.[498] It remains the case, however, that there may be an indication that evidence has been disregarded by the Trial Chamber when evidence that is "clearly relevant" to the Trial Chamber's findings is not addressed in its reasoning.[499]

252 When an appellant alleges that the Trial Chamber failed to consider evidence, he or she must identify the evidence, show that it is relevant evidence, and demonstrate that the Trial Chamber disregarded the evidence.[500] The Appeals Chamber will therefore dismiss such an allegation where the Trial Chamber did in fact consider the evidence or where the evidence referred to is not relevant to the point at hand.[501]

b. Analysis of Trial Chamber Findings

253 The Appeals Chamber will analyze in turn the instances in which the Trial Chamber allegedly disregarded evidence relevant to the attribution of Green 071 to Mr Merhi.

i. <u>Evidence of Green 071's Movement on 15 January 2005</u>

254 The Prosecution claims that the Trial Chamber failed to consider "one of the two instances" when Green 071 co-located with Purple 231 outside of south Beirut—the instance

[495] *Prlić et al.* Appeal Judgment, paras 182, 187.
[496] *Prlić et al.* Appeal Judgment, para. 187. *See also Kanyarukiga* Appeal Judgment, para. 127; *Ndindabahizi* Appeal Judgment, para. 75; *Stanišić and Župljanin* Appeal Judgment, para. 537 (holding that "a trial chamber's failure to explicitly refer to particular evidence will not often amount to an error of law, especially where there is significant contrary evidence on the record").
[497] *Stakić* Appeal Judgment, para. 55.
[498] *Kvočka et al.* Appeal Judgment, para. 23.
[499] *Kvočka et al.* Appeal Judgment, para. 23. *See also Kalimanzira* Appeal Judgment, para. 195; *Nchamihigo* Appeal Judgment, para. 166; *Galić* Appeal Judgment, para. 256.
[500] *Galić* Appeal Judgment, para. 257.
[501] *Galić* Appeal Judgment, paras 257-258.

of 15 January 2005.[502] The Prosecution points to specific paragraphs of the Judgment in which the Trial Chamber analyzed and made findings in relation to the movement of Green 071 without referring to the calls made on 15 January 2005.[503] In particular, the Prosecution challenges the Trial Chamber's findings that the activation of ANQOUN2 on 25 September 2004 "provides the only example when either Purple 231 or the Grey mobile were used in a manner that made co-location possible by virtue of the common movements of the mobiles" and that "[o]therwise the common activations were of cells in a confined area in southern Beirut."[504]

255 The Trial Chamber concluded, among other reasons, that the evidence was insufficient to attribute Green 071 to Mr Merhi because of lack of movement. The basis for the Trial Chamber's conclusion was the evidence presented through Mr Philips and Mr Donaldson, which encompassed the data of Green 071's activity during the attribution period, including its activity on 15 January 2005.[505] We note that the Prosecution recognizes that the Trial Chamber expressly referred to the evidence of movement of Purple 231 and Green 071 on 15 January 2005.[506]

256 In accordance with settled jurisprudence, it must be presumed that the Trial Chamber's conclusion was based on all the relevant evidence presented before it.[507] Moreover, the Trial Chamber was not obliged to provide a detailed analysis of each item of evidence in the Judgment, as long as it did not disregard clearly relevant evidence.[508]

257 We therefore hold that the Prosecution has failed to demonstrate that the Trial Chamber disregarded the evidence of common movement of 15 January 2005. The paragraphs of the Judgment cited by the Prosecution merely show that the Trial Chamber did not consider the movement of Green 071 on 15 January 2005 as an instance of common movement with Purple 231 and/or as movement outside the main area of concentration of the phone. Whether this was erroneous and whether the Trial Chamber should have arrived at a different conclusion will be assessed further below, when we will decide upon Sub-ground 4 (E), in which the Prosecution alleges an error of fact.

---

502 Prosecution Appeal Brief, para. 185.
503 Prosecution Appeal Brief, para. 190.
504 Judgment, para. 3660.
505 Judgment, paras 3522, fn. 6998, 3541, 5349-5351, 5355.
506 Prosecution Appeal Brief, para. 190.
507 *Prlić et al.* Appeal Judgment, para. 187.
508 *Ntabakuze* Appeal Judgment, para. 161; *Krajišnik* Appeal Judgment, para. 139.

ii. Evidence of Mr Merhi's Contacts with Messrs Ayyash and Badreddine

258 The Prosecution argues that the Trial Chamber erred in limiting its assessment on the attribution of Green 071 to single-user analysis. The Prosecution also alleges that the Trial Chamber erred in finding that the fact that Green 071 was contacting Mr Badreddine's Green mobile, which was in turn contacting Mr Ayyash's Green mobile, could not be used to prove that Mr Merhi was using Green 071.[509]

259 It is clear that the issue before the Appeals Chamber amounts to a disagreement between the Prosecution and the Trial Chamber as to whether the evidence of Mr Merhi's contact with Messrs Ayyash and Badreddine is relevant for attributing Green 071 to Mr Merhi. We recall that, when an appellant alleges that the Trial Chamber failed to consider evidence, he or she must identify the evidence, show that it is relevant evidence, and demonstrate that the Trial Chamber disregarded the evidence.[510]

260 The Appeals Chamber considers vague the Trial Chamber's wording of its finding— that Mr Merhi's contacts with Messrs Ayyash and Badreddine "could not be used" to prove that Mr Merhi used Green 071. However, we recall that a trial chamber has the discretion to determine the evidence on which it will ultimately rely and the weight to be assigned thereto.[511] In the context of deciding whether Green 071 was used by Mr Merhi during the relevant period, the Trial Chamber exercised its discretion to determine the evidence on which it relied, as well as its weight, and found that Green 071's co-location with Mr Merhi's two other mobiles was the only evidence it would rely on for its determination regarding the attribution of Green 071. Despite the vague wording chosen by the Trial Chamber, it did assess the evidence of Mr Merhi's contacts with Messrs Ayyash and Badreddine in order to reach the conclusion that those contacts were of insufficient weight to attribute Green 071 to Mr Merhi. Thus, we find that the Trial Chamber did not make an error of law.

iii. Evidence of Common Characteristics of the Green Network mobiles

261 In this third argument, the Prosecution argues that the Trial Chamber failed to take into account its own findings and the evidence about the origins of the other Green Network

[509] Prosecution Appeal Brief, paras 194, 201.
[510] *Galić* Appeal Judgment, para. 257.
[511] *Tolimir* Appeal Judgment, para. 26. *See also Ngirabatware* Appeal Judgment, para. 86; *Kvočka et al.* Appeal Judgment, para. 375.

mobiles. The Prosecution argues that the findings and evidence were relevant due to "the similarities between the start of the attribution of the other two Green [Network mobiles] alongside the evidence of Green 071".[512]

262. We recall that the Trial Chamber generally held that, "[i]n its deliberations, for each relevant fact, a trial chamber must evaluate and weigh each piece of evidence against other relevant pieces of evidence."[513] It correctly stated that "[a] chamber cannot evaluate evidence in a 'piecemeal' fashion"[514] and must "assess each piece of evidence in the context of all related evidence",[515] especially when dealing with telecommunication evidence.[516] We note that the Trial Chamber considered the characteristics of the Green Network mobiles and made findings on this issue in several parts of the Judgment.[517] The Trial Chamber therefore did not disregard the evidence of the Green Network mobiles' characteristics. In line with the settled jurisprudence, it is presumed that the Trial Chamber took this evidence into account in its assessment of the evidence related to Green 071.

263. In the context of deciding specifically whether Green 071 was used by Mr Merhi from 24 September 2004, the Trial Chamber considered that "[w]hether Mr Merhi was using Green 071 rests solely upon its co-location with Purple 231 and the Grey mobile."[518] In doing so, the Trial Chamber was exercising its discretion to determine the evidence on which it relied and the weight to be given to that evidence. Moreover, we emphasize that, while there is a duty on the part of the Trial Chamber to assess evidence holistically, it is the Prosecution that must prove its case through reliance on the evidence that supports its allegations.

264. For the foregoing reasons, the Prosecution has not demonstrated that the Trial Chamber disregarded the alleged similarities between the Green Network mobiles. The arguments of the Prosecution on this point must therefore be dismissed.

265. Finally, it is worth noting the Trial Chamber's statement that the fact that there was no change of user of Green 071 between 20 and 24 September 2004 did not necessarily preclude it from finding that Mr Merhi was the user of Green 071.[519] It is clear that the negative finding

---

[512] Prosecution Appeal Brief, para. 206.
[513] Judgment, para. 230.
[514] Judgment, para. 232 (footnote omitted).
[515] Judgment, paras 188, 253.
[516] Judgment, para. 253.
[517] *See*, *e.g.*, Judgment, paras 2196-2201, 2208-2209, 2217-2218, 2221-2223, 2232-2246, 4203, 4208-4209, 4277.
[518] Judgment, para. 3619.
[519] Judgment, para. 3636.

on a change of user of Green 071 between 20 and 24 September 2004 did not impede the Trial Chamber's assessment of whether the mobile could nonetheless be attributed to Mr Merhi. The Trial Chamber assessed the activity of Green 071 during the attribution period starting 24 September 2004, as pleaded by the Prosecution. There was therefore no legal error.

4. Conclusion

266. We find that the Trial Chamber did not disregard relevant evidence in its determination of whether Green 071 could be attributed to Mr Merhi. The Prosecution has therefore not demonstrated an error of law invalidating the Judgment.

267. For the foregoing reasons, Sub-ground 4 (C) is dismissed.

268. This is without prejudice to any further assessment as to whether the Trial Chamber erred in fact when it concluded that the evidence was insufficient to demonstrate that Mr Merhi was using Green 071.

D. Sub-ground 4 (D): Whether the Trial Chamber Erred in Fact by Miscalculating Green 071's Cell Activations in SFEIR3

1. Submissions of the Parties

269. The Prosecution submits that the Trial Chamber made a factual error in its analysis of Green 071's geographical profile that led it to dismiss the geographical profile evidence as a whole.[520] The Prosecution argues that the Trial Chamber disagreed with Mr Donaldson's evidence and observations on Green 071 and Purple 231's geographical profiles based on a mathematical error.[521] The error, according to the Prosecution, was in changing the night-time window used by Mr Donaldson from 20:00–10:00 to 18:00–6:00, leading the Trial Chamber to recalculate the number of day-time and night-time activations of the mobiles.[522] Based on this error, the Prosecution alleges that the Trial Chamber incorrectly concluded that a majority of Green 071 SFEIR3 activations were at night.[523] The Prosecution adds that, even accepting the Trial Chamber's "unilateral change in the night-time window", the Trial Chamber's recalculation was wrong.[524]

---

[520] Prosecution Appeal Brief, para. 214.
[521] Prosecution Appeal Brief, paras 215-216.
[522] Prosecution Appeal Brief, para. 216.
[523] Prosecution Appeal Brief, para. 216.
[524] Prosecution Appeal Brief, para. 217.

270. Moreover, the Prosecution contends that, despite changing the time-window of analysis for Green 071, the Trial Chamber "did not re-calculate the pattern observed for Purple 231, which was the ultimate reference point for determining whether Green 071 and Purple 231 shared a geographical profile".[525] This allegedly led the Trial Chamber to conclude that it did not see the same pattern identified by Mr Donaldson and that the evidence of Green 071 and Purple 231's geographical profiles was unsupportive of attribution.[526]

271. While acknowledging the Trial Chamber's error in calculating the number of times Green 071 activated SFEIR3 between 18:00 and 6:00, Counsel for Mr Merhi argue that it was a minor mistake, which did not occasion a miscarriage of justice.[527] Counsel for Mr Merhi contend that, notwithstanding the minor error, the Prosecution's calculations do not match with Mr Donaldson's theory.[528] Furthermore, Counsel for Mr Merhi posit that the Trial Chamber did not dismiss the geographical profile evidence as a whole, as the Prosecution contends, but rather did consider it.[529]

272. In its Reply, the Prosecution first argues that the Trial Chamber's error, acknowledged by Counsel for Mr Merhi, had an impact on its analysis because the error led the Trial Chamber to dismiss the evidence on Green 071's geographical profile.[530] Second, the Prosecution submits that, once corrected, the Trial Chamber's calculation of Green 071's cell activations would reveal the same pattern as that identified by Mr Donaldson—which does not require *exclusive* activation of SFEIR3 during the day but only *predominant* activation.[531] Finally, the Prosecution replies that the Trial Chamber did not consider the whole of the geographical profile evidence, which is not limited to Mr Donaldson's evidence of a similar pattern of Green 071 and Purple 231's cell activations.[532]

2. Trial Chamber Findings

273. The Trial Chamber observed that the two cells most frequently activated by Green 071 were SFEIR3 and BRAJNE2.[533] The Trial Chamber further observed that 14 out of 20

---

[525] Prosecution Appeal Brief, para. 218.
[526] Prosecution Appeal Brief, paras 220-221.
[527] Merhi Response Brief, paras 234, 241.
[528] Merhi Response Brief, paras 235-237.
[529] Merhi Response Brief, paras 238-240.
[530] Prosecution Reply Brief, para. 68.
[531] Prosecution Reply Brief, para. 70.
[532] Prosecution Reply Brief, paras 71-72.
[533] Judgment, para. 3521

activations of SFEIR3 by Green 071 occurred between 10:00 and 20:00 and that eight out of ten activations of BRAJNE2 occurred between 20:00 and 10:00.[534] The Trial Chamber then recounted the conclusions of Mr Donaldson, according to which Green 071's geographical profile was similar to that of Purple 231 because the top two cells activated by Purple 231 were also SFEIR3 and BRAJNE2 and during the same timeframe as Green 071.[535] Based on this evidence, Mr Donaldson's thesis was that those mobiles had a single user who lived in the area of the BRAJNE2 cell and worked in the area of the [SFEIR3] cell.[536]

274 The Trial Chamber found that Mr Donaldson's assessment did not hold for Green 071 because 11 of the 20 activations of SFEIR3 by Green 071 occurred between 18:00 and 6:00. For this reason, the Trial Chamber could not find the same pattern as argued by Mr Donaldson and generally held that "[n]o real pattern has emerged for Green 071's activations of SFEIR3 from which positive conclusions one way or another can be drawn."[537]

3. Discussion

275 The Appeals Chamber notes that the Trial Chamber, in recounting Mr Donaldson's evidence on Green 071 and Purple 231's geographical profiles, referred to his analysis using his timeframe—whereby night-time is from 20:00 to 10:00 and day-time from 10:00 to 20:00.[538] We further note that the Trial Chamber, when counting the activations of SFEIR3 by Green 071, took as reference a timeframe spanning 18:00 to 6:00.[539] The Trial Chamber did not explain the basis for choosing this timeframe as opposed to that of Mr Donaldson; however, the Trial Chamber was not bound by Mr Donaldson's night-time window and was free to determine that 18:00 to 6:00 was a more appropriate night-time window.

276 Having said this, we agree with the Prosecution that the Trial Chamber made a mistake in counting the number of activations of SFEIR3 by Green 071. The Trial Chamber found that 11 out of 20 activations of SFEIR3 by Green 071 were during the night, which departed from Mr Donaldson's theory that Mr Merhi, as the user of Green 071, worked in the area of the SFEIR3 cell. The Trial Chamber made a mistake and should have found that six—not 11—

534 Judgment, para. 3521.
535 Judgment, para. 3648.
536 Judgment, para. 3648.
537 Judgment, para. 3651.
538 Judgment, para. 3648.
539 Judgment, para. 3649.

activations of SFEIR3 by Green 071 were between 18:00 and 6:00.[540] This assessment is based on the use of the Trial Chamber's own reckoning of what constituted the night-time window.

277 Following this flawed calculation, the Trial Chamber held that the activations of BRAJNE2 by Green 071 were more consistent with Mr Donaldson's theory but did not "explain the SFEIR3 activations 'out of hours'".[541] It concluded that no pattern had emerged with respect to Green 071's activations of SFEIR3 and that it therefore could not make conclusions one way or the other.[542]

278 We disagree with Counsel for Mr Merhi that the Trial Chamber's error was minor. As shown by the Prosecution in its Appeal Brief, this mistake amounts to a finding that 55% of the activations of SFEIR3 by Green 071 happened at night—whereas, following the correct number of activations, only 30% of those activations were at night, and the remaining 70% were during the day. Had a reasonable trier of fact not made a mistake in counting the activations, it would have discerned the same pattern as Mr Donaldson and given more weight to the geographical profile evidence.

4. Conclusion

279 We find that the Trial Chamber committed an error in counting the number of activations of SFEIR3 by Green 071.

280 Whether this error led the Trial Chamber to give incorrect weight to the evidence on Green 071's geographical profile and thus whether this error occasioned a miscarriage of justice will be assessed in relation to Sub-ground 4 (E) below.

E. Sub-ground 4 (E): Whether, Given the Totality of the Evidence, the Trial Chamber Erred in Fact as No Reasonable Chamber Could Have Failed to Find That Mr Merhi Used Green 071

1. Submissions of the Parties

281 The Prosecution claims that, given the totality of the evidence, no reasonable trial chamber could have failed to find that Mr Merhi used Green 071.[543] In order to support this

---

540 Exhibit P01205.
541 Judgment, para. 3650.
542 Judgment, para. 3651.
543 Prosecution Appeal Brief, para. 222.

Sub-ground, the Prosecution recounts the Trial Chamber's findings and the evidence based on which the Trial Chamber should, in its view, have concluded that Mr Merhi was the user of Green 071 during the attribution period. These are, as alleged by the Prosecution: (a) that Green 071 changed user between 20 September and 24 September 2004, displaying similarities with Green 300 and Green 023;[544] (b) the evidence that Green 071 co-located with Mr Merhi's two other phones, Purple 231, and the Grey Mobile;[545] (c) the geographical profile evidence;[546] and (d) Mr Merhi's connections to the conspiracy and the interactions between the Green Network mobiles and the Purple Phones.[547] The Prosecution submits that—based on these findings and evidence, taken in combination—the only reasonable inference is that Mr Merhi used Green 071, which no reasonable trial chamber could have failed to find.[548] Therefore, the Prosecution requests that the Appeals Chamber correct the errors of the Trial Chamber and find that Mr Merhi was the user of Green 071.[549]

282 Counsel for Mr Merhi contend that this sub-ground should be summarily dismissed because (a) the Prosecution is merely presenting an alternative version of the evidence without identifying an error on the part of the Trial Chamber and (b) the Prosecution is repeating arguments that failed at trial without explaining how the Trial Chamber erred in rejecting them.[550] According to Counsel for Mr Merhi, apart from generally stating that the Trial Chamber erred in failing to find that Mr Merhi was the user of Green 071, the Prosecution is not pointing to any error and is consequently not meeting its burden on appeal.[551] Moreover, Counsel for Mr Merhi posit that the Prosecution is presenting new elements on appeal, which should be rejected.[552]

283 On the merits, Counsel for Mr Merhi recall that the Trial Chamber analyzed and made findings in relation to all instances of co-location, to the hierarchical calls of 14 and 15 January 2005, and to the Associate Purple Phones.[553] Counsel for Mr Merhi argue that the Prosecution is ignoring those findings and merely repeating the evidence—which warrants a

---

544 Prosecution Appeal Brief, paras 223-226.
545 Prosecution Appeal Brief, paras 227-232.
546 Prosecution Appeal Brief, paras 233-236.
547 Prosecution Appeal Brief, paras 237-242.
548 Prosecution Appeal Brief, para. 243.
549 Prosecution Appeal Brief, para. 245.
550 Merhi Response Brief, para. 242.
551 Merhi Response Brief, para. 243, *referring to Orić* Appeal Judgment, para. 109.
552 Merhi Response Brief, para. 244.
553 Merhi Response Brief, paras 245-247.

dismissal of this sub-ground.[554] Finally, Counsel for Mr Merhi maintain that the Trial Chamber's conclusions on the attribution of Green 071 were reasoned and reasonable in light of the evidence adduced at trial.[555]

284 The Prosecution replies that its appeal is not based on any new elements.[556] The Prosecution adds that the hierarchical call flows of 14 and 15 January 2005 and the fact that Green 071 started being used between 20 and 24 September 2004 are relevant for the attribution of Green 071 to Mr Merhi.[557]

2. Trial Chamber Findings

285 The Trial Chamber provided a summary of the evidence adduced at trial in relation to Green 071: Green 071's subscriber details,[558] evidence related to the start of the attribution period defined by the Prosecution,[559] Green 071's contact profile,[560] its geographical profile,[561] and the calls and cell activations of Green 071, including the evidence of Mr Philips and Mr Donaldson.[562]

286 The Trial Chamber then proceeded to make findings on this evidence, starting with the possible change of user of Green 071 between 20 and 24 September 2004. On this point, the Trial Chamber held that "the case for a change in user on Monday 20 September 2004, while credible, is not that strong". The Trial Chamber nevertheless still held open the possibility that Green 071 could be attributed to Mr Merhi through other evidence.[563]

287 Turning to the co-location between Green 071 and Purple 231 and between Green 071 and the Grey Mobile, the Trial Chamber analyzed the evidence in order to determine whether these three mobiles were being used by the same person, namely, Mr Merhi. Recalling the standard of proof that must be met for a conviction, the Trial Chamber stated that "the ultimate question is whether the patterns of use are such that the only conclusion reasonably available

---

[554] Merhi Response Brief, paras 246-248.
[555] Merhi Response Brief, para. 249.
[556] Prosecution Reply Brief, para. 73.
[557] Prosecution Reply Brief, paras 74-75.
[558] Judgment, para. 3513.
[559] Judgment, paras 3514-3516.
[560] Judgment, paras 3517-3518.
[561] Judgment, paras 3519-3522.
[562] Judgment, paras 3523-3543.
[563] Judgment, para. 3636.

from the evidence is that the reason that Green 071 and Purple 231, and Green 071 and the Grey mobile appeared to be co-locating is that they had a single user in Mr Merhi".[564] Ultimately, the Trial Chamber concluded that "there is insufficient evidence to make a finding to the high standard of beyond reasonable doubt that Mr Merhi was using Green 071".[565]

3. Discussion

788 In addition to or in the alternative of the other sub-grounds in Ground 4, the Prosecution generally alleges an error of fact on the part of the Trial Chamber for failing to find that Mr Merhi was the user of Green 071 during the attribution period.

789 We will now assess this Sub-ground of appeal, examining the evidence to determine whether no reasonable trier of fact could have failed to find beyond reasonable doubt that Mr Merhi was the user of Green 071 during the attribution period.

a. Change of User

790 The Prosecution argues that Mr Merhi started to use Green 071 between 20 and 24 September 2004, after a change from its previous user. The change of user allegedly occurred between 20 and 24 September because Green 071 was inactive between those days.[566]

791 In support of its theory that Green 071 changed user between 20 and 24 September 2004, the Prosecution points to a change in Green 071's geographical profile and its contact profile.[567] Moreover, the Prosecution argues that there are similarities in the way Mr Ayyash's Green 300 and Mr Badreddine's Green 023 started being used, which are not mere coincidences, but rather evidence that these mobiles were behaving in a similar manner.[568] Those are: (a) similar periods of inactivity of Green 300 and Green 023 shortly before they were attributed to Mr Ayyash and Mr Badreddine, respectively, around the same time as the period of inactivity of Green 071; and (b) similarly to Mr Ayyash's Green 300 and with few exceptions, Green 071 was exclusively in contact with Mr Badreddine's Green 023 after 24 September 2004.[569]

[564] Judgment, para. 3661.
[565] Judgment, para. 3666.
[566] Judgment, para. 3517.
[567] Prosecution Appeal Brief, paras 211, 223.
[568] Prosecution Appeal Brief, paras 224-225.
[569] Prosecution Appeal Brief, para. 224.

292. The Appeals Chamber notes that Green 071 was activated as an Alfa post-paid subscription on 15 July 2004, under the name Assaf Jamal Mohammad.[570] Its only contact between 26 July and 4 August 2004 was with an Alfa service number, after which the mobile was inactive until 24 August 2004.[571] Mr Donaldson initially identified a potential attribution period from 24 August 2004 to 7 February 2005, but later readjusted this period to begin from 24 September 2004 because Green 071's geographical and contact profiles changed at that time.[572] From 24 September 2004, Green 071 started activating, for the first time, the top two cells (SFEIR3 and BRAJNE2) activated by Mr Merhi's two mobiles.[573] In terms of contact profile, Green 071 was involved in 190 calls between 24 August and 20 September 2004 with four other mobiles, including Green 023.[574] From 24 September 2004 to 7 February 2005, Green 071 was involved in 43 calls. All 43 of these calls, except for two calls to previous contacts of Green 071, were exclusively with Green 023.[575]

293. The Trial Chamber found that the evidence, although convincing, was not strong enough to support the argument that Green 071 changed user during its short period of inactivity. Based on the evidence, the Trial Chamber found that "something changed after 20 September 2004".[576] Noting that a change of user was one possibility, the Trial Chamber equally found credible other possibilities, such as a "change in the reason for contacting others in the closed network" or because the user moved house.[577] The Trial Chamber also noted that the handset did not change.[578] We hold that the alternative inferences identified by the Trial Chamber are reasonable and can explain the changes observed from Green 071's activity. We therefore find that the Trial Chamber was not unreasonable in finding that the evidence was not strong enough to support the change of user theory because the Prosecution's theory was not the only reasonable inference available from the evidence.

294. Moreover, we agree with the Trial Chamber that the change of user of Green 071 was not necessarily determinative of whether that mobile could be attributed to Mr Merhi. In making this finding, the Trial Chamber restricted its analysis of the data on Green 071 to the

[570] Judgment, para. 3513.
[571] Judgment, para. 3514.
[572] Judgment, paras 3515-3516.
[573] Judgment, para. 3519.
[574] Judgment, para. 3517.
[575] Judgment, para. 3518.
[576] Judgment, para. 3635.
[577] Judgment, para. 3635.
[578] Judgment, para. 3635.

attribution period alleged by the Prosecution. Therefore, the alleged error of the Trial Chamber—in not finding a change in user of Green 071—could not have occasioned a miscarriage of justice.

295 We will now turn to examine the evidence put forward by the Prosecution to demonstrate attribution and assess whether the Trial Chamber was reasonable in its findings in that respect.

b. Evidence on Attribution

296 The Prosecution submits that the evidence demonstrates that Mr Merhi was the user of Green 071 during the attribution period. This evidence includes, according to the Prosecution, the data on Green 071 showing instances of co-location with Mr Merhi's two other mobiles, Green 071's geographical profile, and Mr Merhi's contacts with the conspiracy.

i. Co-location Evidence

297 The Appeals Chamber recalls that, during the attribution period, Green 071 was involved in 43 calls and received three service SMS messages.[579] Except for two inbound calls, Green 071's only contact during that period was with Green 023—the Green mobile attributed to Mr Badreddine.[580]

298 The Appeals Chamber has thoroughly reviewed the pairs of calls identified by Mr Philips as candidates for co-location, which were listed in the Judgment and recalled briefly in the Prosecution Appeal Brief.[581] In total, there were 26 pairs of candidate calls between Green 071 and Purple 231 and 14 pairs of candidate calls between Green 071 and the Grey Mobile. Out of those 40 calls, 21 fell into the category of "could be co-located", and 19 fell

[579] Judgment, para. 3518.
[580] Judgment, paras 3518, 4262.
[581] Judgment, para. 3652; Prosecution Appeal Brief, para. 229. Candidates for co-location are pairs of calls that provide support for single-user analysis, *i.e.*, whether two or more mobiles are being used by the same person during a given time. These pairs of calls are then categorized according to: (a) whether the two mobiles activate the same cell on the same network or overlapping cells if not on the same network (what Mr Philips categorizes as "could be co-located"); or (b) whether the two mobiles activate cells that are apart from one another and it is possible to travel the distance between the cells within the time between the calls (what Mr Philips categorizes as "would not preclude co-location"). Two other categories exist—"may preclude co-location" and "would preclude co-location"—and tend to show "dislocation" between two mobiles. This is when the mobiles activate cells at a distance that cannot be travelled within the time separating the activations. *See* Judgment, paras 2524-2531.

into the category of "would not preclude co-location", according to Mr Philips.[582] There was no instance of dislocation.

299 Apart from the quantity, the Trial Chamber also reviewed the quality of the calls. To this end, the Trial Chamber gave importance to whether there were examples of common movement between the three mobiles. The Appeals Chamber notes that common movement between mobiles can help to remove coincidence of co-location that may arise when many people live in the same area.[583] The Trial Chamber identified three instances of common movement outside of southern Beirut between Green 071 and Mr Merhi's two mobiles.[584] Although the Trial Chamber concluded that there was common movement between Green 071 and Mr Merhi's two mobiles, it did not find that this was determinative of the attribution of Green 071 to Mr Mehri.[585]

300 The Appeals Chamber finds that the single-user analysis of Green 071, Purple 231, and the Grey Mobile provides evidentiary support for the conclusion that Green 071 was being used by Mr Merhi. We note that the Trial Chamber held that such a conclusion, while "reasonable", would be based on a limited sample size of candidate calls over a relatively lengthy period of time.[586] While we agree with this statement, the quality of the co-location evidence was just as important in the overall assessment of the evidence. Accordingly, the sample size of candidate calls should not have prevented the Trial Chamber from making a finding based on the evidence available, as long as the evidence in its totality supported a finding that Green 071 was being used by Mr Merhi.

ii. <u>Green 071's Geographical Profile</u>

301 In terms of geographical profile, Green 071's most frequently activated cells during the attribution period were SFEIR3, BRAJNE2, HARA2, MIKAEL2, and ROUEIS3.[587] The Trial Chamber found that, during the attribution period, Green 071, in five instances, activated cells "outside of its main area of concentration in Bourj Brajneh and Haret Hreik".[588] Turning to the

[582] Judgment, paras 3641-3642.
[583] Judgment, paras 2534-2535, 3657, 3660.
[584] These were on 25 September 2004 (around 50 kilometres south of Beirut), 27 September 2004 (close to the airport), and 23 December 2004 (in central Beirut) when Green 071 and either of Mr Merhi's two mobiles activated cells. Judgment, para. 3659.
[585] Judgment, paras 3660-3667.
[586] Judgment, para. 3655.
[587] Judgment, para. 3521.
[588] Judgment, para. 3522.

comparison between Green 071, Purple 231, and the Grey Mobile, the Trial Chamber noted Mr Philips's report in which he stated that the top ten cells of the three mobiles combined were all in the southern suburbs of Beirut.[589]

302. As noted above,[590] most of the activations of SFEIR3 by Green 071 happened during the day, while, at night, the mobile mostly activated BRAJNE2.[591] This is similar to the geographical profile observed for Purple 231. We recall that the Trial Chamber made an error in counting the number of times Green 071 activated SFEIR3 during the day and during the night and that this error led the Trial Chamber to conclude that no pattern had emerged with respect to Green 071's activations of SFEIR3.[592] Without the Trial Chamber's error, a clear pattern emerges, showing that the user of Green 071 was working in the area of SFEIR3 and living in the area of BRAJNE2, similarly to Mr Merhi. The evidence on Green 071's geographical profile therefore supports a finding that Green 071 and Purple 231 were being used by the same person.

iii. Mr Merhi's Contacts

303. We recall that the Trial Chamber did not err in finding that Mr Merhi's contacts could not be used for the purpose of attributing Green 071 to Mr Merhi.[593] In the present sub-ground, the Prosecution is using Mr Merhi's contacts through other mobiles in order to support its claim that Green 071 is attributable to Mr Merhi. However, the evidence cited by the Prosecution demonstrates nothing more than the fact that Mr Merhi had contacts with Mr Ayyash and that Green 071 had contacts with a mobile that had contacts with Mr Ayyash. At most, this shows that Mr Merhi might have known the user of Green 071. Consequently, we find that the Trial Chamber was reasonable in deciding not to give weight to the evidence of Mr Merhi's contacts for the purpose of attribution and relying solely on single-user analysis.

4. Conclusion

304. Having reviewed the relevant evidence in support of the attribution of Green 071 to Mr Merhi, we conclude that the evidence, when viewed in its totality, supports a finding beyond reasonable doubt that Green 071's activity is consistent with it being used by the same

[589] Judgment, para. 3525.
[590] *See* above Sub-ground 4 (D).
[591] Exhibit P01205.
[592] Judgment, para. 3651.
[593] *See* above Sub-ground 4 (C).

user of Purple 231 and the Grey Mobile, namely, Mr Merhi, during the attribution period. Green 071 co-located with Purple 231 and/or the Grey Mobile on several occasions, and there were no instances of dislocation. There was also evidence of common movement of the mobiles, including one instance where two of the mobiles travelled together 50 kilometres south of Beirut and activated the cell that provides coverage to Ain Qana,[594] where Mr Merhi owned land.[595] In addition, Green 071's geographical profile reveals that, similarly to that of Purple 231, there is a pattern of use consistent with its user working in the area of SFEIR3 and living in the area of BRAJNE2. When the evidence is reviewed in its totality, the only reasonable inference available is that Green 071 was being used by Mr Merhi during the attribution period.

305 We thus find that the Trial Chamber was unreasonable in failing to find that Mr Merhi was the user of Green 071.

306 Sub-grounds 4 (D) and 4 (E) are therefore granted.

F. Conclusion

307 For the foregoing reasons, Ground 4 is dismissed in part and granted in part.

[594] Exhibit P01962.1, para. 149; Judgment, para. 3659.
[595] Exhibit P02016.

VI. GROUND 5: WHETHER THE TRIAL CHAMBER ERRED IN FAILING TO FIND THAT THE GREEN NETWORK WAS USED TO COORDINATE THE OVERALL CONSPIRACY

308 The Prosecution submits that the Trial Chamber erred in failing to find that the Green Network was used to coordinate and monitor the attack and the preparation for the false claim of responsibility.[596] The Prosecution submits that this erroneous conclusion resulted, individually and cumulatively, from five errors.[597] The Appeals Chamber will address each of the alleged errors in turn.

A. Sub-ground 5 (A): Whether the Trial Chamber Erred by Failing to Take Into Account Relevant Evidence

1. Submissions of the Parties

309 The Prosecution submits that the Trial Chamber erred in law by failing to take into account all relevant evidence and its own findings in determining the role of the Green Network.[598] It maintains that the Trial Chamber expressly limited its consideration of the role of the Green Network to evidence of "hierarchical call flows" and to attribution of various mobiles.[599] According to the Prosecution, had the Trial Chamber taken into account all relevant evidence and findings, it would have found that the Green Network coordinated and monitored the assassination and the preparation of the dissemination of the false claim of responsibility.[600]

310 The Prosecution asserts that the Trial Chamber should have taken into account its own findings concerning the characteristics of the Green Network (covertness, intentional structure of communication, coordinated action) and its users (Messrs Ayyash and Badreddine and the user of Green 071),[601] as well as its findings regarding Mr Ayyash's criminal responsibility.[602] The Prosecution also submits that the Trial Chamber should have considered its findings showing links between the Green Network and the Red, Blue, and Yellow Networks,[603] including the common mission of some of the core users of these networks to assassinate

[596] Prosecution Appeal Brief, para. 247.
[597] Prosecution Appeal Brief, paras 248-253.
[598] Prosecution Appeal Brief, para. 256.
[599] Prosecution Appeal Brief, paras 257-258.
[600] Prosecution Appeal Brief, para. 256.
[601] Prosecution Appeal Brief, p. 90.
[602] Prosecution Appeal Brief, p. 97.
[603] Prosecution Appeal Brief, p. 91.

Mr Hariri.[604] According to the Prosecution, the Trial Chamber should have taken into account its own findings and the evidence adduced at trial that linked the Green Network to surveillance of Mr Hariri,[605] as well as its findings linking the Green Network to the purchase of the Canter van[606] and to the attack itself.[607] Finally, the Prosecution submits that, should the Appeals Chamber determine that Green 071 is attributed to Mr Merhi, it should consider findings and evidence linking the Green Network to the disappearance of Mr Abu Adass and the false claim, including hierarchical Green–Purple call flows and Green Network calls between Green 071 and Mr Badreddine.[608]

311 Counsel for Mr Merhi respond that the Trial Chamber did not err, but rather scrupulously analyzed the totality of the evidence in reaching its conclusion in relation to the role of the Green Network.[609] Counsel for Mr Merhi submit that the Trial Chamber must be presumed to have considered the totality of the evidence, and even more so its own findings, in reaching its determination on the role of the Green Network.[610] Moreover, Counsel for Mr Merhi argue that this sub-ground should be summarily dismissed given that the Prosecution merely presents its own conclusions differing from those of the Trial Chamber and fails to identify any specific error in the Judgment.[611]

312 Counsel for Mr Merhi further argue that the Prosecution premises this sub-ground on a selective reading of the Judgment and that a complete reading demonstrates that the Trial Chamber did consider the findings and evidence outlined by the Prosecution.[612] Counsel for Mr Merhi identify various findings of the Trial Chamber that they say are relevant to the Trial Chamber's consideration of the Green Network, but simply ignored by the Prosecution.[613] They also identify paragraphs in the Judgment in which the Trial Chamber considered the elements alleged by the Prosecution to have been omitted. Counsel for Mr Merhi highlight sections of the Judgment in which they say the Trial Chamber did consider the characteristics of the Green

[604] Prosecution Appeal Brief, para. 267, *citing* Judgment, para. 4268.
[605] Prosecution Appeal Brief, p. 92.
[606] Prosecution Appeal Brief, p. 94.
[607] Prosecution Appeal Brief, p. 96.
[608] Prosecution Appeal Brief, paras 286-288.
[609] Merhi Response Brief, p. 70.
[610] Merhi Response Brief, para. 264.
[611] Merhi Response Brief, para. 265.
[612] Merhi Response Brief, paras 257-258.
[613] Merhi Response Brief, paras 262-263.

Network and its users;[614] links between the Green Network and the other networks;[615] links between the Green Network, surveillance of Mr Hariri,[616] and the attack;[617] findings relating to the Canter van;[618] and the criminal responsibility of Mr Ayyash.[619] In the same vein, Counsel for Mr Merhi highlight evidence and findings beyond hierarchical call flows, which was considered by the Trial Chamber in reaching its conclusion on the role of the Green Network.[620]

313 Finally, Counsel for Mr Merhi submit that the Appeals Chamber, in the event that Green 071 is attributed to Mr Merhi, should not reconsider the role of the Green Network in the false claim of responsibility and the disappearance of Mr Abu Adass.[621] They also contend that the Trial Chamber expressly analyzed the role of the Green Network in the false claim under the assumption that Green 071 could be attributed to Mr Merhi and nevertheless rejected any link.[622]

314 Counsel for Mr Oneissi point out that the Prosecution in Ground 5 challenges the factual finding in relation to the role of the Green Network.[623] Counsel for Mr Oneissi also argue that the Prosecution has not demonstrated that the impugned findings in Ground 5 occasioned a miscarriage of justice or invalidated the decision in relation to the acquittal of Mr Oneissi.[624] They insist that the impugned findings in Ground 5 cannot be reasonably argued to have any bearing on the decision to acquit Mr Oneissi because this decision did not turn on the role of the Green Network.[625] They conclude that, given that the acquittal of Mr Oneissi would not be affected by the outcome of Ground 5, the impugned findings cannot constitute a miscarriage of justice and Ground 5 must therefore be dismissed.[626]

315 The Prosecution replies that any presumption that the Trial Chamber evaluated all relevant evidence is rebutted by the Trial Chamber's own words.[627] According to the

[614] Merhi Response Brief, paras 267-272.
[615] Merhi Response Brief, paras 273-278.
[616] Merhi Response Brief, paras 279-284.
[617] Merhi Response Brief, paras 292-294.
[618] Merhi Response Brief, paras 285-291.
[619] Merhi Response Brief, paras 295-301.
[620] Merhi Response Brief, paras 312-313.
[621] Merhi Response Brief, paras 302-310.
[622] Merhi Response Brief, para. 319.
[623] Oneissi Response Brief, para. 152. The Appeals Chamber takes this opportunity to note that the submissions of Counsel for Mr Oneissi have been taken into account in respect of all the sub-grounds of Ground 5.
[624] Oneissi Response Brief, paras 154-155.
[625] Oneissi Response Brief, paras 157-158.
[626] Oneissi Response Brief, para. 160.
[627] Prosecution Reply Brief, para. 80.

Prosecution, nothing in the Trial Chamber's analysis of the role of the Green Network suggests that it considered any evidence other than hierarchical call flows.[628] The Prosecution also reiterates that the Trial Chamber did not consider its own findings and relevant evidence when determining whether the Green Network monitored and coordinated the attack and the false claim of responsibility.[629]

316 The Prosecution further submits that Counsel for Mr Merhi has not identified any paragraphs in which the Trial Chamber considered evidence other than hierarchical call flows when determining the role of the Green Network.[630] The Prosecution insists that it has not ignored or accepted relevant findings relied upon by Counsel for Mr Merhi.[631]

317 Finally, the Prosecution argues that it did demonstrate how the errors in Ground 5, considered with other grounds, impact the acquittals of Messrs Merhi and Oneissi.[632] According to the Prosecution, findings that the Green Network was used to coordinate and monitor the conspiracy and that Mr Merhi used Green 071 would help establish Mr Merhi's *mens rea* and the role of the Purple Phone users, including Mr Oneissi, in the dissemination of the false claim.[633]

2. Trial Chamber Findings

318 The Trial Chamber was not satisfied that the Green Network functioned as mission command.[634] In the passage highlighted by the Prosecution in this sub-ground, the Trial Chamber stated that it had "carefully considered the so-called call flows from the Green to the Blue and Red Network [and had] also considered its findings on the attribution of various mobiles".[635] Although the Trial Chamber was satisfied that there was a connection between calls and the call sequencing between networks, "inferring a hierarchy from a few instances of sequencing" would have been too "speculative", without the content of the calls or any other evidence.[636]

[628] Prosecution Reply Brief, para. 80.
[629] Prosecution Reply Brief, para. 83.
[630] Prosecution Reply Brief, p. 31.
[631] Prosecution Reply Brief, para. 82.
[632] Prosecution Reply Brief, para. 78.
[633] Prosecution Reply Brief, para. 97.
[634] Judgment, paras 4741, 4743.
[635] Judgment, para. 4741.
[636] Judgment, para. 4742.

3. Discussion

319 The Prosecution has raised six elements that it argues the Trial Chamber was required, but failed, to take into account. The Appeals Chamber will consider each in more detail below.

a. Findings Concerning the Characteristics of the Green Network and Its Users

320 The Prosecution submits that the Trial Chamber failed to consider its own findings concerning the characteristics of the Green Network and its users.[637]

321 The Trial Chamber dealt with the characteristics of the Green Network throughout the Judgment. It devoted a section to "[c]overtness factors" in which it set out the evidence of Mr Gary Platt and Mr Philips.[638] The Trial Chamber assessed the "totality of the evidence, including the underlying evidence relied upon by Mr Philips and Mr Platt",[639] and found that the Green Network was a closed, covert network[640] and that its "exclusive communication" within the network was intentional.[641] Elsewhere in the Judgment, the Trial Chamber repeated that the Green Network of three mobiles was covert[642] and that it formed a closed group.[643]

322 The Trial Chamber also found that the Green Network followed an "organisational structure" according to which "most of Green 023's calls were incoming from Green 300 and Green 071".[644] The time and place of their use and the time at which they ceased to be used were found to be "strong evidence of coordinated action by [the] mobiles' users".[645] The Trial Chamber repeated many of its findings relating to the characteristics of the Green Network and its users in the same chapter as that containing the finding impugned by the Prosecution in relation to the role of the Green Network.[646]

[637] Prosecution Appeal Brief, paras 259-263.
[638] Judgment, paras 2172-2178.
[639] Judgment, para. 2191.
[640] Judgment, paras 2232-2233, 2239, 2246.
[641] Judgment, para. 2234.
[642] Judgment, paras 3173, 4668.
[643] Judgment, paras 6380 (ii), 6577.
[644] Judgment, para. 2235. *See also id.* at para. 5226. The Trial Chamber stated that the Prosecution did not present evidence "that the calls between the Purple mobiles followed an open triangle pattern, *like that of the Green Network*" (emphasis added). This finding was repeated. *See id.* at paras 3173, 4247, 4267, 6380 (ii).
[645] Judgment, para. 2236.
[646] *See* Judgment, paras 4267, 4424, 4347, 4644, 4668.

323. Turning to findings in relation to Messrs Badreddine and Ayyash, the Trial Chamber attributed Green 300 to Mr Ayyash following a detailed analysis.[647] In so finding, it took into account that Green 300 communicated almost exclusively with Green 023 and that Green 300 engaged in its last call one hour before the attack on Mr Hariri,[648] using a cell close to the scene of the attack.[649] The Trial Chamber determined that certain mobiles used by Mr Ayyash were involved in the assassination of Mr Hariri.[650] The Trial Chamber found that Mr Badreddine was the single user of Green 023.[651] The Trial Chamber reached these findings in its chapter on attribution, which immediately precedes the chapter in the Judgment containing the finding in relation to the Green Network, which the Prosecution impugns in this sub-ground.

324. In the chapter containing the impugned finding on the role of the Green Network, the Trial Chamber detailed many of the calls between Mr Ayyash's Green 300 and Mr Badreddine's Green 023.[652]

325. Elsewhere in the Judgment, as pointed out by the Prosecution, the Trial Chamber found that Mr Ayyash was a Hezbollah supporter.[653] In its discussion of Mr Badreddine's responsibility for the attack, the Trial Chamber expressly recognized that one of the major strands supporting the Prosecution's case that Mr Badreddine coordinated the assassination was the "alleged hierarchical call flows *in combination with* the use of a closed network"—which allegedly comprised only Messrs Baddreddine, Ayyash, and Merhi.[654] The Trial Chamber thus demonstrated its understanding that the characteristics of the Green Network formed part of the Prosecution's case that this network was at the apex of the mission (with Mr Badreddine at its head).[655]

---

[647] Judgment, paras 3173-3189.
[648] Judgment, para. 3148.
[649] Judgment, para. 3177. Attribution to Mr Ayyash is repeated throughout the Judgment. *See id.* at paras 20, 4639, 6656, 6380 (iii), 6803.
[650] Judgment, para. 2933.
[651] Judgment, paras 4058, 4262. This finding was repeated throughout the Judgment. *See id.* at paras 21, 4804, 6380 (iii).
[652] *See*, *e.g.*, Judgment, paras 4425, 4431, 4445, 4537. The Trial Chamber also noted evidence that was alleged by the Prosecution to demonstrate that Messrs Ayyash and Badreddine were meeting. *Id.* at paras 4427, 4433, 4522, 4544, 4554, 4574, 4739.
[653] Prosecution Appeal Brief, para. 260, *referring to* Judgment, para. 6383.
[654] Judgment, para. 6577 (emphasis added).
[655] *See* Judgment, paras 6570, 6630. In this context, the Trial Chamber also recalled Prosecution submissions as to the nature of the Green Network, including its "strong degree of co-ordination, cohesion and focus demonstrating an organised, well-resourced entity" and its "open triangle formation of contact". Judgment, para. 6631.

b. Findings Concerning Links Between the Green Network and the Red, Blue, and Yellow Networks

326. The Prosecution submits that the Trial Chamber failed to consider its own findings showing links between the Green Network and the Red, Blue, and Yellow Networks,[656] including that some of the core users of these networks had a common mission in the assassination of Mr Hariri.[657]

327. The Trial Chamber found that the Red, Yellow, Green, and Blue Networks were connected and that at least some of their users had a common mission.[658] It did so in the same section that contains the impugned finding in relation to the role of the Green Network. The finding that the networks were interconnected was repeated elsewhere in the chapter containing the impugned finding[659] and elsewhere in the Judgment.[660]

328. The Trial Chamber also summarized evidence indicating interconnectedness,[661] including shared periods of use;[662] largely overlapping periods of use;[663] the networks' "shared common geographical areas of use";[664] common users;[665] cessation of operation or significantly altered operation from Monday 14 February 2005;[666] the shared element of covertness (in varying degrees);[667] shared characteristics of being well-financed; instances of recharges close in time and location; and common contacts.[668] The Trial Chamber concluded that the Green, Red, Blue, and Yellow Networks were "interconnected and coordinated with each other".[669]

---

[656] Prosecution Appeal Brief, paras 264-266.
[657] Prosecution Appeal Brief, para. 267. The Prosecution quotes paragraph 4268 of the Judgment. This argument does not deal with connectedness between the *Yellow* Network and the Green Network, as the Yellow Network was not expressly mentioned in the impugned finding.
[658] Judgment, para. 4736.
[659] Judgment, paras 4671, 4742.
[660] Judgment, paras 2423, 6362, 6380 (ii), 6478, 6721, 6803.
[661] Judgment, paras 2384, 4438, 4443, 4472, 4479, 4540, 4573, 4602, 4616, 4619.
[662] Judgment, para. 2385.
[663] Judgment, para. 2387.
[664] Judgment, para. 2391; *see also id.* at paras 2390, 2392.
[665] Judgment, para. 2393.
[666] Judgment, para. 2399.
[667] Judgment, para. 2401.
[668] Judgment, para. 2402.
[669] Judgment, para. 2423.

c. Findings and Evidence Linking the Green Network to Surveillance of Mr Hariri and Findings Regarding Mr Ayyash's Criminal Responsibility

329. The Prosecution submits that the Trial Chamber failed to consider its own findings and evidence linking the Green Network to surveillance of Mr Hariri.[670] It also submits that the Trial Chamber failed to consider its own findings regarding Mr Ayyash's criminal responsibility, including that Messrs Ayyash and Badreddine communicated on the Green Network on four of the six days on which the Trial Chamber considered Mr Ayyash's involvement in surveillance.[671]

330. Throughout the Judgment, the Trial Chamber discussed possible surveillance of Mr Hariri (including by Mr Ayyash), Mr Ayyash's contemporaneous contact with Mr Badreddine on the Green Network, and the Green Network's involvement in surveillance. The Trial Chamber found generally that "the network mobiles were engaged in surveillance of Mr Hariri in the months prior to the attack".[672]

331. In terms of recognizing Mr Ayyash's involvement in surveillance, the Trial Chamber, throughout its narrative of the Prosecution's case on surveillance of Mr Hariri, recalled evidence of frequent contact between the Green 300 mobile attributed to Mr Ayyash and the Green 023 mobile attributed to Mr Badreddine,[673] as well as the Green Network's involvement in surveillance.[674] These findings and evidence were recounted in the same chapter that contains the impugned finding in relation to the role of the Green Network.

332. In the same section that includes the impugned finding, the Trial Chamber identified 14 instances of network activity coinciding with Mr Hariri's proven movements,[675] four of which involved Green Network activity.[676] It also discussed at length the evidence relating to surveillance, just prior to reaching its impugned decision on the role of the Green Network.[677]

333. Later in the Judgment, the Trial Chamber determined that there were eight calls that may have been connected to surveillance of Mr Hariri, the purchase of the Canter van, Mr Abu

[670] Prosecution Appeal Brief, paras 268-275.
[671] Prosecution Appeal Brief, paras 283-285.
[672] Judgment, para. 4268.
[673] *See*, *e.g.,* Judgment, paras 4307, 4313, 4347, 4424.
[674] Judgment, para. 4480. *See also id.* at paras 4482, 4484, 4512, 4515, 4519, 4554, 4618.
[675] Judgment, para. 4689.
[676] Judgments, paras 4692, 4705, 4708, 4720.
[677] Judgment, paras 4679-4736.

Adass's disappearance, the claim of responsibility, or other preparations for the attack.[678] Of these calls, the Trial Chamber concluded that two were "contemporaneous with surveillance of Mr Hariri", one might connect to the purchase of the Canter van,[679] and one call on 14 February 2005 "appears connected to the attack".[680]

334. In discussing Mr Ayyash's culpability, the Trial Chamber expressly recalled that Mr Ayyash was one of three users of the Green Network and that he contacted other network mobiles during mobile surveillance of Mr Hariri.[681] The Trial Chamber also expressly considered—and accepted—evidence that Mr Ayyash was a "dominant player" in the attack because he was the only individual to have three "mission phones".[682] Despite this, the Trial Chamber rejected the Prosecution's case that the Green Network was mission command. The Trial Chamber was convinced that Mr Ayyash's use of the Blue and Red Network mobiles (but *not* Green 300) "suffice[d] to provide the necessary inferences beyond reasonable doubt" to establish Mr Ayyash's role in the attack.[683]

d. Findings Linking the Purchase of the Canter Van to Green Network Activity

335. The Prosecution submits that the Trial Chamber failed to consider its own findings regarding the purchase of the Canter van used in the attack, findings that the Prosecution argues are linked to Green Network activity.[684]

336. While the Trial Chamber concluded that Green Network calls on 25 January 2005 may have been connected to the purchase of the Canter van,[685] it could not determine any particular network mobile user's role in the Canter van's purchase.[686] The Trial Chamber was also not prepared to find that the Canter van was purchased on 25 January 2005[687] or that Mr Ayyash did anything in relation to the preparation of the van for use in the attack.[688] The Trial Chamber was also not satisfied that Mr Ayyash had seen the Canter van on 11 January 2005 and stated

[678] Judgment, para. 6603. *See also id.* at paras 6604-6608, 6610, 6612-6614.
[679] Judgment, para. 6616.
[680] Judgment, para. 6617.
[681] Judgment, para. 6811.
[682] Judgment, para. 6731. *See also id.* at para. 6732.
[683] Judgment, para. 6733.
[684] Prosecution Appeal Brief, paras 276-281.
[685] Judgment, para. 6604.
[686] Judgment, para. 4795.
[687] Judgment, para. 6604.
[688] Judgment, paras 6501, 6648.

that one inference available from the evidence was that he was in Tripoli on that day for some other reason.[689]

e. Findings Linking the Green Network to the Attack, Including the Call From Mr Ayyash on Green 300 to Mr Badreddine on Green 023 Before the Attack

337 The Prosecution submits that the Trial Chamber failed to consider its own findings linking a Green Network call between Mr Badreddine and Mr Ayyash to the attack.[690]

338 In the chapter containing the impugned finding on the role of the Green Network, the Trial Chamber recalled evidence that Mr Ayyash's Green 300 and Mr Badreddine's Green 023 were used for the last time when Green 300 called Green 023 at 11:58 on 14 February 2005, shortly before the attack.[691]

339 The Trial Chamber analyzed this last Green Network call in detail in other sections of the Judgment, including in the context of its conclusions regarding Mr Ayyash's culpability.[692] The Trial Chamber ultimately determined that the most likely conclusion in relation to the call between Messrs Ayyash and Badreddine on 14 February 2005 was that Mr Ayyash had informed Mr Badreddine of something related to the attack.[693]

4. Conclusion

340 The Appeals Chamber, in assessing whether the Trial Chamber failed to take into account evidence and findings, takes note of the large volume of evidence that was submitted in this case.[694] To deal with the bulk of evidence, the Trial Chamber adopted a structure in its Judgment that involved first determining the nature and purpose of the mobile networks.[695] It

---

689 Judgment, para. 6445.
690 Prosecution Appeal Brief, para. 282.
691 Judgment, para. 4644.
692 Judgment, paras 6687-6690. This analysis included discussion of Mr Platt's evidence that Mr Badreddine was the person in charge of the operation and that the final Green call's relationship with a call between Red mobiles was consistent with the alleged coordination and command structure with the Green mobiles at the top. *See also id.* at paras 2216, 6380 (vii).
693 Judgment, para. 6615. *See also id.* at para. 6630.
694 *See* Judgment, paras 172-174 for the Trial Chamber's summary of the volume of admitted evidence. By way of a similar example, in the *Krajišnik* case, the Appeals Chamber found no failure to provide adequate reasons by the Trial Chamber, when the Trial Chamber stated that there was no practical way of presenting in detail all the evidence it had heard and received during the trial. *Krajišnik* Appeal Judgment, paras 140-141. This case is noted to underline the volume of evidence with which international trial chambers contend and the deference accorded to them by appeals chambers in how they manage this evidence.
695 Judgment, p. 684.

then dealt with the evidence regarding attribution,[696] before setting out in detail the chronology of network activity in the lead up to the assassination.[697] Only after the Trial Chamber had established who was using the Green mobiles (attribution), and when they were used (the chronology), could the Trial Chamber logically discuss the role of the Green Network.[698] The Appeals Chamber considers that the Trial Chamber approached the evidence appropriately by dealing with it in sequential sections, which allowed it to avoid repeating relevant findings and evidence each time a finding was made.

341 In the circumstances of this case, the Appeals Chamber considers that it was sufficient for the Trial Chamber to have recounted relevant evidence and findings in a section of the Judgment separate from that in which it made findings derived therefrom.[699] We note further that the Prosecution concedes that the Trial Chamber summarized much of the evidence that the Prosecution alleges the Trial Chamber failed to take into account.[700] Summarizing the evidence is one indication that the Trial Chamber did not fail to take this evidence into account.[701]

---

696 Judgment, p. 797.
697 Judgment, p. 1383.
698 Judgment, p. 1572.
699 *See Munyakazi* Appeal Judgment, paras 174-175; *Kanyarukiga* Appeal Judgment, para. 127.
700 Prosecution Appeal Brief, paras 272-273.
701 *See Kanyarukiga* Appeal Judgment, para. 127.

342. We find that the Trial Chamber did not err in law by failing to take into account evidence and findings relevant to determining the role of the Green Network.

343. For the foregoing reasons, Sub-ground 5 (A) is dismissed.

344. This finding is without prejudice to the Appeals Chamber's further assessment as to whether the Trial Chamber erred when it found that it could not be satisfied that the Green Network was used to coordinate the attack.

B. Sub-ground 5 (B): Whether the Trial Chamber Considered Each Hierarchical Call Flow in Isolation and Limited its Contextual Assessment to Events on the Specific Day of the Call Flow

1. Submissions of the Parties

345. The Prosecution submits that the Trial Chamber erred in law by considering evidence of hierarchical call flows in isolation from the others and from other evidence and by limiting its contextual assessment to events on the specific day of the call flows.[702] According to the Prosecution, the Trial Chamber did not assess the Green Network calls or the hierarchical calls from the Green to the Red and Blue Networks in their totality to determine whether they revealed patterns from which it could infer a connection to the assassination or false claim of responsibility.[703]

346. The Prosecution maintains that the Trial Chamber should have considered the unified force of all the evidence together to determine whether this could support the inference sought, namely, that the Green Network was mission command.[704] The Prosecution argues that, if the Trial Chamber had considered the call flows holistically and with the totality of the relevant evidence, it would have recognized that Mr Badreddine and the Green Network monitored and coordinated the preparations for the attack.[705]

---

702 Prosecution Appeal Brief, para. 302. "Hierarchical call flows" in this case are the sequences of Green Network calls, immediately followed or preceded by calls on the Blue or Red Networks or amongst the Purple Phones. *See* Judgment, paras 2166, 2409, 5343.
703 Prosecution Appeal Brief, paras 307-308.
704 Prosecution Appeal Brief, paras 312-313.
705 Prosecution Appeal Brief, para. 316.

347 The Prosecution states that Green Network activity in its totality must be linked to the assassination or false claim of responsibility, but argues that this does not mean each individual call on the Green Network needs to be linked to specific events on the day of the call to be meaningful.[706] The Prosecution further submits that the Trial Chamber ignored the pattern demonstrating a hierarchy amongst the networks by adopting an "isolated, day-by-day analysis".[707]

348 Finally, the Prosecution urges the Appeals Chamber, if it grants Ground 4 and attributes Green 071 to Mr Merhi, to reassess the Trial Chamber's treatment of the hierarchical call flows between Green 071 and Purple 018 on 14 and 15 January 2005.[708] The Prosecution maintains that these call flows show a pattern of coordination between the Green Network and the Purple Phone users and therefore a link between the Purple Phones and the attack through the Green Network.[709]

349 Counsel for Mr Merhi submit that the Prosecution alleges errors of fact, not law.[710] They argue that the Trial Chamber did not analyze the hierarchical call flows or the Green Network calls in isolation and did not only have regard to events on the day of the call.[711] Counsel for Mr Merhi further submit that the Trial Chamber's conclusion that evidence was lacking in relation to certain alleged events demonstrates that the Trial Chamber considered the totality of the evidence.[712] According to Counsel for Mr Merhi, the Prosecution simply disagrees with the Trial Chamber's conclusion and therefore this sub-ground should be summarily dismissed.[713] Counsel for Mr Merhi further submit that the Trial Chamber acted reasonably when it sought to give context to the calls, given the lack of call content.[714] They allege that the Prosecution is simply repeating failed arguments from the trial and does not contest that many of the calls have no context or link to an event related to the attack.[715]

706 Prosecution Appeal Brief, paras 309-310.
707 Prosecution Appeal Brief, para. 311.
708 Prosecution Appeal Brief, para. 315.
709 Prosecution Appeal Brief, para. 315.
710 Merhi Response Brief, para. 320.
711 Merhi Response Brief, paras 323-324.
712 Merhi Response Brief, para. 325.
713 Merhi Response Brief, paras 328, 330, 332.
714 Merhi Response Brief, para. 326.
715 Merhi Response Brief, paras 327-328.

350 In reply, the Prosecution submits that Counsel for Mr Merhi simply reiterate the Trial Chamber's conclusions.[716] The Prosecution maintains that it has demonstrated in its Appeal Brief the erroneous and isolated analysis of the call flows and what a holistic analysis would have revealed.[717] The Prosecution also repeats the argument that the Trial Chamber failed to consider the call flows holistically and along with other evidence and asserts that the Prosecution does not accept any of the findings that emanate from this isolated analysis.[718]

2. Trial Chamber Findings

351 In the Judgment, the Trial Chamber discussed each of the alleged call flows between, on the one hand, the Green Network and, on the other hand, the Blue and Red Networks.[719] It did so in order to determine whether Mr Badreddine coordinated the operation to assassinate Mr Hariri.[720] The Trial Chamber prefaced its discussion of these calls by stating that they "may be examples of hierarchical call flows"[721] and that "[t]hey must of course be analysed in their totality".[722] The Trial Chamber concluded that Messrs Ayyash and Badreddine were in regular contact on their Green Network mobiles during the indictment period.[723] The Trial Chamber stressed that it had no direct evidence of what was said during the calls and could "only attempt to draw inferences from the surrounding circumstances as to why and about what the two were communicating".[724]

352 The Trial Chamber found that, to be satisfied beyond reasonable doubt that the Green Network operated as mission command for the conspiracy and that Mr Badreddine directed the conspiracy, it was required to "connect each of the calls, individually and together, to evidence of what was occurring when the calls were made".[725] This was to provide context to and a reason for the calls.[726]

[716] Prosecution Reply Brief, para. 89.
[717] Prosecution Reply Brief, para. 89.
[718] Prosecution Reply Brief, paras 87-88.
[719] Judgment, para. 6579.
[720] Judgment, para. 6577.
[721] Judgment, para. 6578.
[722] Judgment, para. 6579.
[723] Judgment, para. 6580.
[724] Judgment, para. 6580.
[725] Judgment, para. 6592.
[726] Judgment, para. 6592.

333 Following its analysis of the calls, the Trial Chamber determined that four “so-called hierarchical calls” appeared to have a significance that may connect to the evidence of Mr Hariri’s movements and possibly the Canter van’s purchase.[727] The Trial Chamber asked itself whether adding all the other calls to these four calls would provide all calls with the context from which the Trial Chamber could conclude that Mr Badreddine had the pleaded role.[728] It determined this question in the negative.[729]

334 In relation to the call flows between the Green Network and the Purple Phones on 12, 14, and 15 January 2005, the Trial Chamber determined that there was no reliable evidence of anything relevant to the false claim of responsibility occurring on those days.[730] The Trial Chamber therefore decided that it could not determine “from the context why the calls were made” and ultimately did not have sufficient evidence to connect the calls to Mr Abu Adass’s disappearance.[731]

3. <u>Discussion</u>

a. Call Flows from the Green Network to the Red and Blue Networks

335 The Prosecution argues that the Trial Chamber failed to assess, in their totality, the Green Network calls and the hierarchical call flows from the Green to the Red and Blue Networks.[732] The Prosecution identifies several instances in January and February 2005 during which call flows occurred between, on the one hand, the Green Network and, on the other hand, the Blue or Red Network.[733]

336 The Appeals Chamber notes that the Trial Chamber discussed the calls flows between the Green and the Red and Blue Networks in relation to the surveillance of Mr Hariri and the preparations for the attack. It set out in detail the alleged hierarchical call flows on 19 and 28 January 2005[734] and on 8, 11, and 12 February 2005.[735] The Trial Chamber also made findings in relation to the role of the Green Network. The Trial Chamber was satisfied that there was

[727] Judgment, para. 6616.
[728] Judgment, para. 6619.
[729] Judgment, para. 6620.
[730] Judgment, para. 6517.
[731] Judgment, para. 6520.
[732] Prosecution Appeal Brief, para. 305.
[733] Prosecution Appeal Brief, para. 314.
[734] Judgment, paras 4443, 4479.
[735] Judgment, paras 4577, 4602, 4616, 4619.

"sequencing" between calls, including between networks, but found that, "without the content of any of these calls or any other evidence", it could not infer a hierarchy from instances of sequencing because to do so would be speculative.[736] The Trial Chamber emphasized that it had "carefully considered the so-called call flows from the Green to the Blue and Red network".[737]

367 The Appeals Chamber observes that the Trial Chamber also discussed the alleged hierarchical call flows between the Green Network and the Red and Blue Networks on 18, 19, 25, 28, and 31 January 2005 and 3, 8, 11, 12, and 14 February 2005.[738] The Trial Chamber concluded that Mr Ayyash and Mr Badreddine were in regular contact on their Green Network mobiles, but only for calls of very short duration.[739] The Trial Chamber listed the dates on which calls occurred between Mr Ayyash and Mr Badreddine in October, November, and December 2004 and in January and February 2005.[740] It attempted to reconcile the timing and location of these calls with the Prosecution's allegation that Mr Badreddine was at the apex of the conspiracy, but found this "difficult".[741]

368 The Appeals Chamber further notes that, in its analysis of the calls made in the days on which alleged Green Network to Blue or Red Network call flows occurred, the Trial Chamber found that there was no evidence connecting the calls to surveillance of Mr Hariri, the purchase of the Canter van, Mr Abu Adass's disappearance, the false claim of responsibility, or any other preparations for the attack, except for eight calls.[742] Therefore, the Trial Chamber "examined in detail the eight Green network calls that may be connected to events for which there is concrete evidence"[743] and determined that four calls appeared to have a significance that might connect to events linked to the attack.[744] It then asked itself the following:

> whether these four calls, without any evidence of what was said—by themselves, and *taken together*, or added to all the other calls lacking context—provide sufficient evidence beyond reasonable doubt of Mr Badreddine's pleaded role as the person at the

[736] Judgment, para. 4742.
[737] Judgment, para. 4741.
[738] Judgment, paras 4431-4433, 4437-4438, 4472, 4479, 4482, 4484, 4512, 4515-4523, 4537-4541, 4573, 4601-4602, 4616-4619, 4639.
[739] Judgment, para. 6580.
[740] Judgment, paras 6597-6600.
[741] Judgment, para. 6601.
[742] Judgment, para. 6603.
[743] Judgment, para. 6603. *See also id.* at paras 6604-6615.
[744] Judgment, para. 6616.

apex of the conspiracy, directing and commanding the entire operation against Mr Hariri.[745]

359 The Trial Chamber concluded that it was not satisfied that Mr Badreddine directed and commanded the operation.[746] It also repeated its conclusion, reached earlier in the Judgment,[747] that it was not satisfied that the Green Network functioned as mission command.[748]

360 From the above, the Appeals Chamber concludes that the Trial Chamber did not err in its analysis of the call flows as alleged by the Prosecution. It did not isolate each call flow, nor erroneously limit its contextual assessment to events on a specific day. The Trial Chamber carefully analyzed each call flow individually and holistically, so as to "carefully examine[] the inferences that [were] reasonably available from the totality of the evidence".[749]

361 The Trial Chamber prefaced its discussion of the calls by indicating that they "may be examples of hierarchical call flows"[750] and that they must be "analysed *in their totality* to ascertain whether patterns emerge from which findings beyond reasonable doubt may be made of Mr Badreddine's involvement".[751] The Trial Chamber further determined that, to be satisfied beyond reasonable doubt of the Prosecution's case that the Green Network operated as mission command with Mr Badreddine at its apex, it had to connect each of the calls, "individually and *together*, to evidence of what was occurring when the calls were made".[752] The Trial Chamber recognized that patterns evidenced by the call flows could enable it to draw inferences,[753] but that these patterns "must connect to something concrete".[754]

362 The Appeals Chamber therefore finds that the Trial Chamber did not analyze the call flows in isolation. The Trial Chamber did not err in considering the "timing" of the calls to determine whether this demonstrated relevant context to a call, as part of its analysis of the alleged call flows.[755]

---

745 Judgment, para. 6618 (emphasis added).
746 Jugdment, para. 6620.
747 Judgment, para. 4741.
748 Judgment, para. 6635.
749 Judgment, para. 6621.
750 Judgment, para. 6578.
751 Judgment, para. 6579 (emphasis added).
752 Judgment, para. 6592 (emphasis added).
753 Judgment, para. 6593. *See also id.* at para. 6380 (v).
754 Judgment, para. 6595.
755 Judgment, para. 4742.

b. Call Flows from the Green Network to the Purple Phones

363 The Prosecution argues that the Trial Chamber failed to assess the hierarchical call flows between the Green Network and the Purple Phones and thus to recognize that the call flows on 14 and 15 January 2005 showed a pattern of coordination between the Green Network and the users of the Purple Phones.[756]

364 The Appeals Chamber notes that the Trial Chamber considered the alleged hierarchical call flows from the Green Network to the Purple Phones on two separate occasions in the Judgment.[757] The analysis by the Trial Chamber in these two sections is similar. First, the Trial Chamber detailed the three "supposedly" hierarchical call flows.[758] It found that the call on 12 January 2005 from Mr Badreddine to Mr Merhi, followed by a call from Mr Merhi to his brother, did not fit within the Prosecution's case theory of Mr Badreddine coordinating Mr Merhi, who in turn coordinated Mr Oneissi and the user of Purple 018.[759] The Trial Chamber also found that the call from Mr Badreddine to Mr Merhi on 12 January 2005 was not connected to any pleaded event.[760] In any case, the Prosecution is not challenging the Trial Chamber's findings on the alleged hierarchical call flows on 12 January 2005, but only on 14 and 15 January 2005.[761] The Trial Chamber then tried to link the call flows on 14 and 15 January 2005 to the false claim of responsibility, but found that the calls on these two dates were "devoid of context".[762] The Trial Chamber therefore determined that, in relation to the alleged call flows from the Green Network to the Purple Phones, it could not determine from the context why these calls were made.[763] This led the Trial Chamber to the conclusion that it had insufficient evidence to connect the calls to Mr Abu Adass's disappearance.[764]

365 The Appeals Chamber notes that the Trial Chamber also discussed the other evidence that supported the Prosecution's allegation that Messrs Merhi and Oneissi were involved in the preparation of the false claim of responsibility,[765] including the inactivity of the Purple Phones on 16 January 2005 (the date of Mr Abu Adass's alleged abduction), evidence that Mr Oneissi

---

756 Prosecution Appeal Brief, paras 315-316.
757 Judgment, Chapters XII and XIV.
758 Judgment, paras 5469, 6514.
759 Judgment, paras 5472, 6515.
760 Judgment, para. 5472.
761 Prosecution Appeal Brief, para. 315.
762 Judgment, paras 5473, 6519.
763 Judgment, para. 6520.
764 Judgment, paras 5474, 6520.
765 *See* Judgment, paras 5334-5336, 6521-6547.

was the "Mohammed" who met Mr Abu Adass at the Mosque, alleged mobile contact between "Mohammed" and Mr Abu Adass, and Purple Phone activity near the Mosque.

366. The Appeals Chamber concludes from the above that the Trial Chamber did not consider each call flow in isolation, as alleged by the Prosecution. The Trial Chamber appropriately considered the three call flows relied upon by the Prosecution and their connection to the false claim of responsibility. Specifically, the Trial Chamber assessed whether evidence of the calls flows of 14 and 15 January 2005 could be linked to Mr Abu Adass's disappearance.[766] Without this link, the Trial Chamber was of the view that the call flows did not constitute sufficient evidence of the involvement of Messrs Merhi and Oneissi in the false claim of responsibility. The Trial Chamber engaged in an adequate analysis of the calls on 14 and 15 January 2005, but was unable to find that they supported the Prosecution's case.

4. <u>Conclusion</u>

367. We find that the Trial Chamber did not err by considering each alleged hierarchical call flow in isolation or by limiting its contextual assessment to events on a specific day. The Trial Chamber analyzed each call flow individually and holistically. Moreover, the Trial Chamber was entitled, as part of its analysis of the evidence, to consider whether the calls could be linked to events alleged by the Prosecution to be connected to the attack. This conclusion is in relation to both the call flows from the Green Network to the Blue and Red Networks and those from the Green Network to the Purple Phones.

368. For the foregoing reasons, Sub-ground 5 (B) is dismissed.

369. This finding is without prejudice to the Appeals Chamber's further assessment as to whether the Trial Chamber erred when it found that it was not satisfied that the Green Network was used to coordinate the overall conspiracy.

---

[766] Judgment, paras 5474, 6520.

C. Sub-ground 5 (C): Whether the Trial Chamber Erred in Failing to Find That Mr Badreddine was a Hezbollah Military Commander in 2004 and 2005

1. Submissions of the Parties and LRV

370. At trial, the Prosecution contended that Mr Badreddine led the conspiracy at "the apex" of the Green Network.[767] It relied on Mr Badreddine's "senior role in Hezbollah" to argue that he was the type of "sophisticated military actor" who was capable of engaging in the "detailed planning and commitment involved in the attack [on Mr Hariri]".[768]

371. The Prosecution submits that the Trial Chamber erred in fact by not finding that Mr Badreddine was a Hezbollah military commander in 2004 and 2005.[769] The Prosecution submits that the Trial Chamber failed to recognize that "the evidence was corroboratory" in relation to Mr Badreddine adopting the role of a Hezbollah military commander from at least 1995.[770] According to the Prosecution, the Trial Chamber erroneously determined that the evidence of Mr Badreddine's role prior to the indictment period may have been exaggerated or embellished.[771]

372. The Prosecution maintains that Hezbollah's Secretary-General, Mr Hassan Nasrallah, is the primary source of evidence of Mr Badreddine's military role in the organization and points out that the Trial Chamber acknowledged Mr Badreddine's frequent contacts with Hezbollah officials during the attribution period for two of his personal mobiles.[772] According to the Prosecution, Mr Badreddine's lifestyle during the indictment period, including the use of a pseudonym and bodyguards, demonstrates that he had knowledge of surveillance avoidance.[773]

373. The Prosecution further points to the Trial Chamber's acknowledgment of Mr Badreddine's military role in 2011, and its refusal to find that he had such role before that date.[774] The Prosecution points out that these two findings emanated from the same source of

---

767 Prosecution Final Trial Brief, para. 6.
768 Judgment, para. 6400.
769 Prosecution Appeal Brief, paras 317-319.
770 Prosecution Appeal Brief, para. 319.
771 Prosecution Appeal Brief, paras 319, 323.
772 Prosecution Appeal Brief, para. 320.
773 Prosecution Appeal Brief, para. 321.
774 Prosecution Appeal Brief, para. 322, *referring to* Judgment, para. 750.

evidence, *i.e.*, the statements of Mr Nasrallah, but that the Trial Chamber failed to acknowledge this.[775]

374. Finally, according to the Prosecution, the discrepancy concerning the date when Mr Badreddine became a Hezbollah commander—upon which the Trial Chamber relied in part to question the evidence—was "insignificant" and could not reasonably call into question whether he was a military commander at all before 2011.[776]

375. Counsel for Mr Merhi submit that the Trial Chamber's findings in relation to Mr Badreddine were reasonable and point to the Trial Chamber's reliance on the discrepancy between the content of a commemoration broadcast on the television channel *Al Manar* and information published on the news wesbsite *Alahed* regarding Mr Badreddine's early military role.[777] Counsel for Mr Merhi also refer to the Trial Chamber's finding that an element of propaganda may have been present in how Mr Badreddine's achievements in two military campaigns were extolled[778] and highlight that the evidence emanates from Hezbollah itself[779] and is of a poor quality, consisting primarily of press articles.[780]

376. According to Counsel for Mr Merhi, the Prosecution ignores the Trial Chamber's finding that no evidence demonstrates Mr Badreddine's precise role in Hezbollah at the relevant time.[781] They argue that the Prosecution does not point to any new evidence that was not considered by the Trial Chamber.[782] In addition, Counsel for Mr Merhi submit that the Prosecution chose not to call Mr Nasrallah to give oral testimony and must therefore bear the consequences of the Trial Chamber's assessment of the evidence.[783] In relation to the Prosecution's reliance on Mr Badreddine's alleged public activities in 2005, Counsel for Mr Merhi submit that this argument should be rejected as it is not demonstrative of a position in Hezbollah and was not raised during the trial.[784] They also argue that the Trial Chamber was

[775] Prosecution Appeal Brief, para. 322.
[776] Prosecution Appeal Brief, para. 323.
[777] Merhi Response Brief, para. 339.
[778] Merhi Response Brief, para. 339, *referring to* Judgment, para. 6563.
[779] Merhi Response Brief, para. 339.
[780] Merhi Response Brief, para. 340.
[781] Merhi Response Brief, para. 340.
[782] Merhi Response Brief, para. 341.
[783] Merhi Response Brief, para. 342.
[784] Merhi Response Brief, para. 343.

entitled to rely on the same evidence, *i.e.*, Mr Nasrallah's speech, to reach its conclusions that Mr Badreddine was a commander in 2011, but not in 2004 or 2005.[785]

377 Finally, Counsel for Mr Merhi argue that, even if the Trial Chamber committed an error in this respect, this did not occasion a miscarriage of justice, as the error would not have impacted the final determination in the case.[786] This is because the Trial Chamber's conclusions in relation to the alleged roles of Messrs Badreddine and Ayyash in supervising and coordinating the attack were based on the absence of context and content for most Green Network calls and the absence of links between these calls and events pleaded by the Prosecution.[787] Moreover, Counsel for Mr Merhi point out that the Prosecution accepted in its final trial brief that the Trial Chamber need not find that the accused were acting on behalf of any organization and recall that the Trial Chamber did not find that Mr Merhi was a supporter of Hezbollah.[788]

378 The LRV submits that the evidence in relation to Mr Badreddine's role in the Hezbollah command structure and in the attack is so robust that no reasonable trier of fact could have found otherwise.[789] According to the LRV, there is no reasonable alternative inference available from the evidence as to what Mr Badreddine was doing during the indictment period, nor as to the reasons for his involvement with the Green Network, other than his pleaded role in the conspiracy to kill Mr Hariri.[790]

379 The LRV highlights evidence that Mr Badreddine carried numerous unsubscribed mobiles, had demonstrated knowledge of surveillance avoidance, and regularly switched the number plates on his cars.[791] The LRV claims that this evidence, in combination with Mr Nasrallah's declarations and the Prosecution's telecommunication evidence, "points to Mr Badreddine's command leadership within Hezbollah".[792]

380 The LRV further submits that evidentiary material from before and after the indictment period is crucial to establishing command leadership.[793] According to the LRV, it is "illogical"

[785] Merhi Response Brief, para. 344.
[786] Merhi Response Brief, paras 345-348.
[787] Merhi Response Brief, paras 345-346.
[788] Merhi Response Brief, paras 349-350.
[789] LRV Observations, para. 73.
[790] LRV Observations, para. 73.
[791] LRV Observations, para. 68.
[792] LRV Observations, para. 68.
[793] LRV Observations, para. 70.

that Mr Badreddine's role as a Hezbollah commander was interrupted, rather than continuous, in light of the totality of the evidence.[794]

381. In response to the LRV's Observations, Counsel for Mr Merhi submit that the LRV fails to respond to Counsel's argument that the alleged errors in this sub-ground, if proved, would not amount to a miscarriage of justice, nor invalidate the decision.[795] In any event, Counsel for Mr Merhi argue that—while the LRV states that overwhelming evidence points to Mr Baddredine's leadership role from 2004 to 2005 and that this evidence is not only from press organizations—the LRV does not identify any of this evidence.[796]

382. According to Counsel for Mr Merhi, the LRV fails to address the argument that evidence of Mr Baddredine's public lifestyle was not relied upon by the Prosecution during the trial to prove Mr Badreddine's role as a military commander and that this evidence does not support the conclusion that he held this role.[797] Finally, Counsel for Mr Merhi argue that the LRV has not identified any evidentiary basis for its argument that no reasonable trier of fact could have reached a conclusion other than that Mr Badreddine was a Hezbollah commander who took part in the conspiracy.[798]

2. Trial Chamber Findings

383. The Trial Chamber found that the evidence that Mr Badreddine was a long-standing and senior Hezbollah military commander was "uncontested and incontrovertible".[799] However, the Trial Chamber determined that the evidence about Mr Badreddine's precise role in Hezbollah during the indictment period was unclear and therefore that it had "no *reliable* evidence that Mr Badreddine had a command role in 2004 or 2005".[800] As a result, the Trial Chamber could not find that Mr Badreddine had to have been a conspirator during the indictment period based in part on his known activities as a senior Hezbollah military commander.[801]

---

[794] LRV Observations, para. 72.
[795] Merhi Response to LRV Observations, paras 83-86.
[796] Merhi Response to LRV Observations, paras 89-91.
[797] Merhi Response to LRV Observations, para. 90.
[798] Merhi Response to LRV Observations, para. 91.
[799] Judgment, para. 750.
[800] Judgment, para. 6566 (emphasis in the original). *See also id.* at para. 750.
[801] Judgment, para. 6576.

3. Discussion

a. Evidence Considered by the Trial Chamber

384 The Trial Chamber considered evidence adduced by the Prosecution in relation to three commemorative ceremonies held for Mr Badreddine after his death, as well as a biographical article and an article recounting a meeting between Mr Badreddine's family and Ayatollah Ali Khamenei, both published online.

385 On 13 May 2016, *Al Manar's* website announced the death of "commander" Mustafa Badreddine.[802] The article referred to a Hezbollah statement that "[a]fter a lifetime full of jihad, prison, wounds and considerable achievements, Sayed Zou Al-fiqar [Mr Badreddine] concluded his life by martyrdom".[803] Also on 13 May 2016, a condolence ceremony and funeral procession were broadcast on *Al Manar*.[804] This video shows that senior Hezbollah figures (including Messrs Ali Ammar, Amine Sherri, and Wafik Safa) were present and that Mr Badreddine's coffin was draped in a Hezbollah flag.[805]

386 A biographical article on Mr Badreddine was published on the website of *Alahed* on 13 May 2016.[806] The article stated, among other things, that in 1992 Mr Badreddine was placed in charge of Hezbollah's Central Military Unit Command. It also stated that Mr Badreddine played a prominent role in combat in 1993, 1996, and 1997. The article continued by saying that Mr Badreddine was one of the first leaders who went to the Syrian Arab Republic as part of the Syrian crisis, which commenced in 2011. It concluded that Mr Badreddine continued to follow up his *jihad* activities until he died.

387 On 18 May 2016, a commemoration ceremony was held in Mr Badreddine's honour in Damascus, in the Syrian Arab Republic.[807] An article published by the *Tasnim News Agency* stated that the ceremony was to "commemorate the sacrifices of the great jihadist leader Mustafa Badreddine" and was attended by senior Syrian officials, religious leaders, and

---

[802] Judgment, para. 740, *referring to* Exhibit P01982. *See also* Judgment, paras 4085, 4092.
[803] Judgment, para. 740, fn. 1410, *citing* Exhibit P01982.
[804] Judgment, para. 741, *referring to* Exhibit P01986; Exhibit P01987; Exhibit P01988.
[805] Judgment, para. 741, *referring to* Exhibit P01986; Exhibit P01987, Exhibit P01988. Mr Ammar was a Member of Parliament for Hezbollah/Loyalty to the resistance Bloc; Mr Sherri was a Member of Parliament for Hezbollah for Beirut; and Mr Safa was the Head of the Hezbollah Coordination and Liaison Unit. Judgment, para. 4112.
[806] Judgment, para. 745, *referring to* Exhibit P01983.
[807] Judgment, para. 747.

military representatives.[808] It reported that Sheikh Qaouk Fachad described Mr Badreddine as "an exceptional, genius and strategic commander" and stated that Mr Badreddine had "led the most important missions, the mental wars [and] the victory of July 1993 and April 1996".[809] Sheikh Qaouk Fachad added that Mr Badreddine was a "great jihadist commander at the resistance who was killed as a martyr in the battle of defending Syria, Lebanon and the Nation".[810]

388 On 20 May 2016, *Al Manar* broadcast a two-hour commemoration ceremony for Mr Badreddine.[811] This included a live broadcast of a speech by Mr Nasrallah in which he described Mr Badreddine as one of Hezbollah's "best leaders".[812] Mr Nasrallah also stated that Mr Badreddine "worked in this Resistance from its (very) first moments and hours" and that "in 1995, [Mr Badreddine] assumed the leadership of the Military Central Command in Hezbollah until mid-1999".[813] Mr Nasrallah also mentioned Mr Badreddine's involvement in confrontations with Israel in 1996 and 2006, in the Ansaria Ambush in 1997, and in "dismantling the networks of collaborators with [Israel] in 2008 and the years that followed".[814] Finally, Mr Nasrallah stated that by 2016 Mr Badreddine commanded military and security units in the Syrian Arab Republic.[815]

389 According to an article by *Tasnim News Agency*, the Iranian Supreme Leader, Ayatollah Ali Khamenei, met Mr Badreddine's family in Tehran on 25 May 2016.[816] The article recorded that Mr Badreddine, at the time of his death, was "the commander of the military branch of Lebanon Hezbollah".[817]

390 Other evidence on the record in relation to Mr Badreddine's role in Hezbollah includes telecommunication evidence and evidence described by the Prosecution as relating to Mr Badreddine's "public activities".[818] The Trial Chamber attributed to Mr Badreddine several

[808] Exhibit P01990, p. 1.
[809] Exhibit P01990, p. 1.
[810] Exhibit P01990, p. 2.
[811] Judgment, para. 4092, *referring to* Exhibit P01989.
[812] Judgment, para. 742, *citing* Exhibit P01989, p. 2.
[813] Exhibit P01989, p. 2.
[814] Exhibit P01989, p. 3.
[815] Judgment, para. 744, *referring to* Exhibit P01989, pp. 2-3. *See also* Judgment, para. 6559.
[816] Judgment, para. 749; Exhibit P01991.
[817] Exhibit P01991, p. 2.
[818] Prosecution Appeal Brief, para. 321.

mobiles that were not subscribed in his name, specifically mobiles 354,[819] 663,[820] 944,[821] and Green 023.[822] Furthermore, the Trial Chamber found that Mr Badreddine used his personal mobiles 354 and 944 to have contact with Messrs Safa, Ali Ammar, and Sherri.[823]

341. The Trial Chamber was also satisfied that "Mr Badreddine used various false names and aliases"[824] and that he "used the alias Sami Issa from at least 2001 onwards".[825] Moreover, the Trial Chamber noted that in the Lebanese land registry there was no record of property registered in Mr Badreddine's name,[826] but that "one or more apartments" in Jounieh, north of Beirut, were associated with Sami Issa.[827]

342. The Trial Chamber devoted a section of the Judgment to "precautions" adopted by Mr Badreddine (as Sami Issa, as he was known to witnesses) to physically protect himself and to avoid leaving traces of his presence anywhere.[828] These precautions included having "at least three armed bodyguards" between approximately 2002 and 2005,[829] who "sometimes also drove for him".[830] He ordered one witness "to drive in a circuit before and after the working hours to make sure he was not being followed".[831] Other witnesses gave evidence that Sami Issa owned multiple cars and switched these within the same day or throughout the week.[832] Sami Issa also instructed a witness to regularly switch the cars' number plates, including a military number plate.[833]

343. Witnesses described Sami Issa disguising himself when out in public, for example, wearing a moustache, a goatee, or sunglasses and hats, and adopting techniques to avoid identification, such as wiping his fingerprints off items he used or "keeping his head down when getting out of his car to avoid being captured on the street video cameras".[834] A witness

---

[819] Judgment, para. 4127.
[820] Judgment, para. 4175.
[821] Judgment, para. 4200.
[822] Judgment, para. 4262.
[823] Judgment, paras 4112, 4181.
[824] Judgment, para. 4122.
[825] Judgment, para. 4097.
[826] Judgment, paras 4113, 4060.
[827] Judgment, para. 4050.
[828] Judgment, para. 4073.
[829] Judgment, para. 4074.
[830] Judgment, para. 4077.
[831] Judgment, para. 4077.
[832] Judgment, para. 4076.
[833] Judgment, para. 4077.
[834] Judgment, paras 4074-4075.

gave evidence that Sami Issa's number would usually not appear on the screen when he called him.[835]

394 Finally, Mr Badreddine, under the alias Sami Issa, sometimes carried a locked Samsonite briefcase containing up to four or five mobiles.[836] In relation to phone calls, Sami Issa "established a protocol for others to flip [a] mobile phone upside down so that they could not see who was calling and then hand the mobile to him".[837]

b. Whether the Trial Chamber Erred in Fact by Failing to Find That Mr Badreddine Was a Hezbollah Military Commander in 2004 and 2005

395 The Trial Chamber found "uncontested and incontrovertible" evidence that Mr Badreddine "was a long-standing and senior Hezbollah and military commander" long before the indictment period, up to the time of his death[838]—when he was "both a Hezbollah supporter and a senior Hezbollah military commander".[839] However, the Trial Chamber was not satisfied that the evidence demonstrated that he had held that position during the indictment period.[840]

396 We observe that nothing in the wording of the *Alahed* article of 2016 or in Mr Nasrallah's speech broadcast on *Al Manar* suggests that Mr Badreddine had only recently become a military commander of Hezbollah. In fact, the converse is clear from the article and the speech's lengthy descriptions of the many campaigns in which Mr Badreddine had participated throughout the 1990s—as well as in 2006, 2008, and from 2011.[841] We hold that it is not a reasonable inference, having regard to his high-level position in Hezbollah at those times and at the time of his death in 2016, that Mr Badreddine was demoted from a command position between 1995 and 2004 and then regained prominence after 2005. On the contrary, the evidence establishes that Mr Badreddine continued in his prominent and active leadership role in Hezbollah from the 1990s up to the time of his death in 2016.

---

835 Judgment, para. 4077.
836 Judgment, para. 4078.
837 Judgment, para. 4078.
838 Judgment, para. 750. *See also id.* at paras 128, 4095.
839 Judgment, para. 4094.
840 Judgment, para. 750.
841 Exhibit P01983; Exhibit P01989.

397 As recognized by the Trial Chamber, there is evidence of Mr Badreddine's early role as a commander from at least 1995.[842] The evidence from *Alahed* and *Al Manar* may have given different dates when Mr Badreddine assumed the Central Military Unit Command, but those dates are nevertheless consistent with the fact that he was promoted to a powerful and influential position within the Hezbollah military establishment. As to the accuracy of this information, these two items of evidence corroborate each other.

398 The Appeals Chamber sees no reason to disbelieve the information in Mr Nasrallah's speech, nor the article in *Alahed* in relation to Mr Badreddine's position in the 1990s. Based upon all the evidence, it was not reasonable for the Trial Chamber to consider this information to be propaganda with respect to Mr Badreddrine's position within Hezbollah. Other items of evidence also corroborate each other in terms of the various campaigns in which Mr Badreddine participated, including the Ansaria operation in 1997 and "Operation Grapes of Wrath", which involved Israel and Lebanon in 1996, both of which were mentioned by Mr Nasrallah in his speech and in the *Alahed* article.[843] In addition, the Trial Chamber found that Mr Badreddine had contact during the indictment period with Hezbollah officials and that these officials attended his funeral in 2016.

399 Finally, the evidence relied upon by the Prosecution in relation to Mr Badreddine's public lifestyle is relevant and credible. This includes his use of aliases, his knowledge of surveillance-avoidance techniques, and the rotation of his cars and number plates.

400 From the above, the Appeals Chamber concludes that the Prosecution has demonstrated that the Trial Chamber erred in failing to find that Mr Badreddine was a Hezbollah military commander during 2004 and 2005. The Trial Chamber's finding was one that, based on the evidence, no reasonable trier of fact could have reached.

[842] Judgment, paras 744, 6559, *referring to* Exhibit P01989.
[843] Exhibit P01983; Exhibit P01989.

4. Conclusion

401 We find that the Trial Chamber erred in failing to find that Mr Badreddine was a Hezbollah military commander during 2004 and 2005, since, based on the evidence, no reasonable trier of fact could have reached this conclusion.

402 For the foregoing reasons, Sub-ground 5 (C) is granted.

403 This finding is without prejudice to the Appeals Chamber's further assessment whether the Trial Chamber erred when it was not satisfied that the Green Network was used to coordinate the overall conspiracy.

D. Sub-ground 5 (D): Whether the Trial Chamber Erred in Failing to Find That the Green Network Was a Hezbollah Network

1. Submissions of the Parties and LRV

404 The Prosecution submits that the Trial Chamber erred in law and/or fact by not finding that the Green Network was a Hezbollah network.[844] In particular, the Prosecution alleges that the Trial Chamber erred: (a) in law, by requiring Mr Al-Hassan's Rule 158 evidence to be corroborated by tested evidence, because it was untested and contested (and therefore refusing to rely on this evidence);[845] and (b) in law and/or fact, by failing to consider relevant corroborative evidence, which resulted in the erroneous holding that Mr Al-Hassan's evidence was not corroborated.[846] In the Prosecution's view, the totality of the evidence shows that the Green Network was a Hezbollah network.[847]

405 Counsel for Mr Merhi submit that the Trial Chamber did not err when it refused to conclude that the Green Network was a Hezbollah network.[848] First, they submit that the Prosecution alleges an error of fact, not of law.[849] Second, they argue that the Trial Chamber did assess whether Mr Al-Hassan's interview was corroborated by Mr Nasrallah's press conference and expressly noted that Mr Nasrallah did not "specify what, if any, mobiles

[844] Prosecution Appeal Brief, para. 325.
[845] *See* Prosecution Appeal Brief, paras 325-327. *See also* above Sub-ground 1 (E).
[846] Prosecution Appeal Brief, paras 325, 328. *See also id.* at paras 329-333.
[847] Prosecution Appeal Brief, para. 334.
[848] Merhi Response Brief, p. 98.
[849] Merhi Response Brief, paras 354, 363.

Hezbollah used during the tracking".[850] Moreover, Counsel for Mr Merhi point out that the Trial Chamber specifically questioned the Prosecution on the topic of corroboration of Mr Al-Hassan's evidence and that, in any event, a trial chamber is not obliged to detail every step of its reasoning.[851]

406 Counsel for Mr Merhi further contend that the Prosecution ignores the Trial Chamber's conclusions about the poor quality of the evidence, namely, that it is hearsay, lacking clarity and credibility, and untested.[852] As a result, Counsel for Mr Merhi submit that, even if Mr Al-Hassan's evidence were corroborated, it would not have constituted sufficient and reliable proof that the Green Network was a Hezbollah network.[853] Counsel for Mr Merhi note that Mr Nasrallah's statement at the press conference is vague and unclear and that Mr Nasrallah did not state that the Green Network is a Hezbollah network, nor did he discuss specific telephonic data.[854] They also argue that this untested evidence required corroboration by tested evidence because it relates to a "pivotal" aspect of the Prosecution's case, namely, the role of the Green Network.[855]

407 Counsel for Mr Merhi challenge the Prosecution's argument that the Trial Chamber failed to consider relevant evidence.[856] They also take issue with the Prosecution's argument that Messrs Badreddine and Ayyash's links with Hezbollah, as well as the Trial Chamber's finding that the Syrian Arab Republic and Hezbollah may have had motives to eliminate Mr Hariri, support the conclusion that the Green Network was a Hezbollah network.[857] Counsel for Mr Merhi submit that, in any event, the Defence was prejudiced by the Prosecution's failure to mention in the Amended Consolidated Indictment that the Green Network was a Hezbollah network and that this prejudice would be compounded if the alleged link between Hezbollah and the Green Network was used to prove the role that Mr Merhi played in the conspiracy.[858]

---

[850] Merhi Response Brief, para. 355, *citing* Judgment, para. 2243.
[851] Merhi Response Brief, para. 355, *referring to* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3731, Questions for Parties and Legal Representatives of Victims to Answer in Their Oral Closing Arguments Arising from Their Written Final Trial Briefs, 7 September 2018, para. 13.
[852] Merhi Response Brief, para. 356.
[853] Merhi Response Brief, para. 357.
[854] Merhi Response Brief, paras 358-359.
[855] Merhi Response Brief, para. 361, *referring to* Merhi Response Brief, para. 140.
[856] Merhi Response Brief, paras 364-365.
[857] Merhi Response Brief, paras 368-372.
[858] Merhi Response Brief, para. 373.

408 The Prosecution replies that it does not claim that the Trial Chamber did not at all assess Mr Nasrallah's statement.[859] Rather, the Prosecution submits that the Trial Chamber erred when it found Mr Al-Hassan's evidence unreliable, while ignoring corroboratory aspects of Mr Nasrallah's statement and disregarding evidence that linked Network 2 with the Green Network.[860]

409 The LRV submits that the evidence of Mr Al-Hassan was not uncorroborated, nor was it corroborated only by other Rule 158 or untested evidence.[861] The LRV maintains that Mr Al-Hassan's interview was supported by other circumstantial evidence, such as Mr Nasrallah's press conference and attribution evidence (including contact profiles of Purple 231 and its co-location with Green 071).[862] The LRV submits that Rule 158 evidence can corroborate other Rule 158 evidence unless it would form the sole and decisive basis for a conviction.[863]

410 The LRV further contends that the Trial Chamber overlooked additional corroborative circumstantial evidence that "point[s] to the membership or active engagement of the accused Merhi and Oneissi in the Hezbollah cadre".[864] The LRV argues that, in addition to evidence relevant to determining whether the Green Network is a Hezbollah network, other elements should be taken into account by the Appeals Chamber to reinforce findings that Hezbollah had knowledge of the Green Network's operations.[865] In particular, the LRV points to attribution evidence indicating that Messrs Merhi and Oneissi were trusted members of Hezbollah and notes that the funeral of Mr Merhi's brother was attended by Mr Nasrallah and other senior Hezbollah politicians and that Mr Oneissi's brother and nephew were proclaimed martyrs by Hezbollah when they died.[866]

411 Finally, the LRV states that most of the victims participating in the proceedings ("VPPs") are of the view that the Green Network was linked with Hezbollah and some were

[859] Prosecution Reply Brief, para. 91.
[860] Prosecution Reply Brief, paras 90, 92.
[861] LRV Observations, para. 64.
[862] LRV Observations, para. 64.
[863] LRV Observations, para. 65.
[864] LRV Observations, para. 77.
[865] LRV Observations, para. 78.
[866] LRV Observations, para. 79.

disappointed that the "organising hands" behind the attack had not been the subject of a definite finding.[867]

412 Counsel for Mr Merhi reiterate that the Trial Chamber did not err when it refused to conclude that the Green Network was a Hezbollah network.[868] They contend that the LRV disregards the fact that the Prosecution does not challenge the Trial Chamber's finding that there was insufficient evidence to conclude that Mr Merhi was a Hezbollah supporter.[869] Counsel for Mr Merhi also reiterate that the Prosecution has not demonstrated how Mr Merhi's membership in Hezbollah would impact the outcome of the Judgment or the Trial Chamber's findings on the dissemination of the false claim of responsibility.[870]

2. Trial Chamber Findings

413 The Trial Chamber found that Mr Al-Hassan's evidence was "unreliable hearsay" and stated that it would not use it.[871] The Trial Chamber "was not satisfied of the reliability of Mr Al-Hassan's assertion of what Mr Nasrallah allegedly said to him about the ownership of the 18 mobiles in the wider Green network".[872] The Trial Chamber stated that "[i]t is not clear that the Green network […] as alleged by the Prosecution is the same as 'Network 2' which Mr Al-Hassan and Mr Nasrallah allegedly discussed".[873] Regarding Mr Nasrallah's statement at a press conference about Hezbollah tracking an Israeli agent, the Trial Chamber pointed out that his statement "does not specify what, if any, mobiles Hezbollah used during the tracking".[874]

3. Discussion

a. Applicable Law

414 The Appeals Chamber recalls that findings that are indispensable for a conviction must not rest solely or decisively on untested evidence, such as evidence admitted pursuant to

[867] LRV Observations, para. 82.
[868] Merhi Response to LRV Observations, p. 21.
[869] Merhi Response to LRV Observations, paras 100-103.
[870] Merhi Response to LRV Observations, para. 104.
[871] Judgment, para. 127. *See also id.* at para. 2243.
[872] Judgment, para. 771.
[873] Judgment, para. 2243.
[874] Judgment, para. 2243.

Rule 158,[875] because it is "evidence of an individual whom the accused has had no opportunity to cross-examine".[876] Such findings must be "sufficiently corroborated".[877] It is considered to run counter to the principles of fairness and fair trial rights to allow a conviction based on untested evidence without sufficient corroboration.[878]

415 We also recall that it is to be presumed that a trial chamber evaluated all the evidence presented to it, as long as there is no indication that it completely disregarded any particular item of evidence.[879] Even if evidence that has not been referred to by the trial chamber contradicts a finding of the trial chamber, "it is to be presumed that the [t]rial [c]hamber assessed and weighed that evidence, but found that the evidence did not prevent it from arriving at its actual findings".[880] It remains the case, however, that there may be an indication that evidence has been disregarded by the trial chamber when such evidence is clearly relevant to the trial chamber's findings and is not addressed in its reasoning.[881]

b. Analysis of Trial Chamber Findings

416 The Prosecution alleges that the Trial Chamber erred in its treatment of Mr Al-Hassan's Rule 158 evidence and failed to consider relevant corroborative evidence when determining whether the Green Network was a Hezbollah network.[882]

417 The Appeals Chamber notes that the Prosecution relies on the following evidence to demonstrate that the Green Network was a Hezbollah network: (a) a public statement at a press conference by Mr Nasrallah, Secretary-General of Hezbollah;[883] (b) a 2012 Prosecution interview with Mr Al-Hassan, Mr Hariri's Chief of Security in 2005;[884] and (c) a Lebanese Internal Security Forces ("ISF") report and a confirmation document in relation to that report.[885] In addition, the Prosecution points to the Trial Chamber's findings that there was "an

---

[875] *Popović et al.* Appeal Judgment, para. 1222. *See also Lukić and Lukić* Appeal Judgment, para. 570; *Prlić et al.* Decision on Appeals on Admissibility of Evidence, para. 53.
[876] *Đorđević* Appeal Judgment, para. 807.
[877] *Popović et al.* Appeal Judgment, para. 1222.
[878] *Popović et al.* Appeal Judgment, para. 96; *Prlić et al.* Decision on Appeals on Admissibility of Evidence, para. 59. *See also Al Jadeed* Appeal Judgment, para. 131, fn. 378.
[879] *Prlić et al.* Appeal Judgment, para. 187.
[880] *Kvočka et al.* Appeal Judgment, para. 23.
[881] *Kvočka et al.* Appeal Judgment, para. 23. *See also Kalimanzira* Appeal Judgment, para. 195; *Nchamihigo* Appeal Judgment, para. 166; *Galić* Appeal Judgment, para. 256.
[882] *See* Prosecution Appeal Brief, paras 325-334.
[883] Exhibit P02098.
[884] Exhibit P02122.
[885] Exhibit P02124; Exhibit P02125.

organising hand behind the three Green mobiles", that "Syria and Hezbollah may have had motives to eliminate Mr Hariri", and that Messrs Badreddine and Ayyash were Hezbollah supporters.[886]

i. Whether the Trial Chamber Erred in Law in Requiring Mr Al-Hassan's Rule 158 Evidence to be Corroborated by Tested Evidence Because it Was Untested and Contested

418 The Prosecution contends that the Trial Chamber erred in law in requiring that Mr Al-Hassan's Rule 158 evidence be corroborated by tested evidence because it was untested and contested.[887]

419 The Appeals Chamber has already determined that the Trial Chamber erred in requiring that contested Rule 158 evidence, including the evidence of Mr Al-Hassan, be corroborated with tested evidence, regardless of its probative value and decisiveness to the case.[888] We also found that the Prosecution has not demonstrated how this error invalidates the Judgment with respect to Rule 158 evidence other than the evidence of Mr Al-Hassan.[889] We will therefore now assess whether this error has the potential to invalidate the Judgment in relation to the evidence of Mr Al-Hassan.

420 We note that the Trial Chamber determined that the Prosecution's case, as pleaded in the Amended Consolidated Indictment, does not rely upon Hezbollah's involvement.[890] The Trial Chamber found that whether the Green Network was a Hezbollah network "is not a material fact that required pleading".[891] We recall that, as a matter of law, only findings that are indispensable for a conviction cannot rest solely or decisively on untested evidence. We therefore agree with the Prosecution that a finding on the Green Network being a Hezbollah

[886] Prosecution Appeal Brief, para. 333, *citing* Judgment, paras 2236, 787, 6383, respectively.
[887] Prosecution Appeal Brief, paras 326-327.
[888] *See* above Sub-ground 1 (E).
[889] *See* above Sub-ground 1 (E).
[890] Judgment, paras 122-123. In the Amended Consolidated Indictment, the Prosecution only alleged that the accused were supporters of Hezbollah. *See id.* at para. 121. On 23 September 2016, upon request of the Trial Chamber, the Prosecution filed a statement in which it clarified, *inter alia*, that it alleged that the Green Network was a Hezbollah network. *See id.* at paras 108-109. In its final trial brief, the Prosecution confirmed the allegation that Hezbollah controlled the Green Network but maintained that a finding on links between the accused and Hezbollah was not necessary for a conviction. *See id.* at paras 110, 113.
[891] Judgment, para. 127.

network may have rested on untested evidence, including evidence admitted pursuant to Rule 158 such as that of Mr Al-Hassan.

471 However, we also recall that the Trial Chamber found that Mr Al-Hassan's evidence was unreliable hearsay evidence[892] and that it was not clear as to whether the Green Network, as alleged by the Prosecution, was the same as Network 2, which was allegedly discussed by Mr Al-Hassan and Mr Nasrallah.[893] The Trial Chamber also found that Mr Nasrallah's press conference did not provide evidence as to what specific mobiles were used by Hezbollah to track an Israeli agent.[894]

472 We are of the view that the Trial Chamber, by making the above findings on the evidence of Mr Al-Hassan and Mr Nasrallah, exercised its discretionary power to weigh both items of evidence individually and in combination with each other. We hold that, contrary to the Prosecution's submissions, the Trial Chamber did not decline to rely on Mr Al-Hassan's untested and contested evidence because it was not corroborated, but because it was not satisfied that this item of evidence, individually and in combination with Mr Nasrallah's statement, proved that the Green Network was a Hezbollah network. We therefore find that the Prosecution has not demonstrated an error of law invalidating the Judgment in relation to the evidence of Mr Al-Hassan. This determination is without prejudice to our further assessment of the Prosecution's argument that the Trial Chamber erred in failing to consider evidence relevant to determining whether the Green Network was a Hezbollah network and in holding that Mr Al-Hassan's evidence was not corroborated.

ii. Whether the Trial Chamber Erred in Law and/or Fact in Failing to Consider Relevant Evidence

473 The Prosecution asserts that the Trial Chamber failed to consider exhibits P02124 and P02125, which, in its view: (a) are relevant to the issue of whether the Green Network mobiles are the same as Network 2, which was allegedly discussed by Mr Al-Hassan and Mr Nasrallah;[895] and (b) provide independent corroboration of Mr Al-Hassan's evidence concerning his interaction with Mr Nasrallah regarding Network 2.[896]

---

[892] Judgment, paras 127, 2243.
[893] Judgment, para. 2243.
[894] Judgment, para. 2243.
[895] Prosecution Appeal Brief, para. 328.
[896] Prosecution Appeal Brief, para. 331.

474 The Appeals Chamber notes that the Trial Chamber, during the trial, asked the Prosecution to identify evidence, other than Mr Al-Hassan's interview and Mr Nasrallah's press conference, supporting the Prosecution's assertion that the Green Network was a Hezbollah network.[897] In response, the Prosecution specifically drew the Trial Chamber's attention to P02124,[898] as it allegedly confirmed that the ISF considered that Network 2 included Green 300 and Green 023.

475 However, the Appeals Chamber notes that exhibit P02124 is not mentioned in the Judgment, nor is exhibit P02125, which confirms the authenticity of P02124. We recall that it is an indication of error if a trial chamber fails to address evidence that is clearly relevant to the findings in its reasoning. Given the importance of these exhibits to the analysis of Mr Al-Hassan's interview and to the determination of whether the Green Network was a Hezbollah network, the Appeals Chamber holds that the failure to analyze exhibits P02124 and P02125 in the Judgment indicates the Trial Chamber's failure to consider these exhibits.

476 We conclude that the Trial Chamber erred in law by failing to consider relevant evidence and will now turn to assess the impact of this error on the Trial Chamber's assessment of Mr Al-Hassan's Rule 158 evidence.

iii. Whether the Trial Chamber Erred in Law and/or Fact in Holding that Mr Al-Hassan's Evidence Was Not Corroborated

477 The Prosecution argues that the Trial Chamber erred in considering Mr Al-Hassan's evidence unreliable without assessing whether there was evidence corroborating it.[899] According to the Prosecution, Mr Nasrallah's press conference and Mr Al-Hassan's evidence corroborate each other on Network 2 being a Hezbollah network.[900] As mentioned above, the Prosecution also relies on exhibits P02124 and P02125 as documents providing independent corroboration of Mr Al-Hassan's evidence concerning his interaction with Mr Nasrallah regarding Network 2.[901] To further demonstrate the link between Hezbollah and the Green Network, the Prosecution points to the Trial Chamber's findings that there was "an organising

[897] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3731, Questions for Parties and Legal Representatives of Victims to Answer in Their Oral Closing Arguments Arising from Their Written Final Trial Briefs, 7 September 2018, para. 13.
[898] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 14 September 2018, pp. 7-9.
[899] Prosecution Appeal Brief, para. 327.
[900] Prosecution Appeal Brief, paras 327, 332.
[901] Prosecution Appeal Brief, para. 331.

hand behind the three Green mobiles", that "Syria and Hezbollah may have had motives to eliminate Mr Hariri", and that Messrs Badreddine and Ayyash were Hezbollah supporters.[902]

478 As a preliminary matter, the Appeals Chamber observes that the Prosecution, by challenging the Trial Chamber's holding that Mr Al-Hassan's evidence was uncorroborated, substantially alleges that the Trial Chamber erred in fact in holding that Mr Al-Hassan's evidence was unreliable and in failing to find that the Green Network was a Hezbollah network. The Appeals Chamber will therefore assess whether no reasonable trier of fact could have reached those conclusions based on the available evidence.

479 The Appeals Chamber notes that Mr Al-Hassan stated that he spoke to Mr Nasrallah in September 2005 about Network 2[903] and that Mr Nasrallah told him that Network 2 was a Hezbollah network, used to track Lebanese suspected of dealing with the Mossad.[904] According to Mr Al-Hassan, Mr Nasrallah provided him with names and numbers of these alleged Mossad agents so that he could check that Network 2 was tracking those agents.[905] In this regard, we note that Mr Nasrallah acknowledged that he submitted information to Mr Al-Hassan in late 2005 or early 2006 that Hezbollah was tracking an Israeli agent.[906] We also note that Mr Al-Hassan stated that he then gave the names and numbers received by Mr Nasrallah to the ISF to check whether there were instances of co-location with the users of Network 2.[907] He further stated that, in October 2005, the ISF conducted an analysis of three phone numbers given by Mr Nasrallah and conveyed that analysis in a report to STL investigators.[908] The report was tendered at trial as exhibit P02124.[909] It shows that Green 300 and Green 023 were mobiles under consideration by the ISF as part of their assessment of Network 2 and that they co-located in a number of instances with some or all of the three phone numbers identified by Mr Nasrallah.[910]

---

[902] Prosecution Appeal Brief, para. 333, *citing* Judgment, paras 2236, 787, 6383, respectively.
[903] Exhibit P02122, pp. 81, 84, 86.
[904] Exhibit P02122, pp. 86-87.
[905] Exhibit P02122, p. 87. *See also* Exhibit P02121, p. 2.
[906] Exhibit P02098, p. 3.
[907] Exhibit P02122, pp. 87-89. *See also* Judgment, para. 2225, fn. 4644; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 13 December 2017, p. 5.
[908] Exhibit P02121, pp. 2-7. *See also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 13 December 2017, p. 5.
[909] In Exhibit P02125, the ISF confirms that the attached documents, including Exhibit P02124, constituted a file being followed up by Mr Al-Hassan.
[910] Exhibit P02124. *See also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 13 December 2017, p. 5; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 14 September 2018, pp. 6-12.

430 Having carefully reviewed the above evidence, the Appeals Chamber holds that Mr Nasrallah's press conference corroborates Mr Al-Hassan's evidence to the extent that Mr Nasrallah confirms Mr Al-Hassan's specific request for information on Network 2.

431 Moreover, the Appeals Chamber finds that the statement of Mr Al-Hassan, as corroborated by that of Mr Nasrallah and in combination with exhibit P02124, proves that Network 2 was linked with the Green Network and that the Green Network was therefore a Hezbollah network, as submitted by the Prosecution. The Appeals Chamber also holds that the Trial Chamber's findings—that there was an organizing hand behind the three Green mobiles, that Hezbollah may have had motives to eliminate Mr Hariri, that Mr Ayyash was a Hezbollah supporter, and that Mr Badreddine was a Hezbollah military commander in 2004 and 2005—further corroborate the evidence that the Green Network was a Hezbollah network.

432 Based on the totality of the available evidence, the Appeals Chamber finds that no reasonable trier of fact could have reached the conclusions that Mr Al-Hassan's evidence was not corroborated and that the Green Network was not a Hezbollah network. The Appeals Chamber therefore concludes that the Trial Chamber committed an error of fact in holding that Mr Al-Hassan's evidence was unreliable and in failing to find that the Green Network was a Hezbollah network.

4. Conclusion

433 We find that the Trial Chamber (a) did not err in law by requiring Mr Al-Hassan's Rule 158 evidence to be corroborated by tested evidence because it was untested and contested; (b) erred in law by failing to consider evidence relevant to determining whether the Green Network was a Hezbollah network; and (c) erred in fact by holding that Mr Al-Hassan's evidence was unreliable and by not finding that the Green Network was a Hezbollah network, as, based on the totality of the available evidence, no reasonable trier of fact could have reached this conclusion.

434 Sub-ground 5 (D) is therefore granted.

435 This finding is without prejudice to the Appeals Chamber's further assessment as to whether the Trial Chamber erred by not finding that the Green Network was used to coordinate the overall conspiracy.

E. Conclusion

436. For the foregoing reasons, including our discussion and findings on Sub-ground 5 (E),[911] Ground 5 is dismissed in part and granted in part, by majority.

[911] *See* above Sub-grounds 1 (D), 5 (E), and 8 (C).

VII. GROUND 6: WHETHER THE TRIAL CHAMBER ERRED IN FACT IN ITS ASSESSMENT OF THE RELIABILITY OF BEST SERVER COVERAGE MAPS

417 The Prosecution alleges that the Trial Chamber erred in fact in its assessment of the accuracy of the telecommunication evidence relied upon by the Prosecution to establish whether a mobile attributable to a particular person was located close in time and place to a relevant event. In particular, the Prosecution claims that the Trial Chamber erroneously concluded that cells could provide "actual" coverage to a mobile in an overly-expanded area compared to the "predicted" area represented on the best server coverage maps.[912] According to the Prosecution, this finding affected the entirety of the Chamber's analysis regarding the locations of Mr Oneissi and Purple 018 on 14 February 2005.

A. Submissions of the Parties

418 The Prosecution challenges the Trial Chamber's understanding and application of the evidence provided by Witness PRH707, the representative of the Lebanese telecommunication provider Alfa. It argues that the Trial Chamber erred in interpreting PRH707's testimony that the best server coverage maps were 60 to 70% accurate.[913] The Prosecution contends that this erroneous understanding impacted both the Trial Chamber's assessment of the reliability of best server coverage maps for the purpose of determining the general location of the Purple Phones on 14 February 2005 and the Trial Chamber's conclusion that the Purple mobile activity on that day was too remote in time and distance to demonstrate that Mr Oneissi and Purple 018 were present at the relevant times and places.[914]

419 In particular, the Prosecution submits that the Trial Chamber erroneously interpreted PRH707's 60 to 70% accuracy estimate as meaning that cells could convey, as *actual* best server coverage on the ground, an area that "was up to 40 per cent farther from or closer to the cell site base station […] or larger or smaller than represented on the maps".[915] The Prosecution

[912] The evidence shows that a mobile user normally activates the cell providing the strongest signal over a certain geographical area. This cell is called the "best serving cell" and is the cell usually recorded in the Call Data Records ("CDRs"). This information allows assessment of the general locations and movements of mobile users. The area over which the best serving cell may be predicted to provide best server coverage is referred to as "best server coverage area". The areas of best server coverage are determined based on coverage predictions, which are represented in maps showing the area over which each cell site is predicted to emit the strongest signal. *See* Judgment, paras 1640, 1561, 1651 *et seq.*
[913] Prosecution Appeal Brief, para. 354.
[914] Prosecution Appeal Brief, para. 370, *citing* Judgment paras 5691, 5859.
[915] Prosecution Appeal Brief, para. 354. *See also id.* at paras 357-362, 359, fn. 592.

deduces the alleged error from the reasoning and calculation undertaken by the Trial Chamber in paragraph 4769 of the Judgment.[916] According to the Prosecution, the Trial Chamber's erroneous calculations in that passage of the Judgment resulted not in a 40% increase in overall area, but rather in a 96% increase.[917] Moreover, the Prosecution submits that the Trial Chamber's understanding of the 60 to 70% accuracy estimate is irreconcilable with PRH707's evidence—acknowledged by the Trial Chamber—that removing 10% of the outer edges of any coverage map would increase the map's accuracy.[918]

440. The Prosecution requests that the Appeals Chamber correct these alleged errors of fact and, in conjunction with any corrected errors and additional findings arising from Grounds 7 and 8, (a) reconsider the Chamber's findings and Alfa's cell site evidence of events on 14 February 2005 in light of this correction and (b) find that the evidence is sufficiently reliable to be used for employing cell site analysis in determining the general locations of Mr Oneissi and the user of Purple 018 on that day.[919]

441. Counsel for Mr Merhi advance four reasons for rejecting the Prosecution's argument. First, they argue that the Prosecution relies on the single example of paragraph 4769 as indicative of the approach of the Trial Chamber throughout the Judgment.[920] Second, they submit that the Prosecution misrepresents the meaning of paragraph 4769, as the Trial Chamber did not extend, or shrink, the theoretical coverage.[921] Third, they argue that a comprehensive reading of the Judgment shows that the Trial Chamber understood the technicalities of the operation of metadata and adopted an approach that was methodical and reasonable.[922] They add that, in the evaluation of the key locations in connection with the alleged events of 14 February 2005, the Trial Chamber limited itself to measuring exactly the theoretical coverage presented on the coverage maps and did not add a margin of error of 30 to 40%, despite the unreliability of Alfa maps.[923] Fourth, they submit that the Prosecution disregards the core of the issue, namely, the impossibility of employing Call Data Records ("CDRs") to fix the precise location of a person.[924] Consequently, Counsel for Mr Merhi argue that, even if

[916] Prosecution Appeal Brief, para. 359.
[917] Prosecution Appeal Brief, para. 359.
[918] Prosecution Appeal Brief, paras 361-362.
[919] Prosecution Appeal Brief, para. 371.
[920] Merhi Response Brief, paras 393-394.
[921] Merhi Response Brief, paras 396-399.
[922] Merhi Response Brief, para. 401.
[923] Merhi Response Brief, para. 401.
[924] Merhi Response Brief, paras 402-403.

the Trial Chamber had erred regarding the analysis of the reliability of 60 to 70%, the result would have been the same.[925]

442 According to Counsel for Mr Oneissi, Ground 6 should be summarily dismissed as it "lacks the potential to result in the revision or reversal of Mr Oneissi's acquittal": even if the Trial Chamber's finding were to be reversed, the activation of cell sites by mobiles is not sufficiently reliable to establish Mr Oneissi's precise location.[926] It is further argued that the Prosecution has failed to establish that no reasonable Trial Chamber could have interpreted the accuracy estimate as the Trial Chamber did.[927] They submit that the Prosecution also failed during trial to put to PRH707 and Mr Philips its proposed interpretation of the margin of error and secure their clarification.[928] According to Counsel for Mr Oneissi, the impugned interpretation is not incompatible with the Prosecution's proposed interpretation,[929] nor with the suggestion that the inaccuracy of a cell site's theoretical coverage would be highest at the outer edges.[930] They argue that, even if incorrect, Ground 6 (like Ground 7) does not occasion a miscarriage of justice,[931] because the Prosecution has not demonstrated that the impugned interpretation was applied to the activity on 14 February 2005. Thus the error, even if proved, would not change the conclusion that the mere activation of a given cell site cannot be relied upon to pinpoint a mobile's precise location.[932] In any event, Counsel for Mr Oneissi argue that the Prosecution has not challenged the Trial Chamber's finding that the Alfa theoretical coverage is only 60 to 70% reliable.[933]

443 In its Reply, the Prosecution contends that its consistent position has been that the Trial Chamber should not rely on PRH707's qualified personal opinion to the detriment of Mr Philips's expert evidence on the interpretation of coverage maps.[934] Contrary to Counsel for Mr Oneissi's suggestion, the Prosecution submits that it did rely on Mr Philips's evidence that an enlarged area surrounding the coverage represented on the map should be considered.[935] Nevertheless, in the Prosecution's submission, Mr Philips's evidence does not support the Trial

[925] Merhi Response Brief, para. 405.
[926] Oneissi Response Brief, para. 162. *See also id.* at paras 164-168.
[927] Oneissi Response Brief, para. 169. *See also id.* at paras 170-179.
[928] Oneissi Response Brief, paras 171-172, 174-178.
[929] Oneissi Response Brief, para. 178.
[930] Oneissi Response Brief, para. 179.
[931] Oneissi Response Brief, paras 180-182.
[932] Oneissi Response Brief, para. 181.
[933] Oneissi Response Brief, para. 182.
[934] Prosecution Reply Brief, para. 106.
[935] Prosecution Reply Brief, para. 110.

Chamber's reasoning that the 60 to 70% estimate translates to a "precisely measurable discrepancy between the coverage maps and the area of best server coverage on the ground".[936] Regarding PRH707's estimate, the Prosecution submits in response to Counsel for Mr Oneissi[937] that, even if relevant, "almost none of PRH707's hypothetical numbers would amount to 30–40% inaccuracy".[938] The Prosecution argues that the Trial Chamber "necessarily" applied its understanding of PRH707's 60 to 70% accuracy estimate throughout the Judgment.[939] This led the Trial Chamber to conclude there was "greater uncertainty" in locating the Purple Phone users on 14 February 2005 than the evidence in fact permitted.[940] For this reason, the Prosecution submits that correcting these errors necessitates revisiting the Trial Chamber's assessment regarding the location of the Purple Phones on 14 February 2005.[941]

B. Trial Chamber Findings

444 The Trial Chamber found Alfa and Touch's cell site records to be "sufficiently reliable to be used for cell site analysis in *generally* determining the approximate location, movement and call patterns of mobiles".[942] It recognized that, even though cell site analysis cannot pinpoint the location of a mobile at the time of its use, it indicates the likely area of a mobile's location at a particular time with "extremely high accuracy".[943] The Trial Chamber also noted that cell site analysis takes into consideration "the enlarged range of a mobile's approximate location".[944]

445 In terms of reliability of telecommunication evidence, the Trial Chamber noted that cell site analysis is less reliable when a *single* cell activation is examined to determine the geographic location of a mobile user (as opposed to *several* cell activations)[945] because additional factors that might support the analysis—such as movements—are absent. The Trial Chamber recognized that any limitations in the telecommunication evidence must be taken into account[946] and stressed that it had considered general and specific factors that affect cell site

[936] Prosecution Reply Brief, para. 110.
[937] Prosecution Reply Brief, paras 107-109.
[938] Prosecution Reply Brief, para. 109.
[939] Prosecution Reply Brief, paras 102-103.
[940] Prosecution Reply Brief, para. 101.
[941] Prosecution Reply Brief, para. 104.
[942] Judgment, para. 2143 (emphasis in the original). *See also id.* at para. 1571.
[943] Judgment, para. 1571. *See also id.* at para. 2124.
[944] Judgment, para. 2124.
[945] Judgment, paras 2128-2129.
[946] Judgment, para. 2124.

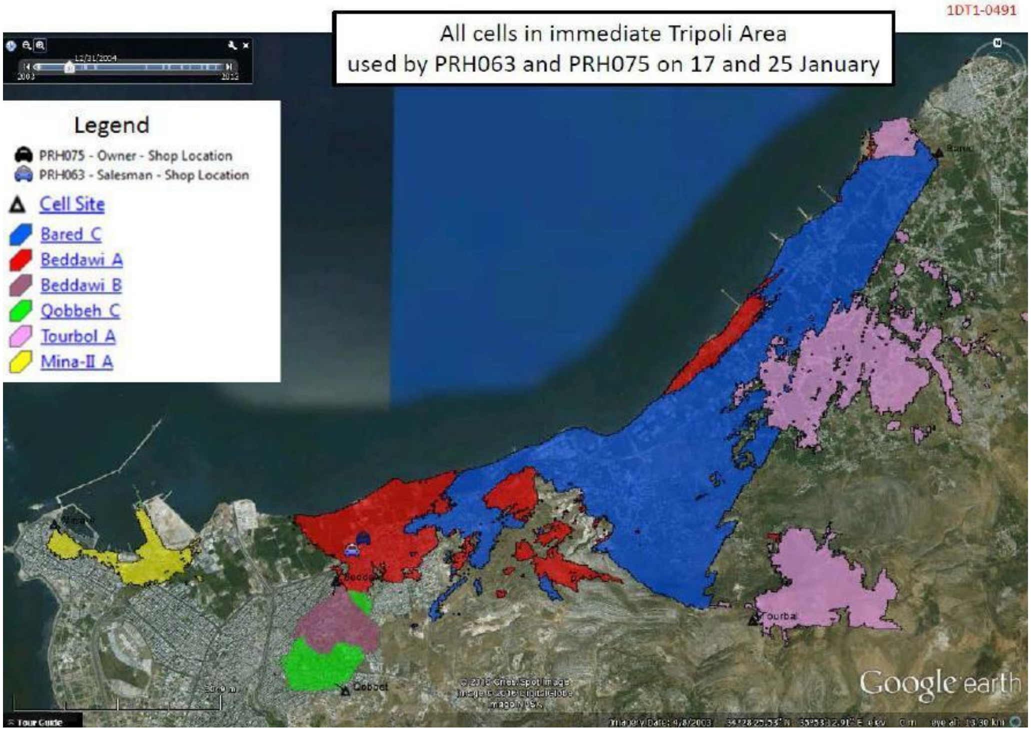
analysis.[947] The Trial Chamber also considered the inherent margin of error in Alfa and Touch's predicted best server coverage maps.[948] It took into account Mr Philips's evidence—that the prediction maps cannot be 100% accurate and inherently contain a margin of error—as well as Witness PRH707's testimony that Alfa shape files are approximations that are 60 to 70% accurate.[949] Further, the Trial Chamber acknowledged the evidence of Mr Philips[950] and PRH707 that the margin of error is "greater at the outer edges of the shape files"[951] so that removing the outer 10% of shape files increases the accuracy for the remaining plot and largely reflects the real coverage on the ground.[952]

446. The Trial Chamber accepted that the 60 to 70% accuracy of the Alfa prediction maps affected the reliability of the cell site analysis.[953] Consequently, it "applied caution" when considering, for each finding relating to a mobile's approximate general location or movement, "the inherent 60 to 70 per cent accuracy of the Alfa prediction maps".[954]

447. In paragraph 4769 of the Trial Judgment, the Trial Chamber took into account the 60 to 70% accuracy of coverage maps in determining the area where a person could have been located. It reasoned that—while involved in two calls occurring about 12 minutes apart and activating different cells—Witness PRH705 could have been in an area covered by both cells, such as one of the points where the two cells were adjacent to one another.[955] It then calculated the distance of the closest border between the two relevant cells and the automobile showroom and determined that the nearest such point was at least five kilometres away from the automobile showroom.[956] In relation to that distance, it concluded that:

> [g]iven the 60 to 70 per cent overall accuracy of coverage data, […] the distance may have been as much as seven kilometres—that is, another 40 per cent further away than five kilometres—or as little as three kilometres—40 per cent closer.[957]

[947] Judgment, para. 2130.
[948] Judgment, para. 1565.
[949] Judgment, paras 1665, 1728, 1746.
[950] Judgment, para. 2009.
[951] Judgment, para. 1747.
[952] Judgment, para. 2009.
[953] Judgment, para. 2009.
[954] Judgment, para. 2010.
[955] Judgment, para. 4769.
[956] Judgment, para. 4769.
[957] Judgment, para. 4769.



From Exhibit 1D00347 (PowerPoint presentation on mobile activity of Witnesses PRH063 and PRH075), ERN 1DT1-0491

448. Lastly, with regard to the 14 February 2005 events, the Trial Chamber relied on Alfa cell site evidence to make several calculations in order to determine the location of Mr Oneissi and Purple 018 at the relevant times.[958] It made the following findings:

449. In relation to the call to *Reuters*, made at 14:11 from the first payphone: "Purple 018[…] [could have been] potentially […] within a few hundred metres of the payphone eight minutes earlier—or 1.6 kilometres away from it […]" or "even further from the first payphone".[959]

450. In relation to the first call to *Al-Jazeera*, made at 14:19 from the second payphone: "[…] Purple 018 and Mr Oneissi […] both activated cells in an area at least one kilometre from this payphone within twenty minutes of the call […]".[960]

451. In relation to the second call to *Al-Jazeera*, made at 15:27 from the third payphone: "[…] the outer boundary of the coverage map of BACHOU2, which provided predicted coverage to [the third] payphone, is a full kilometre from it".[961] A mobile next to the third

[958] Judgment, paras 5570, 5577, 5586, 5588, 5606.
[959] Judgment, paras 5657-5658.
[960] Judgment, para. 5659.
[961] Judgment, para. 5661.

payphone could have also "conceivably" activated SPEARS3 and ZOUKAK3, which "extended respectively for approximately another 570 and 890 metres on the predicted best server coverage maps.[962]

452 In relation to the third call to *Al-Jazeera*, made at 17:04 from the fourth payphone: "[e]leven minutes [after the fourth call], at 17:15, […] Purple 018 activated a cell at the start of the call, OGER3, which was approximately 750 metres from the payphone".[963] This is "equally consistent" with the user of Purple 018 "being able to make the call or to watch someone doing it, but is also consistent with their not doing it" or "with the user being at least a kilometre away".[964] A mobile next to the fourth payphone could have also "conceivably" activated OGER2 and RAMLET1, "which extend respectively […] around 2.7 kilometres and 890 metres from the payphone.[965]

453 In relation to the collection of the tape from the tree: "[t]he tree, covered on predicted maps by BACHOU3[,] is adjacent to BNPI3; their furthest distances, of predicted best server coverage, from the tree are respectively around 715 and 655 metres away".[966] "Mr Oneissi, while connecting to BNPI3, could have been within eyesight of the tree, or equally […] 715 metres away from it" or "he could have been even further distant".[967]

C. Discussion

454 The Appeals Chamber observes that the present ground of appeal includes evidence of a highly technical nature. The issues for consideration may be structured as follows:

1. whether the Trial Chamber erred in fact in employing the 60 to 70% accuracy estimate in paragraph 4769 of the Trial Judgment;

2. whether, owing to its misunderstanding of the 60 to 70% accuracy estimate, the Trial Chamber erred in interpreting Alfa cell site evidence as to the locations of Mr Oneissi and the user of Purple 018 on 14 February 2005; and

---

[962] Judgment, para. 5662.
[963] Judgment, para. 5664.
[964] Judgment, paras 5664 (footnotes omitted), 5666.
[965] Judgment, para. 5665.
[966] Judgment, para. 5668.
[967] Judgment, paras 5668-5669.

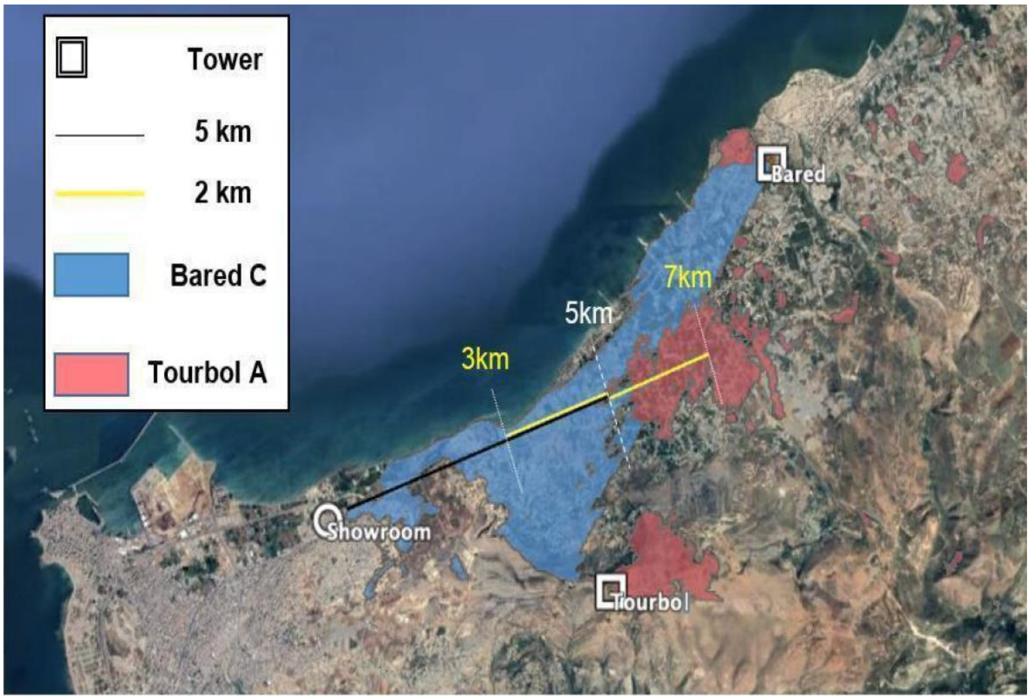
3. whether the Alfa cell site evidence is sufficiently reliable to be used in determining the general location of Mr Oneissi and the user of Purple 018 on 14 February 2005.

455. We take each of these questions in turn.

1. <u>Whether the Trial Chamber Erred in Fact in Employing the 60 to 70% Accuracy Estimate in Paragraph 4769 of the Trial Judgment</u>

456. The Trial Chamber assumed that PRH075 was located at the junction of the two cells Bared C and Tourbol A.[968] It then, in paragraph 4769 of the Judgment, calculated the closest border between the point of conjunction of the two cells and the showroom and then estimated that this distance may have been 40% greater or lesser than its calculation, based on its understanding of the 60 to 70% accuracy estimate.

457. The image below, from the Prosecution Appeal Brief, shows the Trial Chamber's reasoning graphically.



From Prosecution Appeal Brief, para. 364

458. According to the Prosecution, the Trial Chamber in paragraph 4769 gave an erroneous interpretation of PRH707's accuracy estimate, by wrongly concluding that a cell could convey,

[968] Judgment, para. 4769.

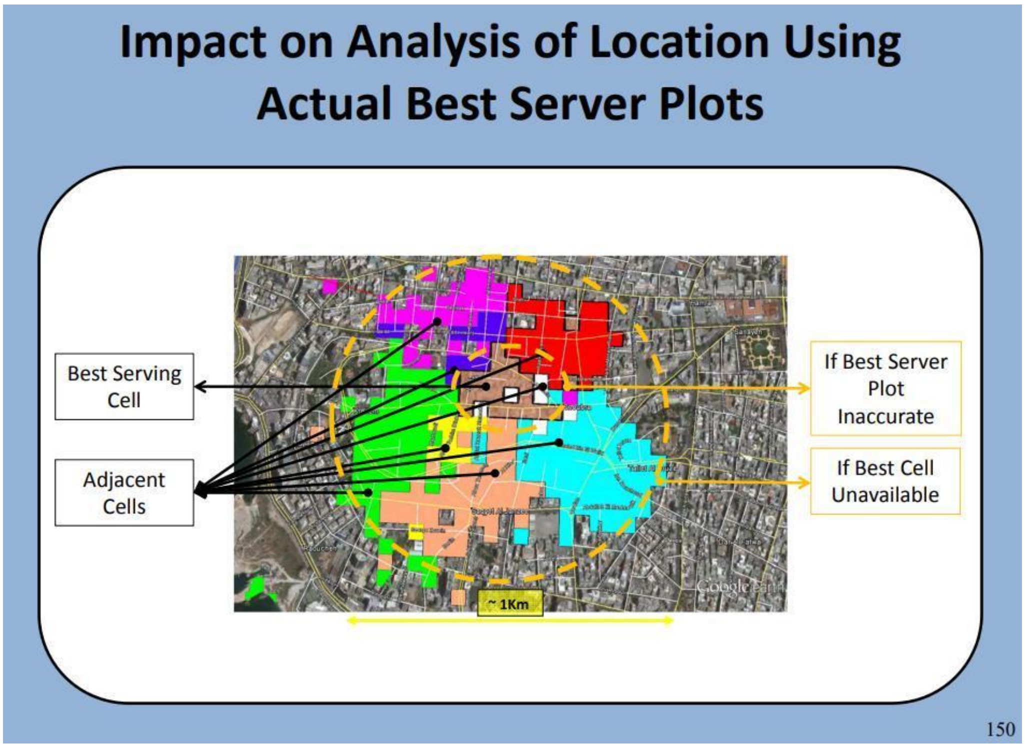
as the "actual" best server coverage on the ground, an area that "was up to 40 per cent farther from or closer to the cell site base station […], or larger or smaller than represented on the maps".[969] The Prosecution contends that PRH707 failed to relate his 60 to 70% accuracy estimate specifically to either "the farthest distance" (from the cell site) or "the overall surface area" of best server coverage and stressed that a discrepancy in *distance* of coverage from the cell site is not the same thing as a discrepancy in overall *surface area* of coverage.[970] The Prosecution thus suggests that, while the 60 to 70% accuracy estimate does not seem to relate to either distance or surface area, the overall surface area is the more reasonable interpretation of the two.[971]

459 To determine whether the Trial Chamber erred in its interpretation of the 60 to 70% accuracy estimate, the Appeals Chamber will consider the evidence that the Trial Chamber received on the accuracy estimate, as referred to by the Parties: PRH707's testimony concerning the accuracy of Alfa's coverage maps and Mr Philips's evidence on the general accuracy of coverage maps.

460 PRH707 clarified that, even though coverage predictions cannot 100% match the situation in the field, "a big percentage of matching [exists] between the information […] from the system and the situation on the ground",[972] which he estimated as similar to the extent of some 60 to 70%.[973] PRH707 illustrated his 60 to 70% accuracy with an example that—contrary to the Prosecution's argument[974]—suggests that he related the accuracy estimate to the overall surface area of best server coverage.[975] PRH707 explained that, if a station has to cover a 200 metre distance from the station, then "the margin of error would be 180 or 220 [metres]".[976] He added that the influence between the predicted coverage and reality is only at the edges of this given cell.[977] He also added that, in the above-mentioned case, the actual coverage on the ground could reach "200 or 230 or 160" metres.[978]

[969] Prosecution Appeal Brief, paras 354, 357-358, 359, fn. 592, 360.
[970] Prosecution Appeal Brief, paras 358-360.
[971] Prosecution Appeal Brief, para. 359, fn. 592.
[972] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 16 February 2016, p. 26.
[973] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 16 February 2016, p. 78; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 21 April 2016, p. 32.
[974] Prosecution Appeal Brief para. 359, fn. 592.
[975] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 21 April 2016, p. 100.
[976] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 21 April 2016, p. 100.
[977] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 21 April 2016, p. 100; *see* also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 16 February 2016, p. 26.
[978] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 21 April 2016, p. 100.

461. Mr Philips explained that cell site analysis is based on best server coverage predictions, which contain an inherent degree of inaccuracy.[979] According to Mr Philips, despite the fact that cell site analysis cannot pinpoint the exact location of a mobile user, it provides an indication of the area in which the user is expected to have been at a particular time such that "[t]he likelihood to be in that area is extremely high, but it's not a hundred per cent".[980] Mr Philips advised that the area over which a certain cell is predicted to provide the best coverage (based on coverage maps) must be enlarged in order to describe its "actual" coverage. The purpose of expanding the area of coverage is to accommodate the potential inaccuracies of coverage predictions.[981] Mr Philips used the image below to illustrate the enlarged area that should be considered in relation to a cell: the inner yellow circle indicates the approximate expanded "actual" area of the predicted coverage of the cell coloured in brown. Mr Philips did not elaborate on which parameters he used to determine the enlarged area enclosed in the inner yellow circle.



From Exhibit P00500, slide 150 of Mr Philips' PowerPoint "Introduction to cell site analysis"

---

[979] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 19 August 2015, pp. 99-100; *see also* Exhibit P00549, Expert Report of J.E. Philips "An Introduction to Cell Site Analysis as Applied to GSM Networks" ("Cell Site Analysis Report"), p. 66.
[980] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 18 August 2015, p. 55. *See also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 19 August 2015, p. 100.
[981] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 20 August 2015, p. 66.

462 In light of PRH707 and Mr Philips's evidence, the Appeals Chamber does not agree with the Prosecution that the 60 to 70% estimate does not relate to either distance or overall surface area of best server coverage. PRH707's testimony substantially aligns with that of Mr Philips: both confirmed that the *area* of coverage for each cell should be expanded in order to account for potential inaccuracies of best server coverage predictions.[982] Consequently, when a mobile user activates a certain cell—the "best serving cell"—the area where the mobile user could have been, based on CDRs, is bigger than that covered by the best serving cell as shown on prediction maps.

463 However, we observe that the increase in surface area that Mr Philips indicated is marginal in comparison to the overall area of predicted coverage of the cell featured in the image above. Also marginal is the increase illustrated by PRH707, who testified that the "extra area" to be added outside the predicted area would amount to approximately 20% and could reach 30% of the area the cell is predicted to cover.[983] We emphasize that, when determining the area where a phone user was located at a relevant time, what is important to consider for present purposes is the "enlarged area", where relevant phone users "could have been" while connecting to certain cells.

464 Based on the evidence of both PRH707 and Mr Philips, we find it reasonable to infer that the surface area actually covered by a cell should be considered, at most, approximately 30% larger than the overall area predicted by the coverage maps, in order to accommodate the potential inaccuracy of the maps. In practical terms, this means that, when looking at the area

[982] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 20 August 2015, p. 66; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 21 April 2016, p. 100.

[983] According to PRH707, if a cell is projected to cover a surface area of 200 metres from the cell site station (we understand 200 metres "in each direction" to have a circular-shaped coverage), the area to be regarded as covered by that cell could be larger or smaller than a circle the diameter of which is 200 metres. Specifically, such an area could be as large as the area of a circle with a diameter of 220 metres or as small as the area of a circle with a diameter of 180 metres. The difference between the areas covered by the two circles is "the margin of error" of coverage maps. We note that the difference in area between the two circles with the diameters of 180 and 220 metres corresponds to 39.99% of the area covered by a circle the diameter of which is 200 metres. That surface area increases or reduces the area embraced by the cell's borders in such a way that, in the case of reduction of the actual from the predicted area, approximately 20% less lies within the area covered by the cell, while, in the case of increase, a further 20% lies outside that area. PRH707 advised that the actual coverage on the ground of the cell could reach 230 metres. In that case, the "extra area" lying outside the area covered would amount to a little over 30% of the area the cell is predicted to cover. *See* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 21 April 2016, p. 100.

covered by a cell on maps, the borders of that cell should be considered as slightly shifted towards the outside, as graphically shown by Mr Philips in his map above.[984]

465 We note that our conclusion is consistent with the Trial Chamber's finding that "Alfa's and Touch's cell site records are sufficiently reliable to be used for cell site analysis in generally determining the approximate location, movement and call patterns of mobiles" and thus "have the necessary probative value for this purpose".[985] Assigning a different meaning to the 60 to 70% accuracy estimate would contradict this finding. We see no reason to do so.

466 Lastly, we do not agree that the Trial Chamber's acknowledgment of PRH707's evidence—that removing 10% of the outer edge of a cell would render maps more accurate—is incompatible with its other finding that, for each cell, an expanded area should be considered to account for the inaccuracy of maps.[986] These two findings do not contradict each other because they answer two different questions. The first question considers from an *ex ante* perspective "what is the area in which a phone user has the highest probability of getting a signal from a certain cell". The second question considers from an *ex post* perspective "what is the area in which there is a reasonable possibility of getting a signal from a certain cell" in order to determine the overall area where a phone user could have been located when he or she activated the cell. We note that only the second proposition is of importance to the present analysis, as it aims to identify the overall area where the phone user could have been when making a call that activated a certain cell, rather than his or her most likely location.

467 We conclude that the Trial Chamber determined, correctly, that the inaccuracy of coverage maps has an impact on the overall surface area, and concurrently the distance, covered by a certain cell. However, in paragraph 4769 of the Trial Judgment, the Trial Chamber erred in determining the enlarged area where PRH075 could have been located, as it relied on incorrect parameters.

468 Based on the evidence of Philips and PRH707, the Trial Chamber should have considered the area covered by the two cells of interest to be, at most, approximately 30% larger than shown on the maps. Instead, the Trial Chamber adopted the impugned interpretation of the 60 to 70% accuracy estimate as set forth in paragraph 4769 of the Trial Judgment, which

---

[984] Exhibit P00500, PowerPoint of J.E. Philips "An Introduction to Cell Site Analysis as Applied to GSM Networks", slide 150.
[985] Judgment, para. 2143 (emphasis omitted).
[986] Prosecution Appeal Brief, para. 361.

yielded an unreasonably significant increase (in the area of 96%). This interpretation resulted in a miscalculation of the overall area where PRH075 could have been located when making the phone calls under scrutiny.

2. Whether, Owing to Its Misunderstanding of the 60 to 70% Accuracy Estimate, the Trial Chamber Erred in Interpreting Alfa Cell Site Evidence as to the Locations of Mr Oneissi and the User of Purple 018 on 14 February 2005

469 The Trial Chamber—in examining the predicted best server coverage maps of 14 February 2005, to determine where Mr Oneissi and Purple 018 could have been while connecting to the cells providing coverage to the payphones and the tree—stated that it would do so "conscious of the agreed technical standard of the sixty to seventy percent accuracy".[987]

470 According to the Prosecution, the Trial Chamber applied its erroneous understanding of PRH707's 60 to 70% accuracy estimate to its assessment of the activities of Mr Oneissi and Purple 018 on 14 February 2005, based on Alfa coverage maps.[988] The Prosecution invites the Appeals Chamber to correct this error of fact, reconsider the Trial Chamber's findings and Alfa cell site evidence from 14 February 2005 in light of this correction, and find that the evidence is sufficiently reliable to be used in determining the general location of Mr Oneissi and the user of Purple 018 on that day.[989] Counsel for Messrs Merhi and Oneissi submit that the Prosecution has failed to demonstrate that the Trial Chamber made the same miscalculations with respect to the activities of 14 February 2005.[990]

471 We see no basis for inferring that the Trial Chamber, in considering cell site evidence from 14 February 2005 relating to the activities of Mr Oneissi and Purple 018, adopted a radically different approach from that which it employed in paragraph 4769 of the Trial Judgment without offering any explanation for doing so. It is reasonable to infer that the Trial Chamber, in its calculation at paragraph 4769 of its Judgment, demonstrated how it understood the concept of the 60 to 70% accuracy estimate, which it then erroneously applied throughout the Judgment.

[987] Judgment, para. 5650.
[988] Prosecution Appeal Brief, para. 354, fn. 582.
[989] Prosecution Appeal Brief, para. 371.
[990] Merhi Response Brief, para. 394; Oneissi Response Brief, para. 181.

472 Consistent with its interpretation of the accuracy estimate expressed in that paragraph, we find that the Trial Chamber adopted the same erroneous understanding and application of the 60 to 70% accuracy estimate in its appraisal of Alfa cell site evidence on 14 February 2005 regarding the Purple Phones.

473 We conclude that, because of the above erroneous calculations, the areas identified by the Trial Chamber where Mr Oneissi and the user of Purple 018 could have been located at the relevant times were substantially larger than if the cell site analysis had been applied correctly. This affected the Trial Chamber's conclusion that the Purple Phone activity was too remote in time and place to demonstrate that Mr Oneissi and the user of Purple 018 were present at the payphones when the calls were made, were otherwise involved in the calls, or were located at the site of the video collection.

3. Whether the Alfa Cell Site Evidence is Sufficiently Reliable to Be Used in Determining the General Location of Mr Oneissi and the User of Purple 018 on 14 February 2005

474 The Trial Chamber found Alfas's cell site records to be "sufficiently reliable to be used for cell site analysis in generally determining the approximate location, movement and call patterns of mobiles",[991] despite acknowledging the limitations of best server coverage maps, stemming from the 60 to 70% accuracy estimate.[992] Consonant with this finding, and for the reasons set forth in Ground 7, we hold that the cell site evidence relevant to the Purple Phone activity on 14 February 2005 is sufficiently reliable to be used in determining the general locations of Mr Oneissi and the user of Purple 018 on that date.

475 Our assessment of the Trial Chamber's findings and Alfa cell site evidence relevant to the activity of the Purple Phones on 14 February 2005 follows in Sub-ground 8 (D).

D. Conclusion

476 We find that the Trial Chamber erred in fact in its assessment of the Alfa cell site evidence, which occasioned a miscarriage of justice.

477 For the foregoing reasons, Ground 6 is granted.

---

991 Judgment, para. 2143 (emphasis omitted).
992 Judgment, paras 2009-2010.

VIII. GROUND 7: WHETHER THE TRIAL CHAMBER ERRED IN FACT IN ITS ASSESSMENT OF MOBILE NETWORK CONGESTION ON 14 FEBUARY 2005

478. The Prosecution alleges that the Trial Chamber erred in fact in its assessment that the congestion on the Alfa mobile network on 14 February 2005 caused numerous calls to be redirected from the best serving cell to one of the neighbouring cells, through the mechanism of "directed retry".[993] The Prosecution claims that this error contributed to the Trial Chamber's erroneous finding that cell site evidence, used to place the Purple Phone users at particular cells in the aftermath of the attack, was unreliable.[994]

A. Submissions of the Parties

479. The Prosecution endeavours to distinguish between congestion of the Mobile Switching Centre ("MSC")[995] and congestion of a specific cell, arguing that the Trial Chamber erred by relying on evidence of congestion "when a single cell is congested, or overloaded", as opposed to evidence of congestion at the MSC-level, as occurred on 14 February 2005.[996] According to the Prosecution, directed retry only occurs in the event of congestion of a specific cell, but not—as erroneously concluded by the Trial Chamber—in the event of congestion at the MSC-level.[997] To support its argument, the Prosecution points to the testimony of Witness PRH707, who stated that directed retry would not be an effective solution for MSC-level congestion "as the MSC does not differentiate between one cell and another".[998] Furthermore, the Prosecution submits that the evidence showed MSC-level congestion, but "[did] not record congestion on a single individual Alfa cell relevant to the evidence of Purple Phone activity on 14 February

---

993 Mobile networks normally record the best serving cell activated at the start and, for some companies including Alfa, at the end of a phone call on Call Data Records ("CDRs"). The best serving cells are those providing the strongest signal over the area where the phone user is located. Typically, the best serving cell is the one located closest to where the call was placed. Knowledge of which cells were activated during a call is thus key, as it provides an indication of the general area in which the phone user was most likely located. In some cases, cells other than the best serving cell are recorded on the CDR. One instance where this may happen is when a mechanism called "directed retry" occurs. Directed retry occurs when the best serving cell is overloaded and then allows the call to be connected via an alternative cell. As a result, when directed retry occurs, the best serving cell is not activated, and the cell in which the caller was physically located would therefore remain unknown. *See* Cell Site Analysis Report, pp. 32, 92, 167; Judgment, paras 1695, 1749; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 26 August 2015, p. 24.

994 Prosecution Appeal Brief, para. 373.

995 The MSC is a fundamental component of telecommunication networks, responsible for connecting calls within the network (including handling call placement and routing) and creating the CDRs. *See* Judgment, para. 1583.

996 Prosecution Appeal Brief, para. 375.

997 Prosecution Appeal Brief, para. 372.

998 Prosecution Appeal Brief, para. 378 (footnotes omitted).

2005"[999] or that the congestion was greater at a location "closer to the crime scene than elsewhere in Beirut or anywhere else in Lebanon".[1000] The Prosecution further argues that evidence of witnesses' inability to connect calls on 14 February 2005 does not support the Trial Chamber's conclusion that numerous calls succeeded, but were redirected.[1001]

480 According to the Prosecution, this allegedly erroneous assessment of the impact of the Alfa network congestion led the Trial Chamber to determine the location of Mr Oneissi and the user of Purple 018 on 14 February 2005 as if they were in an area stretching beyond the predicated coverage area of the best serving cell.[1002] The Prosecution alleges that this, in turn, contributed to the Chamber's allegedly erroneous conclusion that:

> the Purple mobile activity highlighted by the Prosecution is too remote in time and distance to demonstrate that the Accused were present at the payphones when the calls were made, were otherwise involved in the calls, or were located at the site of the video collection.[1003]

481 The Prosecution thus requests that the Appeals Chamber correct the alleged error of fact regarding the assessment of the impact of the Alfa network congestion and reconsider the Trial Chamber's findings and evidence on the location of Mr Oneissi and the user of Purple 018 on 14 February 2005.[1004]

482 According to Counsel for Mr Merhi, the Trial Chamber's conclusion that calls were necessarily redirected to other cells due to the network congestion of 14 February 2005 was reasonable and based on the evidence.[1005] Counsel for Mr Merhi argue that the Prosecution's arguments are flawed for several reasons. First, the evidence of PRH707 and of Mr Philips supports the Chamber's conclusion that the Alfa network had redirected numerous calls to neighbouring cells on 14 February 2005.[1006] Second, the Prosecution distorts the evidence when it argues that, according to PRH707, directed retries did not represent an effective solution to the level of congestion suffered by the networks on 14 February 2005.[1007] Third, while attempting to differentiate congestion at the MSC-level from congestion at the individual

---

999 Prosecution Appeal Brief, paras 377, 381.
1000 Prosecution Appeal Brief, para. 379.
1001 Prosecution Appeal Brief, para. 380.
1002 Prosecution Appeal Brief, paras 383-384.
1003 Prosecution Appeal Brief, para. 384, *citing* Judgment, para. 5691.
1004 Prosecution Appeal Brief, para. 385.
1005 Merhi Response Brief, para. 413.
1006 Merhi Response Brief, para. 408.
1007 Merhi Response Brief, para. 409.

cell-level, the Prosecution fails to acknowledge that, if the MSC is congested, the cells served by it necessarily undergo a significant level of saturation, triggering directed retry at the individual cell-level.[1008] Lastly, the Prosecution's argument that no evidence demonstrates that the cells relevant to the case were congested is unfounded; proof that all MSCs in the network were congested means that the cells were themselves congested, which increased the possibilities of directed retry.[1009] Because the networks were severely congested on the afternoon of 14 February 2005, including the cells relevant to the case, Counsel for Mr Merhi conclude that the reliability of the cellular data was necessarily affected.[1010]

487 According to Counsel for Mr Oneissi, Ground 7 should be summarily dismissed because it lacks the potential to result in the revision or reversal of Mr Oneissi's acquittal.[1011] They argue that the Prosecution's arguments are contradicted by PRH707's testimony that the Alfa network would have experienced more directed retries on the afternoon of 14 February 2005 than in normal circumstances.[1012] Counsel for Mr Oneissi further submit that Ground 7 does not meet the standard of unreasonableness as the Prosecution has failed to demonstrate that no reasonable trial chamber could have concluded that there would have been numerous directed retries on 14 February 2005.[1013] Moreover, Counsel for Mr Oneissi argue that the Prosecution's emphasis on "MSC-level congestion" is misguided[1014] and that its argument that the technical evidence did not show that congestion was greater in locations closer to the crime scene than elsewhere in Beirut is "misleading".[1015] Lastly, Counsel for Mr Oneissi submit that Ground 7 does not occasion a miscarriage of justice because, even if the Trial Chamber erred as pleaded in Grounds 6 and 7, reversal of the impugned findings would not impact the Trial Chamber's acquittal of Mr Oneissi—for three reasons.[1016] First, granting Ground 7 (or Ground 6) would not meaningfully impact the Trial Chamber's finding that cell site evidence was not sufficiently reliable to make conclusions as to Mr Oneissi's precise locations.[1017] Second, a reversal of the impugned findings would not cure the failure of the Prosecution to prove its case with regard to Mr Oneissi's pleaded role in the dissemination

[1008] Merhi Response Brief, para. 411.
[1009] Merhi Response Brief, para. 414.
[1010] Merhi Response Brief, para. 415.
[1011] Oneissi Response Brief, paras 184-185.
[1012] Oneissi Response Brief, paras 186-188.
[1013] Oneissi Response Brief, paras 190-192.
[1014] Oneissi Response Brief, paras 193-194.
[1015] Oneissi Response Brief, para. 195.
[1016] Oneissi Response Brief, para. 196.
[1017] Oneissi Response Brief, paras 197-199.

of the false claim.[1018] Third, a reversal would not affect the broader failure of the Prosecution to prove its case against Mr Oneissi, specifically in relation to his *mens rea*.[1019]

484 In reply, the Prosecution submits that the logic of directed retries is the network redirecting a call from a congested cell to a non-congested neighbouring cell "if the second [cell] has the capacity to take the call".[1020] However, the Prosecution submits that the evidence relied on by Counsel for Mr Oneissi to argue that directed retries take place in case of network congestion does not relate to the network congestion on 14 February 2005, nor to an MSC-level congestion more generally.[1021] Rather, contrary to the submissions of Counsel for Mr Merhi, PRH707's testimony demonstrates that, when the MSCs reach maximum capacity, directed retries will no longer occur—nor will the MSC be able to take any more calls—until another call is first ended.[1022]

B. Trial Chamber Findings

485 The Trial Chamber found that, in exceptional circumstances, such as when cells are overloaded, networks may allocate calls into cells other than the best serving cells.[1023] According to the Trial Chamber, when the best serving cell is congested, the problem is solved in one of two ways, depending on each network's policy: either by redirecting the call into one of the six neighbouring cells through a mechanism called "directed retry" or by deciding not to allocate the call into any cell until the best serving cell is again available.[1024] When directed retry occurs, a call from a congested cell would be redirected into one of the six neighbouring cells, which lies in the same general area and shares the area of best server coverage with the best serving cell.[1025]

486 The Trial Chamber found that the Alfa network experienced substantial congestion on the afternoon of 14 February 2005 due to the explosion.[1026] In particular, all six Alfa network MSCs were affected by the congestion.[1027] The Trial Chamber also received evidence from a

[1018] Oneissi Response Brief, para. 200.
[1019] Oneissi Response Brief, para. 201.
[1020] Prosecution Reply Brief, para. 113.
[1021] Prosecution Reply Brief, paras 115-116.
[1022] Prosecution Reply Brief, paras 114, 117, 121.
[1023] Judgment, paras 1687, 1689, 5551.
[1024] Judgment, paras 1691-1692, 1695. *See also id.* at paras 1763-1764.
[1025] Judgment, para. 1695. *See also id.* at para. 5551.
[1026] Judgment, paras 1689, 5546-5548, 5560.
[1027] Judgment, para. 5549.

number of victims and witnesses that their calls did not connect because the mobile networks were down on the afternoon of the attack.[1028]

487 The Trial Chamber acknowledged PRH707's testimony that, even though directed retries occur in "no more than two per cent of cases", in situations of network congestion, such as in the aftermath of Mr Hariri's assassination, they would be "more numerous".[1029] However, it found that it was "impossible to determine the extent of directed retries from call data records alone".[1030]

488 The Trial Chamber found that, due to the congestion, the Alfa network would have attempted to route calls from the best serving cell to a neighbouring one[1031] or "around the network cells".[1032] It further found that, "in cases of large scale congestion, such as on the afternoon of the attack on Monday 14 February 2005", it could be expected that—as a result of all six neighbouring cells also being congested—"the next best serving cell to which a redirected call would connect would be further away than the six neighbouring cells".[1033] According to the Trial Chamber, the fact that "numerous calls would have been redirected around the network cells"[1034] necessarily affected the reliability of the cell site evidence for the afternoon of 14 February 2005.[1035] Specifically, the Trial Chamber concluded that the congestion must have affected the reliability of the evidence relating to "whether the mobiles used by Mr Oneissi and Mr Sabra were connecting to the best serving cell or to one of six neighbouring cells, or […] *to other cells*".[1036]

C. Discussion

1. Whether More Directed Retries Occurred Due to the Alfa Network Congestion on 14 February 2005

489 To determine whether the Trial Chamber erred in its assessment of the Alfa network congestion on 14 February 2005, we will now discuss the evidence that the Trial Chamber

---

1028 Judgment, paras 5552-5553.
1029 Judgment, para. 1750.
1030 Judgment, para. 5561.
1031 Judgment, para. 5561.
1032 Judgment, para. 5562.
1033 Judgment, para. 2126.
1034 Judgment, para. 5562.
1035 Judgment, para. 5563.
1036 Judgment, para. 5563 (emphasis added).

received on directed retry from Mr Philips and the representative of the Alfa network, Witness PRH707.

490 Mr Philips explained that, in case of cell overload, a call may be allocated to a cell other than the best serving cell through directed retry, rather than the network failing to connect the call at all.[1037] He mentioned a few situations in which an unexpected peak of calls might lead to a cell overload and therefore to directed retries, including a car accident, a concert, and a football match.[1038] Asked about the network congestion on 14 February 2005—specifically, whether the incident "could have caused *havoc* with the phone networks"[1039]—he answered that he could "guess, without any knowledge" that network congestion would be centred around the area of the explosion.[1040]

491 Witness PRH707 explained that directed retry operates for congestion occurring for a short period of time, such as annual events or unexpected heavy road traffic.[1041] He stated that the purpose of directed retry was to give "another opportunity for a mobile [phone] in case it wasn't able to connect to the best-serving cell or station", by enabling it to use a cell that is not very far from the best serving cell, provided that the alternate cell has the capacity to take the call.[1042] He explained that, in the event of directed retry, the data recorded on the Call Data Records ("CDRs") will *not* correspond to the best serving cell, but instead to the cell to which the call was redirected.[1043]

492 Witness PRH707 also gave specific testimony on the congestion that affected the Alfa network on 14 February 2005 and introduced the concept of MSC-congestion as follows:

> When we have, for example, an explosion like the explosion that happened on [14 February 2005], the MSCs will face congestion and they will not be able to take all the calls that are coming to the station. This is what we call the congestion on the MSC. This does not mean that the MSC has stopped working, but this means that the MSC, because of the volume of numbers that [is] being received[,] is bigger than […] the capacity of the MSC.[1044]

[1037] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 20 August 2015, pp. 45-48, 50-52.
[1038] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 20 August 2015, pp. 46-47.
[1039] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 26 August 2015, p. 51 (emphasis added).
[1040] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 26 August 2015, p. 51.
[1041] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 12 February 2016, p. 69.
[1042] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 12 February 2016, p. 59.
[1043] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 12 February 2016, p. 64.
[1044] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 25 July 2016, p. 47.

493 Witness PRH707 explained the need to differentiate "between the congestion on the network or on a station and the congestion over one MSC".[1045] He pointed out that directed retry would not be useful in the case of congestion at the MSC-level because the MSCs had reached maximum capacity and explained that, in those specific circumstances, for a phone call to connect, another one should first end.[1046] Specifically, he testified that, in case of MSC-level congestion:

> The redirect retry will not be useful. […] Any additional phone call will have to wait for the end of the previous call to be able to activate the MSC. […] [W]hen we reach the maximum capacity at the MSC, we will not be able to benefit from [directed retry]. We reach the maximum capacity of the MSC, meaning that the network will not be able to take any more calls unless someone will end his or her call. […] The MSC will not differentiate between one station and the other.[1047]

494 In response to a question from Counsel for Mr Oneissi on "handovers", PRH707 stated that he did not exactly know what "handover" meant.[1048] He assumed it was a phenomenon by which "the phone call will go to another station" and reiterated that, in such a situation, the network would not be able to take any more calls unless someone first ended his or her call because "[t]he MSC will not differentiate between one station and the other."[1049] In the same context, when asked whether there could have been many more "overload handovers" or "quality handovers" than in a normal day on 14 February 2005, PRH707 answered that during such congestion "[l]ogically these cases will be more numerous".[1050]

495 Witness PRH707 gave evidence on the "Alfa trouble data extract"[1051] produced by his company, which recorded the power failures on the Alfa network on 14 February 2005. Failures were recorded on all six Alfa MSCs and in several cells. PRH707 specified that congestion on the network was not limited only to Beirut, but extended to all other regions.[1052]

[1045] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 25 July 2016, p. 60.
[1046] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 25 July 2016, p. 53.
[1047] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 25 July 2016, p. 53. *See also id.* at p. 49.
[1048] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 25 July 2016, pp. 52-53.
[1049] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 25 July 2016, p. 53.
[1050] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 25 July 2016, pp. 56-57.
[1051] Exhibit 4D00263, Alfa "Trouble data".
[1052] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 25 July 2016, pp. 49-52.

496 The Trial Chamber also received evidence from VPPs and several other witnesses stating that calls placed after the explosion on 14 February 2005 generally did not connect.[1053] If they did connect, the line was cut at some point after connecting.[1054]

497 The Appeals Chamber observes that the foregoing evidence supports the conclusion that, in case of MSC-level congestion, calls would not be connected until a previous call had ended, rather than such calls being re-directed. We also observe that PRH707 testified that, due to the congestion, more numerous "handover[s]"—not "directed retr[ies]", as incorrectly submitted by Counsel for Mr Oneissi[1055]—would have occurred on 14 February 2005,[1056] even though PRH707 admitted that he did not know the definition of the term "handover".[1057] We recall that "handover" is a mechanism distinct from directed retry and was discussed by Witness PRH705, the representative of Touch, the other Lebanese telecommunication provider.[1058] While it is possible that PRH707 equated the term "handover" to the term "directed retry", the uncertainty on this critical passage of PRH707's testimony casts doubt on its reliability. The fact that PRH707, in another passage of his testimony, distinguished between "redirect[ed] retry" and "handover"—referring to them as two separate mechanisms—adds to such ambiguity.[1059] To compound the uncertainty arising from the above, PRH707 made only a brief reference to "handovers" being more numerous on 14 February 2005, without elaborating further.[1060]

498 Based on the evidence on the record, the Appeals Chamber is thus unable to conclusively find that the Alfa network redirected more calls than usual from the best serving cell to other cells on 14 February 2005.[1061] However, we find that the actual occurrence of directed retry is irrelevant to the present issue of whether cell site analysis on 14 February 2005 is sufficiently reliable. Instead, we need only assess the *possible impact* of directed retry on

---

[1053] Judgment, paras 5552-5553.
[1054] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 7 July 2015, pp. 77-78.
[1055] *See* Oneissi Response Brief, para. 191.
[1056] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 25 July 2016, p. 57.
[1057] *See* STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 25 July 2016, p. 53.
[1058] PRH705 explained that handover moves an existing call to a different cell to make room for other calls, rather than allocating a cell different from the best serving cell *from the start of the call* (as in case of directed retry). In terms of data recorded on CDRs, a clear difference between handover and directed retry emerged from PRH705's testimony. While in the case of directed retry the CDRs record the neighbouring cell to which the call has been redirected, in the case of handover, the CDRs record the first cell on which the call was established, *i.e.*, the cell providing actual coverage. That is why PRH705 specified that handover "should be *transparent* for the CDR". *See* STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 6 May 2016, pp. 13-14 (emphasis added).
[1059] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 25 July 2016, p. 53.
[1060] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 25 July 2016, p. 57.
[1061] *See* Judgment, para. 5561.

cell site analysis—especially, as here, when it is used to show a pattern of movements as opposed to single activations—for reasons discussed in the following section.

2. Whether the 14 February 2005 Alfa Cell Site Evidence Is Sufficiently Reliable to Be Used in Determining the General Location of Mr Oneissi and the User of Purple 018 on That Day

499 Mr Philips testified that, when directed retry occurs, "the next best cell" allocated by the network must be one of six neighbouring cells, *i.e.*, the cells in the "general vicinity" of the best serving cell.[1062] As explained by Mr Philips, the call must be directed to one of the six neighbouring cells because those are the only cells the mobile has measured and reported to the network as available.[1063] In an urban area, the best serving cell and the next best cell would be close to one another and "have overlapping coverage by definition".[1064]

500 Relying on Mr Philips's evidence, the Trial Chamber found that, in Beirut, the redirection of a call has "limited impact"[1065] on the prediction of a mobile's location because the neighbouring cells are contained "within a relatively small area".[1066] Mr Philips explained that, in the event of redirection, in order to determine the location of the mobile, the range of its approximate location should be expanded to encompass all seven cells—the best serving cell and the six neighbouring cells surrounding it.[1067] Even after this expansion, the general area in which the mobile is likely to be located does not change.[1068]

501 We note that PRH707 clarified that the best serving cell and the cell to which a call will be redirected lie "within the same area of coverage".[1069] Moreover, the second cell, to which a call is redirected, belongs to a determined list of cells that usually surround the cell that is not able to take the call.[1070]

1062 STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 20 August 2015, p. 51.
1063 STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 20 August 2015, p. 51; *see also id.* at p. 55.
1064 STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 20 August 2015, p. 51.
1065 Judgment, para. 2093.
1066 Judgment, para. 2090; *see also* STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 20 August 2015, pp. 65-66.
1067 STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 20 August 2015, p. 56.
1068 STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 20 August 2015, pp. 56-57, 64-65.
1069 STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 12 February 2016, p. 59.
1070 STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 12 February 2016, p. 59; *see also* STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 12 February 2016, p. 63; STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 22 April 2016, pp. 35-36.

502. Based on the testimonies of Mr Philips and PRH707, we find that the redirection of a call within an urban environment may not have a disruptive effect on cell site analysis, as the general area in which the mobile user is likely located does not change.[1071] Such is the case here. The evidence does not support the Trial Chamber's finding that, in case of redirection of a call in a situation of network congestion, the network would redirect the call "around the network cells"[1072] and that the "next best serving cell" would be "further away than the six neighbouring cells".[1073] Nor does it support the Trial Chamber's finding that Mr Oneissi and the user of Purple 018 could have been in any of the six neighbouring cells—*or cells adjacent to these*—when they made the relevant calls in the afternoon of 14 February 2005.[1074]

503. The Trial Chamber found that cell site records were "sufficiently reliable to be used for cell site analysis",[1075] *despite* the occurrence of the directed retry phenomenon and *despite* the fact that no data or statistics relating to the frequency of directed retries were received by the Trial Chamber.[1076] We find no reason to depart from the above findings, as the evidence plainly supports them.

504. The Appeals Chamber thus concludes that, even if directed retries were more numerous in the afternoon of 14 February 2005 than in normal days, cell site analysis would still be reliable to show the general locations and pattern of movements emerging from multiple phone activations. We therefore hold that the Trial Chamber erred when it found that the congestion—in combination with the inaccuracy of maps—fatally undermined the reliability of the cell site evidence for the afternoon of 14 February 2005.[1077]

D. Conclusion

505. We find that the Trial Chamber erred in fact in its assessment of the impact of the Alfa network congestion on cell site analysis, which occasioned a miscarriage of justice.

506. For the foregoing reasons, Ground 7 is granted to the extent that cell site analysis on 14 February 2005 was sufficiently reliable to prove general locations and movements.

[1071] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC, Transcript of 20 August 2015, pp. 56-57, 65.
[1072] Judgment, para. 5562.
[1073] Judgment, para. 2126.
[1074] Judgment, para. 5652.
[1075] Judgment, para. 2143.
[1076] Judgment, paras 5561, 1750.
[1077] Judgment, para. 5859.

IX. SUB-GROUND 8 (D): WHETHER THE TRIAL CHAMBER ERRED IN FACT, AS NO REASONABLE CHAMBER COULD HAVE FAILED TO FIND THAT MESSRS MERHI AND ONEISSI AND THE USER OF PURPLE 018 DISSEMINATED THE FALSE CLAIM OF RESPONSIBILITY GIVEN THE TOTALITY OF THE EVIDENCE

A. Submissions of the Parties

507 The Prosecution, in addition or in the alternative to the other sub-grounds of appeal, submits that the Trial Chamber erred in fact when it did not find that Messrs Merhi and Oneissi and the user of Purple 018 disseminated the false claim of responsibility.[1078] In particular, the Prosecution challenges the Trial Chamber's findings with respect to: (a) the movements and call patterns of the Purple Phones on 14 February 2005;[1079] (b) the simultaneous deactivation of the Purple Phones;[1080] (c) the simultaneous inactivity of the Purple Phones on the day Mr Abu Adass disappeared;[1081] (d) the activities of the Purple Phones during the COLA phase;[1082] and (e) the connections between the Purple Phones and Mr Ayyash.[1083] According to the Prosecution, when the evidence is considered in its totality, the only reasonable inference available is that "the Purple Phones were coordinated and working in tandem between the start of the COLA phase on 29 December 2004 and the simultaneous discarding of their phones on 15–16 February 2005 [and that] they were working together on the delivery of the false claim [of responsibility]."[1084] The Prosecution argues that no reasonable trial chamber could have reached a contrary conclusion.[1085]

508 The Prosecution thus requests that the Appeals Chamber correct the errors of fact made by the Trial Chamber and find that Messrs Merhi and Oneissi and the user of Purple 018 disseminated the false claim of responsibility on 14 February 2005.[1086] Furthermore, the Prosecution requests that the Appeals Chamber set aside the Trial Chamber's alternative inference that Mr Oneissi may have lacked advance knowledge of the assassination.[1087]

[1078] Prosecution Appeal Brief, para. 442.
[1079] Prosecution Appeal Brief, paras 444-449.
[1080] Prosecution Appeal Brief, paras 450-452.
[1081] Prosecution Appeal Brief, paras 453-455.
[1082] Prosecution Appeal Brief, paras 456-459.
[1083] Prosecution Appeal Brief, paras 460-461.
[1084] Prosecution Appeal Brief, para. 442. *See also id.* at paras 462-464.
[1085] Prosecution Appeal Brief, para. 465.
[1086] Prosecution Appeal Brief, para. 467.
[1087] Prosecution Appeal Brief, para. 467.

509 Counsel for Mr Merhi argue that the Trial Chamber's analysis concerning the dissemination of the false claim of responsibility is reasonable.[1088] They challenge the Prosecution's argument that Mr Merhi personally disseminated the false claim of responsibility.[1089] They claim that the Prosecution may not rely on the weaknesses of its own investigation to mould its case depending on how the evidence unfolds.[1090] In Counsel for Mr Merhi's view, the Prosecution merely repeats arguments that failed at trial and seeks to introduce new items of evidence without demonstrating that the Trial Chamber committed an error or was unreasonable in its assessment of the evidence.[1091]

510 Counsel for Mr Merhi challenge the Prosecution's submissions that the Trial Chamber erred in its analysis of: (a) the activities of the Purple Phones on 14 February 2005;[1092] (b) the deactivation of the Purple Phones;[1093] (c) the inactivity of the Purple Phones on 16 January 2005;[1094] (d) the activities of the Purple Phones during the COLA phase;[1095] and (e) the connections between the Purple Phones and Mr Ayyash.[1096] Counsel for Mr Merhi therefore submit that the Prosecution has not demonstrated that the only reasonable inference available from the evidence is that Mr Merhi disseminated the false claim of responsibility.[1097]

511 Counsel for Mr Oneissi submit that the Prosecution improperly relies on additional evidence—specifically, a series of maps portraying the Prosecution's allegations regarding the movements of the users of Purple 095 and Purple 018 on 14 February 2005—"despite having failed to seek leave from the Appeals Chamber to do so, pursuant to Rule 186".[1098] Counsel for Mr Oneissi also claim that Sub-ground 8 (D) should be summarily dismissed because the Prosecution ignores critical adverse findings of the Trial Chamber and simply repeats arguments that did not succeed at trial—in particular, those involving: (a) the telecommunication activity on 14 February 2005;[1099] (b) the deactivations of the Purple

[1088] Merhi Response Brief, p. 141.
[1089] Merhi Response Brief, paras 519-521.
[1090] Merhi Response Brief, para. 522, *citing Ntagerura et al.* Appeal Judgment, para. 27 and *Kupreškić et al.* Appeal Judgment, para. 92.
[1091] Merhi Response Brief, paras 523-525, 528, 536.
[1092] Merhi Response Brief, paras 527-530.
[1093] Merhi Response Brief, para. 531.
[1094] Merhi Response Brief, paras 532-533.
[1095] Merhi Response Brief, paras 534-538.
[1096] Merhi Response Brief, paras 539-544.
[1097] Merhi Response Brief, paras 545-549.
[1098] Oneissi Response Brief, para. 286. *See also id.* at paras 287-292.
[1099] Oneissi Response Brief, para. 297.

Phones;[1100] (c) the inactivity of the Purple Phones;[1101] (d) the COLA phase allegations;[1102] and (e) the contacts between the personal mobiles of Messrs Merhi and Ayyash[1103]—without demonstrating that the Trial Chamber erred in rejecting them.[1104] Counsel for Mr Oneissi assert that, in doing so, the Prosecution is seeking an impermissible *de novo* review of select aspects of the trial record.[1105]

512. Counsel for Mr Oneissi challenge the Prosecution's argument that the Trial Chamber erred in finding that Mr Oneissi's involvement in the dissemination of the false claim of responsibility was not proved.[1106] They also argue that the Prosecution has not demonstrated that the alleged errors occasioned a miscarriage of justice, as the evidence at trial was insufficient to sustain positive findings of the *actus reus* and *mens rea* for the charges in Counts 1 and 6–9 of the Amended Consolidated Indictment.[1107]

513. The Prosecution, in reply, maintains that Mr Merhi coordinated the dissemination of the false claim of responsibility.[1108] The Prosecution points out that the maps in its Appeal Brief do not constitute new evidence[1109] and that it is permissible to demonstrate the error in the Trial Chamber's analysis of the COLA phase through calculations made on the basis of the evidence.[1110]

B. Trial Chamber Findings

514. The Trial Chamber found that the Prosecution had not proved beyond reasonable doubt that Messrs Merhi and Oneissi and the user of Purple 018 participated in the false claim of responsibility for the attack on Mr Hariri.[1111] In particular, the Trial Chamber was unable to make positive findings, *inter alia*, as to whether: (a) the activity of Mr Merhi's Purple 231, Mr Oneissi's Purple 095, and Purple 018 showed that Messrs Merhi and Oneissi and the user of Purple 018 participated in the disappearance of Mr Abu Adass; (b) the connections between

---

[1100] Oneissi Response Brief, para. 298.
[1101] Oneissi Response Brief, para. 299.
[1102] Oneissi Response Brief, para. 300.
[1103] Oneissi Response Brief, para. 301.
[1104] Oneissi Response Brief, paras 293-294, 296, 303.
[1105] Oneissi Response Brief, para. 302. *See also id.* at paras 304, 307.
[1106] Oneissi Response Brief, para. 308.
[1107] Oneissi Response Brief, paras 309-311.
[1108] Prosecution Reply Brief, para. 150.
[1109] Prosecution Reply Brief, paras 151-154.
[1110] Prosecution Reply Brief, paras 155-156.
[1111] Judgment, para. 5862.

Messrs Merhi and Ayyash were linked to the development of the false claim of responsibility; and (c) the activity of the Purple Phones on 14 February 2005 and their simultaneous deactivation in the following days connected Messrs Merhi and Oneissi and the user of Purple 018 to the attack.[1112]

C. Discussion

515 The Prosecution maintains that the only reasonable inference available from the totality of the evidence is that Messrs Merhi and Oneissi and the user of Purple 018 disseminated the false claim of responsibility, as there is no other reasonable alternative inference that would fit the evidence.[1113] The Prosecution also contends that the only reasonable inference available from the totality of the evidence is that Mr Oneissi had advance knowledge of the assassination of Mr Hariri.[1114] In the Prosecution's view, no reasonable trial chamber could reach a contrary conclusion.[1115]

516 The Appeals Chamber observes that the evidence relied upon by the Prosecution to demonstrate that Messrs Merhi and Oneissi and the user of Purple 018 disseminated the false claim of responsibility mainly consists of telecommunication evidence regarding: (a) the movements and call patterns of the Purple Phones on 14 February 2005 and in the preceding weeks, as well as their simultaneous deactivation after the attack;[1116] and (b) the connections between the Purple Phones and Mr Ayyash.[1117] The Appeals Chamber will now turn to review the findings of the Trial Chamber on this evidence in order to assess their reasonableness.

1. The Movements and Call Patterns of the Purple Phones on 14 February 2005

517 The Prosecution argues that the movements and call patterns of the Purple Phones on 14 February 2005 support the conclusion that Mr Oneissi and the user of Purple 018 were involved in the dissemination of the false claim of responsibility and that Mr Merhi coordinated the false claim of responsibility.[1118] The Prosecution points to the fact that Mr Oneissi and the user of Purple 018, in the aftermath of the attack, set out on a similar tour of Beirut that brought

---

[1112] *See, e.g.,* Judgment, paras 5315-5316, 5468, 5537, 5682, 5689, 5691, 5815-5818, 5861, 6861.
[1113] Prosecution Appeal Brief, paras 462-464.
[1114] Prosecution Appeal Brief, para. 467.
[1115] Prosecution Appeal Brief, para. 465.
[1116] Exhibit P00527; Exhibit P01223; Exhibit P01221; Exhibit P01793; Exhibit P01934.
[1117] Exhibit P00527; Exhibit P01889.
[1118] Prosecution Appeal Brief, para. 444.

at least one of them near each of the payphones used for the phone calls to *Reuters* and *Al-Jazeera* and the tree where the videotape of the false claim was collected.[1119] To demonstrate this, the Prosecution included in its Appeal Brief four maps showing the predicted best server coverage for the cells activated by Messrs Merhi and Oneissi and the user of Purple 018 at different stages of the afternoon after the attack;[1120] the location of the four payphones and the tree;[1121] and the Prosecution's allegations regarding the movements of Mr Oneissi and the user of Purple 018 after the attack.[1122] Counsel for Messrs Merhi and Oneissi contend that the maps constitute new evidence on which the Prosecution relies, without having sought and obtained leave from the Appeals Chamber to do so, pursuant to Rule 186.

518 The Appeals Chamber notes that the predicted best server coverage for the cells is shown in an atlas of relevant cell sectors that was tendered into evidence by the Prosecution and admitted as Exhibit P01152. We also note that the locations of the payphones and tree are mapped in the Judgment at paragraph 4836, while the shape files for each of the cell sites are mapped at paragraphs 3460, 3887, 5571, 5576, 5587, and 5607.[1123] We are of the view that the maps included in the Prosecution Appeal Brief constitute a visual aid provided by the Prosecution. The visual aid incorporates the predicted coverage areas for the relevant cells as shown in Exhibit P01152 and the locations of the payphones, tree, and cells—as mapped in the Judgment. The Appeals Chamber therefore finds that, contrary to the submissions of Counsel for Messrs Merhi and Oneissi, the maps do not constitute new evidence.

519 Turning to the movements and call patterns of the Purple Phones on 14 February 2005, we observe that the Prosecution relies upon the Call Sequence Tables ("CSTs") for Mr Merhi's Purple 231, Mr Oneissi's Purple 095, and Purple 018 to prove that Mr Oneissi and the user of Purple 018 were coordinated by Mr Merhi and involved in the dissemination of the false claim.

520 The Appeals Chamber notes that the CST for Mr Merhi's Purple 231 shows that on 14 February 2005 Mr Merhi made six phone calls and received three phone calls and one SMS message.[1124] In all instances, Purple 231 activated SFEIR3.[1125] Conversely, the CST for

[1119] Prosecution Appeal Brief, para. 445.
[1120] Prosecution Appeal Brief, pp. 156, 158, 161, 163.
[1121] Prosecution Appeal Brief, pp. 156, 158, 161, 163.
[1122] Prosecution Appeal Brief, pp. 163.
[1123] The Appeals Chamber notes that the Trial Chamber received evidence on the shape files and the software that displayed them. *See* Judgment, paras 1660, 1869; Exhibit P00592.1.
[1124] Exhibit P00527, pp. 116-117.
[1125] Exhibit P00527, pp. 116-117.

Mr Oneissi's Purple 095 indicates that on 14 February 2005 Mr Oneissi made four phone calls and received seven phone calls and seven SMS messages.[1126] Purple 095 successively activated SFEIR3, CBOURJ3, SABRA3, GHOBAI3, GHOBAI2, CBOURJ3 (again), SIMON1, OUZAI3, BNPI3, SFEIR3 (again), and BRAJNE3.[1127] Similarly, the CST for Purple 018 shows that on 14 February 2005 the user of Purple 018 made seven phone calls and received 11 phone calls and one SMS message.[1128] Purple 018 successively activated SFEIR3, MIKAEL2, BACHA2, SFEIR3 (again), SABRA3, GHOBAI3, CHATIL1, GHOBAI3 (again), SPEARS3, ZOUKAK2, SPEARS3 (again), ETOILE2, MARTYR1, BNPI3, CBOURJ3, OGER3, CELTEC2, OUZAI2, OUZAI3, SFEIR3 (again), and SFEIR2.[1129] The CSTs for Purple 231, Purple 095, and Purple 018 show that, in the hours following the assassination of Mr Hariri, Purple 018 communicated almost exclusively with Mr Merhi's Purple 231 and Mr Oneissi's Purple 095.[1130]

521 The Appeals Chamber also notes that the Trial Chamber found that:

(a) SFEIR3 provided predicted best server coverage to an area northeast of Mr Merhi's home in Bourj-El-Barajneh where Mr Merhi allegedly had his workplace;[1131] on 14 February 2005, SFEIR3 was activated by Purple 018 at 13:33, by Mr Oneissi's Purple 095 at 13:46 and 16:32, and by Mr Merhi's Purple 231 at 14:03, 14:37, 15:53, 15:55, 16:00, 17:15, and 17:24.[1132]

(b) GHOBAI3 and CHATIL1 provided predicted best server coverage to an area southeast of the first and second payphone, from which the call to *Reuters* and the first call to *Al-Jazeera* were made at 14:11 and 14:19, respectively;[1133] GHOBAI3 was activated by Purple 018 at 14:03 and 14:36 and by Mr Oneissi's Purple 095 at 14:38,[1134] while CHATIL1 was activated by Purple 018 at 14:03.[1135]

[1126] Exhibit P01223, pp. 280-281.
[1127] Exhibit P01223, pp. 280-281.
[1128] Exhibit P01221, pp. 291-292.
[1129] Exhibit P01221, pp. 291-292.
[1130] Exhibit P00527, pp. 116-117; Exhibit P01223, pp. 280-281; Exhibit P01221, pp. 291-292.
[1131] Judgment, paras 3460, 3604. *See also* Exhibit P01152, pp. 769-770.
[1132] Judgment, paras 5567, 5569, 5573, 5583, 5592, 5597, 5603-5605. *See also* Exhibit P01221, pp. 291-292; Exhibit P01223, pp. 280-281; Exhibit P00527, pp. 116-117.
[1133] Judgment, paras 5569-5572. *See also* Exhibit P01152, pp. 225-226, 357-358.
[1134] Judgment, paras 5569, 5573-5574. *See also* Exhibit P01221, p. 291; Exhibit P01223, p. 280.
[1135] Exhibit P01221, p. 291.

(c) SPEARS3 and BNPI3 provided predicted best server coverage to areas very close to, respectively, the third payphone—where the second call to *Al-Jazeera* was made at 15:27—and the tree—where the videotape of the false claim of responsibility was collected at 15:53.[1136] SPEARS3 was activated by Purple 018 at 15:53, 15:54, 15:55, and 15:58,[1137] while BNPI3 was activated by Mr Oneissi's Purple 095 at 15:54, 15:58, 16:00, 16:01, and 16:02,[1138] and by Purple 018 at 16:00, 16:01, and 16:02.[1139]

(d) OGER3 was adjacent to OGER2, part of which provided predicted best server coverage to a location very close to the fourth payphone, from which the third call to *Al-Jazeera* occurred at 17:04.[1140] OGER3 was activated by Purple 018 at 17:15.[1141]

522. The Appeals Chamber has carefully reviewed the evidence relied upon by the Prosecution in light of the above findings on the reliability of best server coverage maps and on the mobile network congestion in the aftermath of the attack.[1142] The Appeals Chamber finds that the evidence shows that Mr Merhi remained in southern Beirut on the afternoon of 14 February 2005. It also shows that Mr Oneissi, in the same period of time, made a tour of the city that brought him close to the first and second payphones twenty-seven minutes after the call to *Reuters* was made, nineteen minutes after the first call to *Al-Jazeera* occurred, and very close to the tree one minute after the videotape of the false claim of responsibility was collected. Similarly, the call pattern of Purple 018 indicates that its user contemporaneously engaged in a tour of Beirut that brought him or her close to the first and second payphone seven minutes before the call to *Reuters* was made, seventeen minutes after the first call to *Al-Jazeera* occurred, very close to the third payphone twenty-six minutes after the second call to *Al-Jazeera*, very close to the tree seven minutes after the videotape of the false claim of responsibility was collected, and close to the fourth payphone 11 minutes after the third call to *Al-Jazeera.* The evidence also shows that: (a) the user of Purple 018 communicated almost exclusively with Messrs Merhi and Oneissi in the hours following the assassination of Mr Hariri; (b) Mr Merhi communicated mostly with the user of Purple 018; and (c) no communication occurred between Messrs Merhi and Oneissi.

[1136] Judgment, paras 5580, 5583, 5587-5589. *See also* Exhibit P01152, pp. 169-170, 788-789.
[1137] Judgment, paras 5583, 5591-5592, 5595. *See also* Exhibit P01221, p. 291.
[1138] Judgment, paras 5591, 5595-5596, 5598. *See also* Exhibit P01223, p. 281.
[1139] Judgment, paras 5597-5598. *See also* Exhibit P01221, pp. 291-292.
[1140] Judgment, paras 5601, 5604, 5607. *See also* Exhibit P01152, pp. 635-638.
[1141] Judgment, para. 5604. *See also* Exhibit P01221, p. 292.
[1142] *See* above Grounds 6 and 7.

523. The Appeals Chamber finds that the call patterns of Messrs Merhi and Oneissi and the user of Purple 018 prove that Mr Oneissi and the user of Purple 018 disseminated the false claim of responsibility under the direct supervision of Mr Merhi. We hold that it is not reasonable to interpret the movements of Mr Oneissi and the user of Purple 018—bringing at least one of them in the proximity of each payphone and the tree at relevant times—as a mere coincidence. Moreover, there is no reasonable explanation for the intense exchange of phone calls between the user of Purple 018 and Messrs Merhi and Oneissi in the aftermath of the attack—other than that Mr Oneissi and the user of Purple 018 disseminated the false claim of responsibility under Mr Merhi's instruction and reported back upon its completion.

524. The Appeals Chamber shares the Trial Chamber's view that the Purple Phones' movements and communications with each other on 14 February 2005 were "of course suspicious".[1143] However, contrary to the Trial Chamber's findings,[1144] the Appeals Chamber holds that the evidence establishes that Messrs Merhi and Oneissi participated in the dissemination of the false claim of responsibility. This conclusion is reinforced by our findings on: (a) the simultaneous deactivation of the Purple Phones after the attack, which supports the conclusion that the Purple Phones were coordinated and involved in the dissemination of the false claim of responsibility; and (b) the activities of the Purple Phones during the COLA phase, which demonstrates that Messrs Merhi and Oneissi and the user of Purple 018 were involved in the preparation of the false claim of responsibility. The Appeals Chamber finds that the only reasonable inference available from the totality of the evidence is that Messrs Merhi and Oneissi were involved in the dissemination of the false claim of responsibility.

525. The Appeals Chamber therefore finds that no reasonable trier of fact could have reached the conclusion that the movements and call patterns of the Purple Phones on 14 February 2005 do not support the conclusion that Mr Oneissi was coordinated by Mr Merhi and involved in the dissemination of the false claim of responsibility for the assassination of Mr Hariri.

[1143] Judgment, para. 5682.
[1144] Judgment, para. 5689.

2. The Simultaneous Deactivation of the Purple Phones After the Attack

526. The Prosecution argues that the simultaneous deactivation of the Purple Phones equally supports the conclusion that Messrs Merhi and Oneissi and the user of Purple 018 were coordinated and involved in the dissemination of the false claim of responsibility.[1145] To demonstrate this, the Prosecution relies upon the Trial Chamber's findings that the CSTs for Mr Merhi's Purple 231, Mr Oneissi's Purple 095, and Purple 018 prove that the Purple Phones were simultaneously deactivated within 36 hours of the attack.

527. The Appeals Chamber notes that the CST for Mr Merhi's Purple 231 shows that Purple 231 was active since 19 December 2002 and that its last activity was an incoming phone call on 15 February 2005, after which the mobile was never used again.[1146] Similarly, the CSTs for Mr Oneissi's Purple 095 and for Purple 018 show that Purple 095 and Purple 018 were active since 3 December 2002 and 22 November 2001, respectively, and that their last activities were an incoming and an outgoing phone call on 16 February 2005, after which Purple 095 and Purple 018 were not used again.[1147]

528. Having carefully reviewed the evidence and in light of our findings on the movements and call patterns of the Purple Phones on 14 February 2005 and in the preceding weeks, the Appeals Chamber concludes that Mr Merhi's Purple 231, Mr Oneissi's Purple 095, and Purple 018 were all deactivated within less than 48 hours of the assassination of Mr Hariri. In our view, this is not a coincidence. The simultaneous deactivation of three mobiles that had been active for more than two years, particularly occurring within such a short time, is more than suspicious and establishes the involvement of Messrs Merhi and Oneissi in the dissemination of the false claim of responsibility. This conclusion is supported by the movements and call patterns of those mobiles in the aftermath of the attack on 14 February 2005 and during the COLA phase. We therefore find that the Trial Chamber erred in finding that the discarding of the Purple Phones soon after the attack does not buttress the other cell site evidence and does not necessarily mean that Messrs Merhi and Oneissi and the user of Purple 018 were involved in the making and dissemination of the false claim of responsibility.[1148] We hold that the simultaneous deactivation of the Purple Phones—together with their movements and call patterns on 14 February 2005 and in the preceding weeks—

[1145] Prosecution Appeal Brief, paras 450-451.
[1146] Exhibit P00527, pp. 1, 117.
[1147] Exhibit P01223, pp. 1, 281; Exhibit P01221, pp. 1, 292.
[1148] Judgment, paras 5815-5818. *See also id.* at para. 6861.

demonstrates that Messrs Merhi and Oneissi and the user of Purple 018 were involved in the dissemination of the false claim of responsibility.

529. The Appeals Chamber therefore finds that no reasonable trier of fact could have found that the simultaneous deactivation of the Purple Phones does not support the conclusion that Messrs Merhi and Oneissi and the user of Purple 018 were coordinated and involved in the dissemination of the false claim of responsibility for the assassination of Mr Hariri.

3. The Simultaneous Inactivity of the Purple Phones on the Day Mr Abu Adass Disappeared

530. The Prosecution argues that the simultaneous inactivity of the Purple Phones on the day Mr Abu Adass disappeared demonstrates the coordination of the Purple Phones before the assassination of Mr Hariri.[1149] In particular, the Prosecution relies upon the CSTs for Mr Merhi's Purple 231, Mr Oneissi's Purple 095, and Purple 018 to prove that Messrs Merhi and Oneissi and the user of Purple 018 were involved in the disappearance of Mr Abu Adass and in the preparation of the false claim of responsibility.

531. The Appeals Chamber observes that the CST for Mr Merhi's Purple 231 shows that Purple 231 was inactive from 15 January 2005 at 18:52 to 17 January 2005 at 20:44.[1150] Similarly, the CSTs for Mr Oneissi's Purple 095 and for Purple 018 indicate that Purple 095 was inactive from 15 January 2005 at 20:26 to 17 January 2005 at 07:01, while Purple 018 was inactive from 16 January 2005 at 00:03 to 17 January 2005 at 08:18.[1151] We further note that the Trial Chamber found that Mr Merhi's Grey Mobile was activated in the early evening of 16 January 2005[1152] and that Mr Abu Adass left his home on 16 January 2005, did not return, and is most likely deceased.[1153]

532. Having carefully reviewed the evidence, the Appeals Chamber is of the view that—while the CSTs prove that Purple 231, Purple 095, and Purple 018 were inactive during the time Mr Abu Adass disappeared on 16 January 2005—they do not prove that Messrs Merhi and Oneissi and the user of Purple 018 were necessarily involved in his disappearance. We

[1149] Prosecution Appeal Brief, para. 453.
[1150] Exhibit P00527, p. 110.
[1151] Exhibit P01223, p. 264; Exhibit P01221, p. 285.
[1152] Judgment, para. 5467.
[1153] Judgment, para. 5860.

agree with the Trial Chamber that the absence of mobile activity does not in itself unequivocally establish any particular action by their users, let alone their implication in the commission of a crime.[1154]

[illegible] The Appeals Chamber therefore finds that the Prosecution has not demonstrated that no reasonable trier of fact could have reached the conclusion that the simultaneous inactivity of the Purple Phones on the day Mr Abu Adass disappeared does not demonstrate the coordination of the Purple Phones before the assassination of Mr Hariri.

4. <u>The Activities of the Purple Phones During the COLA Phase</u>

[illegible] The Prosecution argues that the activities of the Purple Phones near the Mosque in the weeks leading up to Mr Abu Adass's disappearance further demonstrate that Messrs Merhi and Oneissi and the user of Purple 018 were coordinated before the attack.[1155] To demonstrate this, the Prosecution relies on Mr Platt's chronologies of the events from 20 December 2004 to 31 December 2004 and of the Purple Phones' activities, as well as on the CSTs for Mr Merhi's Purple 231, Mr Oneissi's Purple 095, and Purple 018.[1156]

[illegible] The Appeals Chamber notes that the CSTs for Purple 231, Purple 095, and Purple 018 show that, between 29 December 2004 and 7 January 2005, Mr Oneissi and the user of Purple 018 contacted each other thirty-seven times[1157]—which amounts to approximately 45% of all contacts occurring between them over two years[1158] and to a seventy-four fold increase in their average daily contacts.[1159] They also exchanged a combined fifteen contacts with Mr Merhi's Purple 231[1160]—a threefold increase in Mr Merhi's average contact volume with Purple 095 and Purple 018.[1161] The Appeals Chamber notes that the Trial Chamber listed the

[1154] Judgment, para. 5468.

[1155] Prosecution Appeal Brief, paras 456, 459. The Appeals Chamber notes that, by making this argument, the Prosecution is appealing the Trial Chamber's finding that the Purple Phones' activity during the COLA phase did not demonstrate that Messrs Merhi and Oneissi were involved in the preparation of the false claim of responsibility. The Appeals Chamber will therefore review whether the evidence adduced by the Prosecution establishes this.

[1156] Prosecution Appeal Brief, paras 457-458.

[1157] Exhibit P01223, pp. 256-261; Exhibit P01221, pp. 279-283.

[1158] Exhibit P01793, slide 446; Exhibit P01934, slide 7. *See also* Exhibit P01223; Exhibit P01221.

[1159] The Appeals Chamber notes that between 26 December 2002 and 22 December 2004 Purple 018 and Mr Oneissi's Purple 095 exchanged 36 contacts, *i.e.*, almost 0.05 contacts per day, while they exchanged 37 contacts between 29 December 2004 and 7 January 2005, *i.e.*, 3.7 contacts per day.

[1160] Exhibit P00527, pp. 107-109; Exhibit P01223, pp. 256-261; Exhibit P01221, pp. 279-283.

[1161] The Appeals Chamber notes that the Trial Chamber found that between 26 December 2002 and 22 December 2004 Mr Merhi's Purple 231 exchanged 360 contacts with Purple 018 and Mr Oneissi's Purple 095, *i.e.*, almost 0.5 contacts per day, while the evidence shows that it exchanged 15 contacts between cells in the vicinity of the Mosque and found that the COLA cells provided the predicted best coverage to the immediate area of the Mosque.[1162] We observe that the CSTs show that, between 29 December 2004 and 7 January 2005, Mr Oneissi's Purple 095 and Purple 018 activated cells in the vicinity of the Mosque for outgoing calls nine times and twenty-two times, respectively, while in the same period the COLA cells were activated for outgoing and incoming calls and for SMS messages nineteen times by Purple 095 and fifty times by Purple 018.[1163] We also note that the Trial Chamber found that, between 9 January 2003 and 22 December 2004, Purple 095 and Purple 018 activated cells in the vicinity of the Mosque, including the COLA cells, twenty-eight times and fifteen times, respectively.[1164]

536. Having carefully reviewed the evidence and in light of our findings on the movements and call patterns of the Purple Phones on 14 February 2005 and on the simultaneous deactivation of the Purple Phones after the attack, we find that it was not a mere coincidence that there was such a spike in the contacts between the Purple Phones between 29 December 2004 and 7 January 2005 and in the spike in the activations of cells in the vicinity or in the immediate area of the Mosque by Purple 018 and Mr Oneissi's Purple 095 in the same ten days. Never had the Purple Phones communicated as much with each other, nor had Purple 095 and Purple 018 activated the cells, including the COLA cells, in the vicinity of the Mosque as frequently as they did in the ten days leading up to Mr Abu Adass's disappearance. In our view, the only reasonable inference available from the evidence is that the Purple Phones were involved in the preparation of the false claim of responsibility.

537. We disagree with the Trial Chamber's finding that the activities of the Purple Phones during the COLA phase—including their activities near the Mosque in the weeks leading up to Mr Abu Adass's disappearance—rise to a level no higher than that of coincidental suspicion.[1165] To the contrary, we find that these activities—together with the Purple Phones' movements and call patterns on 14 February 2005 and their simultaneous deactivation after the attack—establish the involvement of Messrs Merhi and Oneissi in the preparation and dissemination of the false claim of responsibility.

---

29 December 2004 and 7 January 2005, *i.e.*, 1.5 contacts per day. Judgment, para. 5301; Exhibit P00527; Exhibit P01223; Exhibit P01221.
[1162] Judgment, paras 5103-5104.
[1163] Exhibit P01223, pp. 256-261; Exhibit P01221, pp. 278-283.
[1164] Judgment, para. 5300.
[1165] Judgment, paras 5315-5316.

538 The Appeals Chamber therefore finds that no reasonable trier of fact could have reached the conclusions that the activities of the Purple Phones near the Mosque in the weeks leading up to Mr Abu Adass's disappearance do not support the conclusion that Messrs Merhi and Oneissi participated in the preparation of the false claim of responsibility for the assassination of Mr Hariri.

5. <u>The Connections Between the Purple Phones and Mr Ayyash</u>

539 The Prosecution argues that the timing of the contacts between Messrs Merhi and Ayyash, as well as between the users of Purple 018 and Yellow 425, and the user of Yellow 425 and Mr Ayyash, show a connection to the conspiracy.[1166] The Prosecution relies upon the CSTs for Purple 231 and Purple 018 and Mr Platt's chronology of the events from 18 January 2005 to 27 January 2005 to demonstrate the direct contact between Messrs Merhi and Ayyash, the users of Purple 018 and Yellow 425, and the user of Yellow 425 and Mr Ayyash.

540 The Appeals Chamber observes that the CST for Mr Merhi's Purple 231 shows that Purple 231 was in contact with Mr Ayyash's personal mobile 091 twice on 23 January 2005, once on 5 February 2005, and four times on 6 February 2005.[1167] We note that the Trial Chamber found that the decision to proceed with the assassination of Mr Hariri was made in early February.[1168] Mr Platt's chronology of the events from 18 January 2005 to 27 January 2005 also shows that the contacts between Mr Merhi's Purple 231 and Mr Ayyash's personal mobile 091 on 23 January 2005 occurred during a tight exchange of calls between Mr Ayyash's Blue 233 and Blue 864.[1169] Furthermore, the CST for Purple 018 shows that this phone had contact with Yellow 425 on 4 January 2005.[1170] We note that the Trial Chamber also found that Yellow 425 had contacts with Mr Ayyash's personal mobile 165[1171] and was in contact for eight seconds with Mr Ayyash's Yellow 294 two hours after the call with Purple 018 on 4 January 2005.[1172]

[1166] Prosecution Appeal Brief, paras 460-461.
[1167] Exhibit P00527, pp. 111, 114-115.
[1168] Judgment, para. 4735.
[1169] Exhibit P01889, slide 139.
[1170] Exhibit P01221, p. 282. *See also* Judgment, paras 2361, 5205.
[1171] Judgment, para. 2361.
[1172] Judgment, para. 5205.

541 Having carefully reviewed the evidence, the Appeals Chamber finds that it does not show that the connections between Mr Merhi's Purple 231 and Mr Ayyash's personal mobile 091, as well as those between Purple 018 and Yellow 425, which in turn had contacts with Mr Ayyash's personal mobile 165 and Yellow 294, are linked to the conspiracy. We hold that the phone calls between Mr Merhi's Purple 231 and Mr Ayyash's personal mobile 091 do not add materially to Mr Merhi's connection with the decision to assassinate Mr Hariri, the making of the video, nor the other preparatory acts to the dissemination of the false claim of responsibility. We agree with the Trial Chamber that, in the absence of evidence of the reason for the contacts between Messrs Merhi and Ayyash, those phone calls are without context, especially in light of the fact that Mr Ayyash is not alleged to have been involved in the false claim of responsibility.[1173] For the same reasons, the contacts between Purple 018 and the Yellow Phones—which in turn exchanged contacts with Mr Ayyash—only prove that Purple 018 and Mr Ayyash had shared contacts and do not add materially to Purple 018's involvement in the false claim of responsibility.

542 The Appeals Chamber therefore finds that the Prosecution has not demonstrated that no reasonable trier of fact could have reached the conclusion that the contacts between Messrs Merhi and Ayyash, the users of Purple 018 and Yellow 425, and the user of Yellow 425 and Mr Ayyash do not add materially to the connection of Mr Merhi to the conspiracy.

543 It is however far from being a point in Mr Mehri's favour. The primary task of Mr Ayyash did not include personal involvement in the attempted cover-up of his identity and that of others immediately involved in the detonation of the fatal bomb. That, we find, was the task of Mr Mehri who during the COLA phase, and soon after the detonation, was overseeing the activity of Mr Oneissi and the user of Purple 018.

544 Such communication is consistent with the rest of the present Judgment. Important passages include (a) our previous findings regarding the activities of the Purple Phones near the Mosque in the weeks leading up to Mr Abu Adass's disappearance,[1174] (b) our finding that the Trial Chamber erred in failing to find that Messrs Mehri and Oneissi participated in the preparation of the false claim of responsibility for the assassination of Mr Hariri,[1175] and (c) our

[1173] Judgment, para. 5537.
[1174] *See* above Sub-section IX (C) (4).
[1175] *See* Sub-section IX (C) (6) below.

conclusion that Mr Merhi was a member of the Green Network, which acted as the mission command of the attack, and that he is guilty of the crimes alleged against him.[1176]

6. Conclusion

545. Based on the totality of the evidence, we find that the Trial Chamber erred in fact by failing to find that Messrs Merhi and Oneissi participated in the preparation and dissemination of the false claim of responsibility for the assassination of Mr Hariri. We find that Messrs Merhi and Oneissi did participate in the preparation and dissemination of the false claim of responsibility for the assassination of Mr Hariri and that no reasonable trier of fact could have found otherwise.

546. Sub-ground 8 (D) is therefore granted.

547. We find that this error of fact was determinative in the acquittals of Messrs Merhi and Oneissi. The Appeals Chamber will determine below whether the Trial Chamber committed an error of law in defining the elements of conspiracy, on the one hand, and of accomplice liability, on the other hand. The Appeals Chamber will then assess whether the elements of crimes and modes of liability—as charged by the Prosecution against Messrs Merhi and Oneissi in Counts 1 and 6–9 of the Amended Consolidated Indictment—have been proved in respect of Messrs Merhi and Oneissi through the preparation and dissemination of the false claim of responsibility with advance knowledge of the attack.

D. Conclusion

548. For the foregoing reasons, including our discussion and findings on Sub-grounds 8 (A)–(C),[1177] Ground 8 is dismissed in part and granted in part, by majority.

[1176] *See* Sub-sections XII (A) and XII (C) (2) (a) below.
[1177] *See* above Sub-grounds 1 (B)-(D), 5 (E), and 8 (A)-(C).

X. GROUND 2: WHETHER THE TRIAL CHAMBER ERRED IN ITS IDENTIFICATION OF THE APPLICABLE LAW ON CONSPIRACY

549 Ground 2 of the Prosecution Appeal Brief alleges an error of law on the part of the Trial Chamber in its identification of the applicable law to the crime of conspiracy. In particular, the Prosecution claims that the Trial Chamber added legal requirements to the crime of conspiracy to commit a terrorist act that are not provided for under Lebanese law and were not identified by the Appeals Chamber in the 2011 Interlocutory Decision on Applicable Law. Considering that all Sub-grounds of appeal contained in Ground 2 pertain to the same legal issue, the Appeals Chamber will assess them together.

A. Submissions of the Parties

550 The Prosecution argues that the Trial Chamber "misinterpreted the 'specific means' element of [Lebanese Criminal Code ("LCC")] Article 270 as requiring agreement on details beyond use of means liable to create a public danger for a conspiracy to commit a terrorist act".[1178] The Prosecution states that, in doing so, the Trial Chamber rejected the Appeals Chamber's interpretation of the "specific means" element.[1179] Furthermore, the Prosecution submits that the Trial Chamber misinterpreted the Lebanese jurisprudence in relation to the specific means element of the crime of conspiracy.[1180]

551 More specifically, the Prosecution first posits that the Trial Chamber "erred in requiring an agreement to kill a particular person *in addition* to the agreement to use explosives in public".[1181] According to the Prosecution, while an agreement to kill a prominent political figure may alone meet the specific means element of conspiracy, "such agreement is not required in addition to the agreement to use explosives in a public space".[1182]

552 Second, the Prosecution—quoting the Appeals Chamber's statement according to which "a precise determination of the means is not required", as well as Lebanese jurisprudence—argues that the Trial Chamber erred in requiring that there be an agreement to

[1178] Prosecution Appeal Brief, para. 108. Article 270 of the LCC provides: "Any agreement concluded between two or more persons to commit a felony *by specific means* shall be qualified as a conspiracy" (emphasis added).
[1179] Prosecution Appeal Brief, paras 108, 110.
[1180] Prosecution Appeal Brief, para. 112.
[1181] Prosecution Appeal Brief, para. 119 (footnote omitted) (emphasis in the original).
[1182] Prosecution Appeal Brief, para. 120.

use a *large* explosive device.[1183] The Prosecution argues that, on the contrary, an agreement to detonate explosive materials in a public place is sufficient.[1184]

553 Finally, the Prosecution submits that the Trial Chamber "erred in requiring the conspirators to agree that people would be killed or injured as a result of the terrorist attack",[1185] as this "is not an element of the crime of conspiracy" nor "an element of the underlying crime of committing a terrorist act", but only an aggravating circumstance.[1186]

554 Counsel for Mr Merhi argue that the Trial Chamber did not err in its definition of the crime of conspiracy and that it did not reject the conclusions reached by the Appeals Chamber in the 2011 Interlocutory Decision on Applicable Law.[1187] In substance, they assert that the Trial Chamber, recognizing the limits of Lebanese jurisprudence on this issue, correctly found that the only binding source with respect to the crime of conspiracy was the LCC[1188] and concluded that the specific means element of conspiracy pertained to the manner in which the crime is to be committed as opposed to the physical means enumerated in Article 314 of the LCC.[1189] In addition, Counsel for Mr Merhi submit that the alleged error would not invalidate the Judgment because the result—namely, the acquittals—would have been the same irrespective of whether knowledge of the identity of Mr Hariri or other details were required.[1190] They state that the Trial Chamber could not find that Messrs Merhi or Oneissi knew *any* details of the assassination prior to the explosion.[1191]

555 Counsel for Mr Oneissi likewise claim that the outcome of the Judgment would have been the same had the Trial Chamber interpreted the specific means element as the Prosecution does and that the alleged error presented in Ground 2 does not therefore invalidate the Judgment.[1192] In particular, they argue that, since Mr Oneissi was not found to be connected to the false claim of responsibility—or to the conspiracy in general—"there is no point in discussing whether he could have known or agreed to kill Mr Hariri, with a large explosive

---

[1183] Prosecution Appeal Brief, para. 124, *citing* 2011 Interlocutory Decision on Applicable Law, para. 199; Prosecution Appeal Brief, para. 125, *referring to* Lebanese Judicial Council Judgment No. 79/1959.
[1184] Prosecution Appeal Brief, para. 127.
[1185] Prosecution Appeal Brief, para. 128 (footnote omitted).
[1186] Prosecution Appeal Brief, para. 129.
[1187] Merhi Response Brief, paras 151-152.
[1188] Merhi Response Brief, para. 154.
[1189] Merhi Response Brief, para. 155.
[1190] Merhi Response Brief, para. 161.
[1191] Merhi Response Brief, para. 161.
[1192] Oneissi Response Brief, para. 128.

device, or whether he could have known and agreed that people would be injured and killed in the attack".[1193] They add that the detailed analysis of the Trial Chamber as to Messrs Oneissi or Merhi's *mens rea* for the conspiracy was "superfluous"[1194] and that the Prosecution's argument is "irrelevant and moot".[1195]

B. Trial Chamber Findings

556. In defining the crime of conspiracy—more specifically, conspiracy to commit a terrorist act—the Trial Chamber examined the LCC, the 2011 Interlocutory Decision on Applicable Law, and Lebanese jurisprudence. It agreed, to a certain extent, with the definition of the crime as set out in the 2011 Interlocutory Decision on Applicable Law and held that it generally agreed with the Appeals Chamber's description of the first, second, third, and fifth elements of conspiracy.[1196] These are: the need for two or more individuals; concluding or joining an agreement; aiming at committing crimes against the security of a state; and a criminal intent.[1197] However, as to the fourth element—premeditation of the means to be used to commit the crime[1198] or "specific means" element—the Trial Chamber noted that this was the only element on which the Parties fundamentally differed[1199] and proceeded to give a definition of its own.

557. With respect to the specific means element of conspiracy, the Trial Chamber considered that the Appeals Chamber's determination left some issues uncertain.[1200] On the basis of Lebanese law, the Trial Chamber found that the participants to the pleaded conspiracy must have known and agreed on "both the particular physical means of committing the alleged terrorist act, namely an explosive device, and four additional matters".[1201] Those four additional matters were defined by the Trial Chamber as the knowledge that (a) the explosive device would be large; (b) it would be used in a public place; (c) the purpose was to assassinate Mr Hariri; and (d) other people would also be killed and injured.[1202] In its overall conclusion on the specific means element, the Trial Chamber held that:

[1193] Oneissi Response Brief, para. 127.
[1194] Oneissi Response Brief, para. 127.
[1195] Oneissi Reponse Brief, para. 128.
[1196] Judgment, paras 6217, 6219, 6228.
[1197] 2011 Interlocutory Decision on Applicable Law, para. 194.
[1198] 2011 Interlocutory Decision on Applicable Law, para. 194.
[1199] Judgment, para. 6236.
[1200] Judgment, para. 6238.
[1201] Judgment, para. 6241.
[1202] Judgment, para. 6242.

> […] to commit the crime of conspiracy aimed at committing a terrorist act, two or more people must agree to commit a terrorist act, each of them knowing:
>
> > 1. that the act will be committed using a means that is liable to create a public danger;
> >
> > 2. which particular means liable to create a public danger will be used; and
> >
> > 3. that that means will be used in a way that is liable to create a state of terror.
>
> If the terrorist act is intended to kill a particular person *and* killing that person would be likely to create a state of terror, each of them must also know:
>
> > 4. that the act is intended to kill that person.[1203]

C. Discussion

1. Applicable Law

a. Conspiracy

558 Pursuant to Article 2 of the Statute, "[t]he provisions of the Lebanese Criminal Code relating to the prosecution and punishment of […] conspiracy" shall be applicable to the crimes falling under the Tribunal's jurisdiction. Therefore—and as stated in the 2011 Interlocutory Decision on Applicable Law[1204] and the Judgment[1205]—the law applicable to the crime of conspiracy charged in Count 1 of the Amended Consolidated Indictment is Lebanese law. This includes relevant jurisprudence from Lebanese courts applying or interpreting the crime of conspiracy, except when such application or interpretation (a) appears to be unreasonable; (b) may result in a manifest injustice; or (c) is not consonant with international principles and rules binding upon Lebanon.[1206]

559 Article 270 of the LCC defines the crime of conspiracy as follows:

> Any agreement concluded between two or more persons to commit a felony by specific means shall be qualified as a conspiracy.[1207]

560 The crime of conspiracy under Lebanese law therefore consists of five elements.[1208] The objective element (*actus reus*) of conspiracy consists of: (a) two or more individuals; (b) who conclude or join an agreement; (c) aimed at committing a crime against State security;

1203 Judgment, paras 6268-6269.
1204 2011 Interlocutory Decision on Applicable Law, para. 192.
1205 Judgment, para. 6201.
1206 2011 Interlocutory Decision on Applicable Law, para. 39.
1207 STL Official Translation.
1208 2011 Interlocutory Decision on Applicable Law, para. 202.

(d) with an agreement on the means to be used to commit the crime. The fifth element of conspiracy pertains to the subjective element (*mens rea*) and consists of the existence of criminal intent.

561 The issue in the current appeal is limited to one of the five elements of conspiracy, namely, an agreement on the means to be used to commit the crime or specific means element. The Prosecution has not raised any ground of appeal with respect to the other elements.

562 The Appeals Chamber has already had the opportunity to expand upon this element of the crime of conspiracy under Lebanese law, with specific regard to conspiracy to commit a terrorist act. In this respect, we have held that:

> […] The agreement has also to contemplate the means and tools that the conspirators want to use to commit the crime. The agreement would be incomplete, and the conspiracy would not stand, if the conspirators did not agree on the means to achieve their aim. However, a precise determination of the means is not required. If the conspirators agree that they will use a means described as terrorist, it is sufficient to say that they agree on the means to execute the agreement. In this respect, the conspiracy to commit a terrorist act must include agreement on means meeting the requirements of Article 314, in other words, means liable to create a public danger.[1209]

563 The definition of this element was based on our interpretation of relevant Lebanese case law[1210] and secondary sources.[1211] The Appeals Chamber notes that the jurisprudence discussed by the Trial Chamber and the Parties was either already taken into account in the 2011 Interlocutory Decision on Applicable Law or deals with fact patterns specific to the conspiracies in those particular cases.

b. Terrorism

564 The Appeals Chamber has previously set out at length the applicable law for the crime of terrorism, defined in Article 314 of the LCC.[1212] The crime of terrorism as applicable before the Tribunal is composed of three elements, the first two representing the objective element (*actus reus*), and the last one pertaining to the subjective element (*mens rea*).[1213] These are: (a) the volitional commission of an act; (b) through means liable to create a public danger; (c) with the intent of the perpetrator to cause a state of terror.

1209 2011 Interlocutory Decision on Applicable Law, para. 199 (footnote omitted).
1210 *Balamand Monastery* Judgment.
1211 Mohammed El-Fadel, *Jara'im amen al dawla*, 2nd ed., 1965.
1212 *See* 2011 Interlocutory Decision on Applicable Law, paras 42-148. The Appeals Chamber notes that "terrorism" and "terrorist act" are used herein as legal synonyms interchangeably.
1213 2011 Interlocutory Decision on Applicable Law, para. 147.

565 Regarding the reference to a means liable to create a public danger, we recall that our previous analysis of the element led us to conclude that such means are not a predetermined list of physical weapons capable of creating a public danger. On the contrary, we have found that whether certain means are liable to create a public danger should always be assessed on a case-by-case basis, having regard to the non-exhaustive list in Article 314 of the LCC, as well as to the context and circumstances in which the conduct occurs.[1214] Accordingly, means liable to create a public danger, and by definition the means agreed upon in a conspiracy, are not limited to "physical means" but also encompass the circumstances in which such means are employed.

2. Analysis of Trial Chamber Findings

566 In determining the specific means element, the Trial Chamber found that Article 270 was to be interpreted broadly and that it followed from this broad interpretation that the specific means element was not confined to physical means but referred generally to "how conspirators have agreed to realise the felony".[1215] In reaching this conclusion, it relied mainly on the *Balamand Monastery* Judgment and on a few other Lebanese cases in which the crime of conspiracy was found, as well as secondary sources.[1216]

567 The Trial Chamber held that it would be "meaningless" if the words "by specific means" contained in Article 270 did not refer to something additional to the definition of the felony agreed upon.[1217] This reasoning has no basis and is contradicted by the Trial Chamber's own ultimate conclusion.[1218] The crime of conspiracy, although an autonomous crime, requires an agreement to commit acts constituting a felony. Accordingly, when conspiracy and the agreed felony both contain a means element—as it is the case for conspiracy and terrorism—the elements of the two crimes can overlap.

568 As we have stated before, when the conspiracy is aimed at committing a terrorist act, the specific means element of conspiracy must satisfy the requirement of the means element of terrorism, *i.e.*, a means liable to create a public danger.[1219] However, since the Trial Chamber

---

[1214] 2011 Interlocutory Decision on Applicable Law, para. 147, fn. 253.
[1215] Judgment, para. 6247.
[1216] Judgment, paras 6247-6260.
[1217] Judgment, para. 6258.
[1218] Judgment, para. 6268.
[1219] 2011 Interlocutory Decision on Applicable Law, para. 199.

eventually found that the conspirators must have known "that the act will be committed using a means that is liable to create a public danger",[1220] it actually adopted the same definition as the Appeals Chamber.

569 Turning to the specifics of the Prosecution's appeal, we must first address whether proof of agreement of the target's identity is required as part of the specific means element of conspiracy (Sub-ground 2 (A)). In particular, we must assess whether the Trial Chamber's finding that proof of agreement on the target's identity is required in addition to proof of agreement on means liable to create a public danger when a conspiracy is aimed at committing a terrorist act by killing a specific individual.

570 We recall that the assassination of a prominent political or military leader can *per se* be liable to cause a public danger, regardless of the weapon used or the place of the attack.[1221] This is strictly a matter of fact pertaining to the *proof* needed and does not modify in any way the legal requirements for the crime of conspiracy. Even in such a case, the definition of the specific means element of conspiracy remains an agreement on means liable to create a public danger.

571 However, not all conspiracies to commit a terrorist act will target a specific individual or individuals. The fact that conspirators not only agree to commit a terrorist act using an explosive device—which is a means liable to create a public danger pursuant to Article 314 of the LCC—but also agree to kill a prominent political figure in the process cannot play in their favour. The Trial Chamber therefore committed a legal error in requiring the conspirators to know the target's identity *in addition* to agreeing on the use of an explosive device, thereby unduly adding a legal requirement to the crime of conspiracy.

572 Thus, the Prosecution has demonstrated, in Sub-ground 2 (A), that the Trial Chamber committed an error of law.

573 The Prosecution further argues that the Trial Chamber erred in requiring that conspirators had to agree that the explosive device would be large (Sub-ground 2(B)) and would kill and injure people (Sub-ground 2(C)).

[1220] Judgment, para. 6268.
[1221] 2011 Interlocutory Decision on Applicable Law, para. 127.

574 As we have just held, as long as proof is presented that conspirators agree on the use of means liable to create a public danger to carry out a terrorist act, no other factor is required under this element. In the Amended Consolidated Indictment, the Prosecution pleaded certain material facts underpinning the means liable to create a public danger element, *i.e.*, a large explosive device. The identification of material facts will depend upon the manner in which the Prosecution frames the conspiracy charge in the indictment. When the Trial Chamber was recounting what the Prosecution had to prove for the fourth element of conspiracy, it was not adding legal elements to the crime, but rather identifying material facts that had to be proved.[1222] The same reasoning applies to the Trial Chamber's characterization of the material fact that people would be killed and injured.

575 Thus, the Prosecution has not demonstrated, in Sub-grounds 2 (B) and (C), that the Trial Chamber committed errors of law.

576 Finally, and although this is not directly challenged by the Prosecution, the Appeals Chamber, for the sake of clarity and completeness of the applicable law, finds erroneous the statement of the Trial Chamber that "the alleged conspirators must also have agreed on using the relevant means in a way that would cause a state of terror".[1223] As noted above, one of the objective elements of conspiracy is an agreement with a predetermination of the means to be used to commit the felony, whereas the subjective element for terrorism is the intent to cause a state of terror. The Trial Chamber therefore, in its finding quoted above, conflated these two elements of the different crimes. The specific means element of conspiracy requires an agreement on the use of means liable to create a public danger. It does not require that those means be used to cause a state of terror.

D. Conclusion

577 We find that to be liable for conspiracy to commit a terrorist act, conspirators must have agreed to use means liable to create a public danger. What constitutes means liable to create a public danger can only be assessed on a case-by-case basis, according to the facts of each case.

578 On this basis, we find that the Trial Chamber erred with respect to Sub-ground 2 (A) in identifying the applicable law for conspiracy and, in particular, in requiring that the conspirators know that the planned felony would involve the killing of a specific individual *in*

[1222] Judgment, paras 6241-6243.
[1223] Judgment, para. 6263. *See also id.* at para. 6268.

addition to the use of an explosive device. The Trial Chamber also erred when it required that the conspirators know that the means would be used to create a state of terror. On the other hand, we find that the Trial Chamber did not err as a matter of law with respect to Sub-grounds 2 (B) and 2 (C) in requiring proof of material facts that the conspirators agree that the explosive device would be large and would kill and injure people, provided that the use of a large explosive device in a public place constitutes the means liable to create a public danger.

579. Because we have found above that the Trial Chamber erred when it found that Mr Oneissi did not take part in the dissemination of the false claim of responsibility and that Mr Merhi did not coordinate it, we find that the Trial Chamber's error of law with respect to the elements of conspiracy invalidates the Trial Judgment.

580. For the foregoing reasons, Ground 2 is dismissed in part and granted in part.

XI. GROUND 3: WHETHER THE TRIAL CHAMBER ERRED IN IDENTIFYING THE APPLICABLE LAW FOR ACCOMPLICE LIABILITY

581 Ground 3 of the Prosecution Appeal Brief alleges an error of law on the part of the Trial Chamber in its identification of the law applicable to accomplice liability. In particular, the Prosecution claims that the Trial Chamber added legal requirements to this mode of liability that are not required under Lebanese law and that were not identified by the Appeals Chamber in the 2011 Interlocutory Decision on Applicable Law. The first two sub-grounds relate to accomplice liability for the crime of terrorism, while the last sub-ground relates to accomplice liability for the crime of intentional homicide. Accordingly, the Appeals Chamber will address the first two sub-grounds together and the last one separately.

A. Submissions of the Parties

582 The Prosecution argues that the Trial Chamber "erroneously required accomplices to know additional details of the crimes they assist"[1224] and did so without providing legal authority in support.[1225] According to the Prosecution, an accomplice is only required to know the category of crime to be committed, and neither the LCC's definition of accomplice liability nor its interpretation by the Appeals Chamber requires knowledge of details beyond the intent of the perpetrator to commit a particular crime.[1226]

583 Concerning accomplice liability for terrorism, the Prosecution submits that the Trial Chamber erred in requiring that an accomplice know: (a) the identity of any targeted individual;[1227] and (b) that a large explosive would be used and that people would die and be injured as a result.[1228] As to accomplice liability for intentional homicide, the Prosecution argues that the Trial Chamber erred in requiring that an accomplice know the identity of the victim prior to the crime.[1229]

584 Counsel for Mr Merhi argue that, contrary to the Prosecution's assertions, the Trial Chamber did not add legal requirements to accomplice liability, but rather applied the law to

[1224] Prosecution Appeal Brief, para. 136.
[1225] Prosecution Appeal Brief, para. 143.
[1226] Prosecution Appeal Brief, para. 139.
[1227] Prosecution Appeal Brief, para. 148.
[1228] Prosecution Appeal Brief, para. 153.
[1229] Prosecution Appeal Brief, para. 156.

the facts of the case, while respecting the definition given by the Appeals Chamber in 2011.[1230] They add that the facts that an accomplice must have known correspond to the facts pleaded by the Prosecution in the Amended Consolidated Indictment.[1231] In their view, the Trial Chamber did not err in its analysis of Lebanese jurisprudence and correctly recognized that it was of limited assistance considering the highly factual nature of each decision.[1232] Furthermore, Counsel for Mr Merhi claim that the Prosecution wrongly states that the Trial Chamber required accomplices to know more than co-perpetrators since, as the Prosecution acknowledges itself, the Trial Chamber required the same knowledge for the alleged accomplices as it did for Mr Ayyash.[1233]

585. Finally, Counsel for Mr Merhi recall that the Trial Chamber acquitted Messrs Merhi and Oneissi because of the lack of evidence proving what was alleged against them and even found that, assuming that Mr Oneissi and the user of Purple 018 had made the four phone calls after the attack, there was no proof that they agreed to be accomplices or knew about the attack in advance.[1234] As submitted in response to Ground 2, Counsel for Mr Merhi argue that these alleged errors of law, even if proved, did not invalidate the Judgment since the acquittals did not rest on Messrs Merhi and Oneissi's lack of knowledge of the identity of Mr Hariri as the target of the attack or on their lack of knowledge that the explosive device would be large and kill or injure people.[1235]

586. Counsel for Mr Oneissi emphasize the Trial Chamber's finding that the conduct alleged against Mr Oneissi did not satisfy the *actus reus* requirement for accomplice liability.[1236] Noting that this ground of appeal relates to the *mens rea* for accomplice liability, Counsel for Mr Oneissi contend that the Prosecution's arguments are thus "irrelevant and moot".[1237] Considering that the Trial Chamber could not conclude that Mr Oneissi participated in the false claim of responsibility, Counsel for Mr Oneissi question how the Prosecution could prove that he had the requisite *mens rea*.[1238] They further claim that the Prosecution misunderstood the

---

[1230] Merhi Response Brief, para. 169.
[1231] Merhi Response Brief, para. 169.
[1232] Merhi Response Brief, para. 171.
[1233] Merhi Response Brief, para. 172.
[1234] Merhi Response Brief, paras 174-175.
[1235] Merhi Response Brief, paras 175-176.
[1236] Oneissi Response Brief, para. 136.
[1237] Oneissi Response Brief, paras 137-138.
[1238] Oneissi Response Brief, para. 141.

2011 Interlocutory Decision on Applicable Law.[1239] Finally, Counsel for Mr Oneissi conclude that Ground 3 should be dismissed because the errors of law alleged would not, even if corrected in the way the Prosecution requests, invalidate the Judgment since the Prosecution's evidence could not demonstrate Mr Oneissi's participation in any of the crimes charged nor the requisite *mens rea*.[1240]

B. Trial Chamber Findings

587 The Trial Chamber reviewed Lebanese law and jurisprudence and the 2011 Interlocutory Decision on Applicable Law and then performed its own analysis of the elements required for accomplice liability. With respect to the requisite *mens rea* under Article 219 (4) of the LCC, the Trial Chamber noted that Lebanese courts have generally held that an accomplice must have some knowledge of the intended crime, but stated that the precise level of knowledge required further analysis.[1241] The Trial Chamber held that, in order to fulfil the *mens rea* under Article 219 (5), "the person who performed the shielding act or omission must have agreed, before the crime was committed, with either the perpetrator(s) or another accomplice or accomplices, to help to shield one or more of the participants in the crime from justice".[1242]

588 Regarding both Articles 219 (4) and (5), the Trial Chamber found that "the person must know which particular crime (or crimes) the perpetrator(s) intend to commit", "the likely consequences of both the perpetrator's or perpetrators' commission of that crime", and the likely consequences of his own act or omission.[1243] The Trial Chamber further opined that the accomplices must know all of the foregoing *before* the beginning of the commission of the crime.[1244] As a result, the Trial Chamber was of the view that, if the accomplices acquire knowledge *during* the commission of the crime, their responsibility as accomplices would not stand.[1245]

589 In defining accomplice liability for terrorism, the Trial Chamber held that an accomplice must have known the means by which the act would be perpetrated, namely, an

---

[1239] Oneissi Response Brief, paras 143-146.
[1240] Oneissi Response Brief, paras 148-150.
[1241] Judgment, para. 6063.
[1242] Judgment, para. 6147.
[1243] Judgment, para. 6148.
[1244] Judgment, para. 6148.
[1245] Judgment, para. 6149.

explosive device.[1246] The Trial Chamber recognized that the specific level of knowledge required depends on the nature of the principal crime and the circumstances of each case, but that it need not extend to all details of the principal crime.[1247] Given the circumstances of the present case, the Trial Chamber reiterated the findings made in its Rule 167 Decision that it would suffice that Messrs Merhi and Oneissi "knew they were acting pursuant to a plan to commit a terrorist act, namely, to assassinate Mr Hariri by means of a large explosive device in a public place, therefore causing terror, and further that in so doing they were aware that others would die and be injured".[1248]

C. Discussion

1. Applicable Law

a. Accomplice Liability

540. Article 219 of the LCC defines accomplice liability under Lebanese law and enumerates the six different forms of this mode of liability. The list provided for in Article 219 is exhaustive.[1249] In the Amended Consolidated Indictment, Messrs Merhi and Oneissi were charged as accomplices under Article 219 (4) and (5) of the LCC.[1250] Article 219 provides, in relevant part, as follows:

> The following shall be deemed to be accomplices to a felony or misdemeanour:
>
> […]
>
> 4. Anyone who aids or abets the perpetrator in acts that are preparatory to the offence;
>
> 5. Anyone who, having so agreed with the perpetrator or an accomplice before commission of the offence, helped to eliminate the traces, to conceal or dispose of items resulting therefrom, or to shield one or more of the participants from justice;
>
> […].[1251]

541. We recall that accomplice liability under Lebanese law is a mode of liability similar to aiding and abetting under international criminal law. The Appeals Chamber has previously

---

[1246] Judgment, para. 6150.
[1247] Judgment, para. 6151.
[1248] Judgment, para. 6151; *see also* Rule 167 Decision.
[1249] 2011 Interlocutory Decision on Applicable Law, para. 219. The Appeals Chamber notes that, in the 2011 Decision and the Lebanese jurisprudence, the terms "accomplice liability" and "complicity" are often used interchangeably.
[1250] Amended Consolidated Indictment, paras 63, 65, 67, 69.
[1251] STL Official Translation.

ruled that, notwithstanding this similarity, accomplice liability as defined under Lebanese law is more protective of the rights of the accused and should therefore be applied at the Tribunal.[1252]

542 Accomplice liability under Lebanese law is composed of an objective element (*actus reus*) and a subjective one (*mens rea*), each of them consisting of sub-elements. The objective elements are: (a) an understanding; (b) assistance in a form specified in Article 219 of the LCC; and (c) conduct by the perpetrator amounting to a crime.[1253] The subjective elements of accomplice liability are: (a) knowledge of the intent of the perpetrator to commit a crime; and (b) intent to assist the perpetrator in his or her commission of the crime.[1254]

543 With respect to the subjective element (*mens rea*) of accomplice liability, which is at issue in the Prosecution's appeal, we have held that "Lebanese law generally requires an accomplice to know of the crime to be committed, to join with the perpetrator in an understanding, whether immediate or long-standing, to commit the crime, and to share in the intent to further that particular crime".[1255]

544 Given that Messrs Merhi and Oneissi were charged as accomplices to the crimes of terrorism, intentional homicide, and attempted intentional homicide, the Appeals Chamber will briefly restate the elements of those crimes.

b. Terrorism

545 As recalled above,[1256] a terrorist act consists of (a) the volitional commission of an act; (b) through means liable to create a public danger; (c) with the intent of the perpetrator to cause a state of terror.

[1252] 2011 Interlocutory Decision on Applicable Law, paras 228, 264. Although the Trial Chamber decided to apply Lebanese law on accomplice liability for different reasons, it agreed with the Appeals Chamber's conclusion, which it found to be an additional consideration in favour of applying Lebanese law. Judgment, para. 6145.

[1253] 2011 Interlocutory Decision on Applicable Law, para. 219. The assistance can be provided (a) before the crime as in the case specified in Article 219 (1)-(3) of the LCC; (b) during the perpetration of the crime as in the case specified in Article 219 (4); or (c) after the perpetration of the crime as in the case specified in Article 219 (5)-(6). Notwithstanding the timing of the assistance, an accomplice will be liable only when the understanding was reached prior to the perpetration of the crime. 2011 Interlocutory Decision on Applicable Law, paras 219-220.

[1254] 2011 Interlocutory Decision on Applicable Law, para. 220.

[1255] 2011 Interlocutory Decision on Applicable Law, para. 228 (emphasis omitted).

[1256] *See* above Ground 2.

596 In addition, we have previously held that terrorism under Lebanese law does not require the commission of an underlying crime, but merely a volitional act on the part of the perpetrator.[1257] It follows that the death of an individual as a result of a terrorist act can serve as an aggravating circumstance—as opposed to a required objective element (*actus reus*) of terrorism—or can form part of the objective element of another crime distinct from terrorism, such as intentional homicide.[1258]

c. Intentional Homicide

597 Under Lebanese law, intentional homicide is defined in Article 547 of the LCC. The objective element (*actus reus*) of intentional homicide requires (a) conduct that can be an act or a culpable omission aimed at impairing the life of another human being; (b) a result, which is the death of an individual; and (c) a nexus between the conduct and the result.[1259]

598 The *mens rea* of intentional homicide requires (a) knowledge; and (b) intent.[1260] For the *mens rea* to be satisfied, the perpetrator must know that his conduct could lead to the death of an individual and must either intend to achieve this result or at least foresee the result and accept the risk of its occurrence, pursuant to the doctrine of *dolus eventualis*.[1261] It must be noted that the *mens rea* can be met even though the victim is not predetermined or if there is an error regarding the identity of the victim.[1262]

d. Attempted Intentional Homicide

599 Under Lebanese law, attempt is defined in Article 200 of the LCC and is characterized when (a) the perpetrator begins executing the crime; (b) with the intent to commit it; and (c) without voluntarily withdrawing from the commission of the crime.[1263] In other words, there is attempt to commit intentional homicide when the perpetrator has the requisite intent to kill, but when he begins executing the elements of the crime, he gets interrupted or fails to reach the intended result—namely, the death of the victim—because of circumstances independent of his will or beyond his control.[1264]

[1257] 2011 Interlocutory Decision on Applicable Law, para. 145. Therein, the Appeals Chamber referred to the objective element of terrorism as a "material element".
[1258] 2011 Interlocutory Decision on Applicable Law, paras 59, 145.
[1259] 2011 Interlocutory Decision on Applicable Law, paras 153-154, 156, 158.
[1260] 2011 Interlocutory Decision on Applicable Law, para. 161.
[1261] 2011 Interlocutory Decision on Applicable Law, paras 163-165, 169.
[1262] 2011 Interlocutory Decision on Applicable Law, para. 165.
[1263] 2011 Interlocutory Decision on Applicable Law, para. 177.
[1264] 2011 Interlocutory Decision on Applicable Law, paras 178-179, 182.

2. Analysis of Trial Chamber Findings

600. At the outset, the Appeals Chamber will address the Prosecution's argument that it was erroneous for the Trial Chamber to add legal elements to accomplice liability on the basis, in part, of the *in dubio pro reo* principle, and without identifying an ambiguity warranting the use of this principle.[1265] In the Judgment, the Trial Chamber found that Lebanese law was not clear as to whether "an accomplice to a terrorist act, an intentional homicide or an attempted intentional homicide that targeted a particular person must know that person's identity".[1266] This conclusion was based on the Trial Chamber's analysis of some Lebanese cases stating that the accomplices knew the identity of the target.[1267] The Trial Chamber thus decided that it was "preferable" to adopt a stricter standard requiring that the accomplices knew the identity of the target.[1268]

601. The Appeals Chamber has already defined the scope of application of the *in dubio pro reo* principle as a tool for interpreting substantive law. We have held that the Appeals Chamber—and, by extension, the Trial Chamber—is authorized to resort to this principle as a standard of construction when the STL's Statute or the LCC is unclear and when other rules of interpretation have not yielded satisfactory results.[1269] Here, we note that the Trial Chamber found Lebanese law unclear merely because the Trial Chamber was not able to identify a case that could perfectly apply to the case before it or that stated in general the extent of the knowledge required of an accomplice. We agree with the Prosecution that this approach was erroneous.

602. The Appeals Chamber is of the view that the Trial Chamber was bound to interpret the relevant Lebanese provisions in light of the facts of the case before it, rather than to survey Lebanese jurisprudence in the hopes of finding an identical case to serve as a precedent. Lebanese jurisprudence can be used as guidance for the Trial Chamber on how to interpret Lebanese provisions, but it cannot be used to substitute the Trial Chamber's own interpretation or application of the law to the facts before it. In any case, the Appeals Chamber observes that the cases reviewed by the Trial Chamber did not hold that knowledge of the identity of the target is a required element of accomplice liability under Lebanese law.

[1265] Prosecution Appeal Brief, paras 144-146.
[1266] Judgment, para. 6152.
[1267] Judgment, paras 6114-6117, 6124.
[1268] Judgment, paras 6150, 6152.
[1269] 2011 Interlocutory Decision on Applicable Law, para. 32.

603. As to the merits, we have stated above that, in order to be liable under Article 219 (4) or (5) of the LCC, an accomplice must have assisted in the commission of a crime or helped to shield the perpetrators from justice and must have agreed to do so in advance. An accomplice also must have done so *knowingly*. This means that, in assisting the main perpetrator or in helping to shield him or her afterwards, an accomplice must have known that he or she was providing help to an individual who intended to commit a crime and specifically which crime. It follows that the knowledge required from an accomplice does not go beyond the elements of the crime intended by the main perpetrator.

604. As a matter of law, to satisfy the knowledge requirement for accomplice liability, it was therefore sufficient for the Prosecution to demonstrate that Messrs Merhi and Oneissi knew that the perpetrators intended to commit a terrorist act and an intentional homicide. The evidence required to prove this knowledge may vary from one case to another.

605. We turn now to the specific sub-grounds of appeal of the Prosecution.

a. Sub-grounds 3 (A) and (B)

606. We will first address whether the Trial Chamber erred in requiring that Messrs Merhi and Oneissi, in order to be accomplices to the terrorist act, must have known the identity of a targeted individual (Sub-ground 3 (A)) and that the explosive used would be large and would kill and injure people (Sub-ground 3 (B)).

607. To satisfy the knowledge element of accomplice liability for terrorism, it is sufficient to demonstrate that the accomplice knew that the perpetrator would use means liable to create a public danger with the intent to cause a state of terror.

608. While a terrorist act need not necessarily injure and/or ultimately kill an individual, nor necessarily be intended to do so, we recall our discussion on the potential link between the assassination of a prominent political figure and the means liable to create a public danger.[1270] The Appeals Chamber agrees with the Prosecution's submission that knowledge of either the perpetrators' intent to detonate an explosive device in a public place or their intent to kill Mr Hariri, if proved, would constitute material facts that would satisfy the subjective element (*mens rea*) of accomplice liability to commit a terrorist act.[1271]

[1270] *See* above Ground 2.
[1271] Prosecution Appeal Brief, paras 151-152.

609 The Lebanese cases identified by the Trial Chamber, in which the accomplices to a terrorist act happened to know the identity of the target, are not determinative for the case at hand, which involves different factual circumstances. The Trial Chamber itself acknowledged that these cases did not require knowledge of the identity of the victim for accomplice liability to have been proved.[1272]

610 For the foregoing reasons, we find that the Trial Chamber erred in law in holding that Messrs Merhi and Oneissi must have known that Mr Hariri was the target of the terrorist act, in addition to knowing that means liable to create a public danger would be used with the intent to cause a state of terror.

611 As to Sub-ground 3 (B), while we agree with the Prosecution that material facts pleaded in an indictment do not alter the legal requirements of a crime or mode of liability, the material facts in a given case are relevant to proving those legal requirements. In the Amended Consolidated Indictment, the Prosecution pleaded certain material facts in order to demonstrate the use of means liable to create a public danger and the intent to cause a state of terror on the part of the perpetrators of the terrorist act. When the Trial Chamber concluded that the accomplices must have known that the explosive device would be large and would kill and injure people, it was identifying the material facts that needed to be proved by the Prosecution in order to satisfy the elements of terrorism and, by extension, of accomplice liability for terrorism.

612 Thus, the Prosecution has not demonstrated, in Sub-ground 3 (B), that the Trial Chamber committed an error of law.

b. Sub-ground 3 (C)

613 Turning to whether the Trial Chamber erred with respect to the knowledge required for an accused to be found liable as an accomplice to intentional homicide (Sub-ground 3 (C)), we recall that the identity of the victim is not an element of that crime nor is it necessary that the perpetrator intended to kill any particular individual. Therefore, it is not required for the Prosecution to prove that an accomplice to an intentional homicide knew the identity of the victim. It suffices that the accomplice knew that he was assisting in the commission of killing someone.

[1272] Judgment, paras 6114-6115.

614 In the same vein as for accomplice liability for terrorism, the Lebanese cases identified by the Trial Chamber, in which the accomplices to an intentional homicide happened to know the identity of the target, are not determinative of the present case. The Trial Chamber also acknowledged that these cases did not require knowledge of the identity of the victim for accomplice liability to be proved.[1273]

615 We conclude that the Trial Chamber erred in law in holding that Messrs Merhi and Oneissi must have known that Mr Hariri was the target of the intentional homicide.

D. Conclusion

616 We find, by majority, that, with respect to Sub-ground 3 (A), the Trial Chamber erred in law when it held that Messrs Merhi and Oneissi must have known that Mr Hariri was the target of the attack in addition to knowing that an explosive device would be detonated in order to be accomplices to the terrorist act.

617 With respect to Sub-ground 3 (B), the Trial Chamber did not err in law in requiring proof of material facts, as pleaded in the Amended Consolidated Indictment, that Messrs Merhi and Oneissi knew that a large explosive device would be used and that people would be killed and injured in the attack—provided that the use of a large explosive device in a public place constitutes the means liable to create a public danger.

618 With respect to Sub-ground 3 (C), the Trial Chamber erred in law when it held that Messrs Merhi and Oneissi must have known that Mr Hariri was the target of the attack in order to be accomplices to intentional homicide.

619 Because we have found above that the Trial Chamber erred when it held that Mr Oneissi did not take part in the dissemination of the false claim of responsibility and that Mr Merhi did not coordinate it, we find that the Trial Chamber's error of law with respect to the elements of accomplice liability invalidates the Trial Judgment.

620 For the foregoing reasons, Ground 3 is dismissed in part and granted in part, by majority.

[1273] Judgment, para. 6116.

XII. IMPACT OF THE APPEALS CHAMBER'S FINDINGS

621 The Appeals Chamber has dismissed the Prosecution's Sub-grounds 1 (A)–(E), 2 (B)–(C), 3 (B), 4 (A)–(C), 5 (A)–(B), 5 (E), and 8 (A)–(C) because the Prosecution has not demonstrated that the Trial Chamber made an error of law invalidating the Judgment.

622 The Appeals Chamber has granted the Prosecution's Sub-grounds 2 (A), 3 (A), 3 (C), 4 (D)–(E), 5 (C)–(D), and 8 (D) and Grounds 6 and 7, as the Trial Chamber committed both errors of law and fact meeting the standard of appellate review. The Appeals Chamber will now assess the impact of those errors on the acquittals of Messrs Merhi and Oneissi.

A. The Role of the Green Network

623 The Trial Chamber found that the Green Network was a covert network including Mr Badreddine's Green 023, Mr Ayyash's Green 300, and Green 071.[1274] However, the Trial Chamber fell short of attributing Green 071 to Mr Merhi.[1275] The Trial Chamber was also unable to link the Green Network with Hezbollah or to find that the Green Network acted as a mission command of the attack.[1276]

624 The Appeals Chamber recalls that the evidence adduced at trial shows that Green 071 co-located with Mr Merhi's Purple 231 and/or his Grey Mobile on several occasions and that there were no instances of dislocation.[1277] The evidence also shows several instances of common movement of the phones, including one where the phones travelled together 50 kilometres south of Beirut. Moreover, Green 071's geographical profile reveals that, similarly to Purple 231's geographical profile, there is a pattern of use consistent with its user working in the area of SFEIR3 and living in the area of BRAJNE2.[1278] Accordingly, based on the totality of the evidence, the Appeals Chamber is satisfied beyond reasonable doubt that Mr Merhi was using Green 071 during the attribution period.

625 The Appeals Chamber observes that Mr Badreddine's role as a Hezbollah military commander in 2004 and 2005 can be inferred from the evidence adduced at trial. This evidence consists of three commemorative ceremonies held for Mr Badreddine after his death, as well

---

[1274] Judgment, para. 2232.
[1275] Judgment, paras 3666-3667.
[1276] Judgment, paras 2243, 4738-4743.
[1277] Exhibit P02120, p. 190; Exhibit P02133. *See also* Exhibit P01205; Exhibit P00527; Exhibit P02144.
[1278] Exhibit P01205; Exhibit P00527.

as biographical information and evidence of a meeting between Mr Badreddine's family and Ayatollah Ali Khamenei.[1279] It has therefore been established that Mr Badreddine was a Hezbollah military commander in 2004 and 2005.

626. As a Hezbollah military commander, Mr Badreddine's membership (along with two other members) in the Green Network is convincing evidence of Hezbollah's involvement in this covert network. Mr Al-Hassan stated that he spoke to Mr Nasrallah in September 2005 about Network 2 and that Mr Nasrallah told him that Network 2 was a Hezbollah network that was used to track Lebanese agents suspected of dealing with the Mossad.[1280] This statement is corroborated by Mr Nasrallah's statement that he submitted information to Mr Al-Hassan in late 2005 or early 2006 that Hezbollah was tracking an Israeli agent.[1281] These statements—in combination with the ISF report showing that Green 300 and Green 023 were mobiles under consideration by the ISF as part of their assessment of Network 2[1282]—show that the Green Network was a Hezbollah network.

627. The Appeals Chamber notes that the Trial Chamber found that the Red, Yellow, Green, and Blue Networks were connected and that some of their users had a common mission, namely, the assassination of Mr Hariri.[1283] We find that the Green Network was a covert Hezbollah network, which included among its members Mr Badreddine—a Hezbollah military commander—and Mr Ayyash, who was convicted of participating in the surveillance of Mr Hariri and coordinating the team responsible for physically carrying out the attack through his memberships in the Red, Blue, and Yellow Networks.[1284] It has therefore been established that (a) the Green Network was used to coordinate and monitor the activities of the other networks in the preparation and execution of the attack; (b) its members were Messrs Badreddine, Ayyash, and Merhi; and (c) the Green Network was a covert Hezbollah network acting as the mission command of the attack.

[1279] Exhibit P01982; Exhibit P01983; Exhibit P01984; Exhibit P01985; Exhibit P01986; Exhibit P01987; Exhibit P01988; Exhibit P01989; Exhibit P01990; Exhibit P01991.
[1280] Exhibit P02122, pp. 81, 84, 86-87.
[1281] Exhibit P02098, p. 3.
[1282] Exhibit P02124, pp. 1-3; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 14 September 2018, pp. 6-12.
[1283] Judgment, paras 2423, 4669, 4736, 6721, 6803.
[1284] Judgment, paras 6653, 6655, 6740-6741, 6803, 6897.

B. The Preparation and Dissemination of the False Claim of Responsibility

628. The Trial Chamber found that the Purple Phones formed a non-covert network including Mr Merhi's Purple 231, Mr Oneissi's Purple 095, and Purple 018.[1285] However, the Trial Chamber was unable to make a finding that the users of the Purple Phones were involved in the preparation and dissemination of the false claim of responsibility based, in part, on its consideration that the telecommunication evidence tendered at trial was of limited accuracy and reliability.[1286] The Appeals Chamber, on the contrary, has found that the telecommunication evidence was reliable and sufficiently accurate to show patterns of movements at the relevant times and places.

629. The Appeals Chamber recalls that the telecommunication evidence adduced at trial shows that, on the afternoon of 14 February 2005, Mr Oneissi and the user of Purple 018 participated, under Mr Merhi's instructions, in the dissemination of the false claim of responsibility. They did so either directly by making the phone calls to *Reuters* and *Al-Jazeera* or indirectly by monitoring others who were doing so, as well as by watching the tree where the videotape of the false claim of responsibility was collected.[1287]

630. The cell activations of Mr Merhi's Purple 231, Mr Oneissi's Purple 095, and Purple 018 show that Mr Merhi directed the dissemination of the false claim of responsibility from southern Beirut on the afternoon of 14 February 2005. They also show that Mr Oneissi, soon after the attack, made a tour of the city that brought him close to the first and second payphones twenty-seven minutes after the call to *Reuters* was made, nineteen minutes after the first call to *Al-Jazeera* occurred, and very close to the tree one minute after the videotape of the false claim of responsibility was collected. Similarly, the cell activations of Purple 018 indicate that its user contemporaneously engaged in a similar tour of Beirut that brought the user close to the first and second payphone seven minutes before the call to *Reuters* was made, seventeen minutes after the first call to *Al-Jazeera* occurred, very close to the third payphone twenty-six minutes after the second call to *Al-Jazeera*, very close to the tree seven minutes after the videotape of the false claim of responsibility was collected, and close to the fourth payphone 11 minutes after the third call to *Al-Jazeera.* The Call Sequence Tables for Mr Merhi's Purple 231, Mr Oneissi's Purple 095, and Purple 018 also show a significant

[1285] Judgment, paras 2468, 2470, 2486.
[1286] Judgment, paras 5314-5317, 5689, 5691, 5815-5818, 5859, 5861-5862, 6861.
[1287] Exhibit P00527, pp. 116-117; Exhibit P01223, pp. 280-281; Exhibit P01221, pp. 291-292.

number of exchanges between the user of Purple 018 and both Messrs Merhi and Oneissi in the hours following the assassination of Mr Hariri. Moreover, the telecommunication evidence shows that Messrs Merhi and Oneissi and the user of Purple 018 simultaneously discarded their phones after the attack.[1288]

631 There is only one reasonable explanation for the pattern of movements of Mr Oneissi and the user of Purple 018 after the attack; for the intense exchange of phone calls between the user of Purple 018 and Messrs Merhi and Oneissi on the afternoon of 14 February 2005; and for the subsequent simultaneous discarding of the Purple Phones. Mr Oneissi and the user of Purple 018 participated in the dissemination of the false claim of responsibility under Mr Merhi's instructions and reported back upon its completion, before the Purple Phones were discarded in order to conceal evidence.

632 The Appeals Chamber recalls that the telecommunication evidence adduced at trial shows that the Purple Phones exchanged a significant number of contacts during the period from 29 December 2004 to 7 January 2005.[1289] In those days, Purple 018 and Mr Oneissi's Purple 095 often activated cells around the Mosque.[1290] This was the Mosque where Mr Abu Adass, the young Palestinian man who appears in the videotape of the false claim of responsibility, regularly prayed before his disappearance on 16 January 2005. The movements and activities of the Purple Phones during the COLA phase may not, taken in isolation, amount to proof beyond reasonable doubt that Messrs Merhi and Oneissi and the user of Purple 018 were involved in the preparation and dissemination of the false claim of responsibility. Nevertheless, these movements and activities must be considered in conjunction with the fact that Mr Merhi was one of the three members of the Green Network, which acted as mission command of the attack, as well as with the evidence of the Purple Phones' activities on the afternoon of 14 February 2005 and of the subsequent and simultaneous discarding of the phones.

633 The Appeals Chamber notes that Mr Oneissi and the user of Purple 018—after having spent time in or around the Mosque where Mr Abu Adass spent most of the last days before his disappearance—engaged in a particular pattern of movements and simultaneously discarded their mobiles shortly after the attack. These actions prove their participation in the

[1288] Exhibit P00527, p. 117; Exhibit P01223, p. 281; Exhibit P01221, p. 292.
[1289] Exhibit P00527, pp. 107-109; Exhibit P01223, pp. 256-261; Exhibit P01221, pp. 279-283; Exhibit P01793, slide 446; Exhibit P01934, slide 7.
[1290] Exhibit P01223, pp. 257-261; Exhibit P01221, pp. 279-283.

dissemination of the false claim of responsibility via the videotape, which featured Mr Abu Adass himself. Similarly, the Appeals Chamber notes that Mr Merhi had numerous contacts with Mr Oneissi and the user of Purple 018 during the COLA phase and in the aftermath of the attack and simultaneously discarded his mobile as well. On the basis of the totality of the evidence, the Appeals Chamber is satisfied that the Prosecution has established beyond reasonable doubt that Mr Merhi coordinated Mr Oneissi and the user of Purple 018 in both the preparation and dissemination of the false claim of responsibility for the attack.

C. The Appeals Chamber's Findings on the Elements of the Crimes and Modes of Liability

1. Elements of the Crimes and Modes of Liability

a. Conspiracy

634 The Appeals Chamber recalls that, under Lebanese law, conspiracy is an autonomous crime and not a mode of liability. It is defined in Article 270 of the LCC and consists of five elements. The objective element (*actus reus*) of conspiracy consists of: (a) two or more individuals; (b) who conclude or join an agreement; (c) aimed at committing a crime against State security; (d) with an agreement on the means to be used to commit the crime (the "specific means element"). The specific means element of the crime of conspiracy to commit a terrorist act overlaps with that of terrorism, analyzed below. The fifth element of conspiracy pertains to the subjective element (*mens rea*) and consists of the existence of criminal intent. Accordingly, and in light of our findings in relation to Ground 2 above, in order to be liable for conspiracy to commit a terrorist act, Messrs Merhi and Oneissi must have known that means liable to create a public danger would be used—in the present case, the detonation of an explosive device in a public place or the killing of a prominent political figure. Without this knowledge, there could be no agreement and, therefore, no conspiracy.

b. Terrorism

635 The Appeals Chamber recalls that the crime of terrorism (Article 314 of the LCC), as applicable before the Tribunal, is composed of three elements, the first two representing the objective element (*actus reus*), and the last one pertaining to the subjective element (*mens rea*). These are: (a) the volitional commission of an act; (b) through means liable to create a public danger; (c) with the intent of the perpetrator to cause a state of terror.

c. Intentional Homicide and Attempted Intentional Homicide

636 The Appeals Chamber recalls that, under Lebanese law, the objective element (*actus reus*) of the crime of intentional homicide (Article 547 of the LCC) requires: (a) conduct that can be an act or a culpable omission aimed at impairing the life of another human being; (b) a result, which is the death of an individual; and (c) a nexus between the conduct and the result. The *mens rea* of intentional homicide requires: (a) knowledge; and (b) intent, including *dolus eventualis*.

637 Attempt (Article 200 of the LCC) is committed when (a) the perpetrator begins executing the crime; (b) with the intent to commit it; and (c) without voluntarily withdrawing from the commission of the crime.

d. Perpetration

638 According to Article 212 of the LCC, "[t]he perpetrator of an offence is anyone who brings into being the constituent elements of an offence or who participates directly in its commission."[1291]

e. Accomplice Liability

639 The Appeals Chamber recalls that accomplice liability under Lebanese law (Article 219 of the LCC) consists of an objective element (*actus reus*) and a subjective element (*mens rea*), each of them consisting of sub-elements. The objective sub-elements are: (a) an understanding; (b) assistance in a form specified in Article 219 of the LCC; and (c) conduct by the perpetrator amounting to a crime. The subjective sub-elements of accomplice liability are: (a) knowledge of the intent of the perpetrator to commit a crime; and (b) intent to assist the perpetrator in his or her commission of the crime. With respect to the subjective element (*mens rea*) of accomplice liability, we have held that "Lebanese law generally requires an accomplice to *know* of the crime to be committed, to join with the perpetrator in an *understanding*, whether immediate or long-standing, to commit the crime, and to share in the intent to further that particular crime".[1292] Accordingly, and in light of our findings in relation to Ground 3 above, in order to be liable as accomplices to the terrorist act, Messrs Merhi and Oneissi must have known before the attack that the perpetrator would use means liable to create a public danger—

[1291] STL Official Translation.
[1292] 2011 Interlocutory Decision on Applicable Law, para. 228 (emphasis in the original).

in the present case, the detonation of an explosive device in a public place or the killing of a prominent political figure—with the intent to cause a state of terror. They must have also intended to assist the main perpetrator in committing the terrorist act.

2. Individual Criminal Responsibility of Messrs Merhi and Oneissi

a. Hassan Habib Merhi

640. The Prosecution charged Mr Merhi with the crimes of (a) conspiracy aimed at committing a terrorist act (Count 1); (b) being an accomplice to the felony of committing a terrorist act by means of an explosive device (Count 6); (c) being an accomplice to the felony of intentional homicide of Mr Hariri and 21 other persons with premeditation by using explosive materials (Counts 7 and 8); and (d) being an accomplice to the felony of attempted intentional homicide of 226 persons with premeditation by using explosive materials (Count 9).[1293]

641. The Appeals Chamber has found beyond reasonable doubt that Mr Merhi was one of the three members of the Green Network—the mission command of the attack—and was in charge of the preparation and dissemination of the false claim of responsibility aimed at shielding the perpetrators of the attack from justice. In this regard, it has been established beyond reasonable doubt that Mr Merhi coordinated Mr Oneissi and the user of Purple 018 since at least December 2004, with a view to preparing the videotape of the false claim of responsibility that was later disseminated after the attack. The Appeals Chamber has also concluded that Mr Merhi provided instructions to Mr Oneissi and to the user of Purple 018 and that they communicated with each other in the field and then reported back to Mr Merhi on the developments of their criminal activities. It has found this to be the only reasonable inference available from Mr Merhi's membership in the Green Network, the Purple Phones' movements and activities between December 2004 and February 2005, and the simultaneous abandonment of the Purple Phones soon after the attack.

642. Mr Merhi's supervision and coordination of Mr Oneissi and the user of Purple 018 in both the preparation and the dissemination of the false claim of responsibility constitute the form of assistance specified under Article 219 (5) of the LCC with respect to the crimes of committing a terrorist act, intentional homicide, and attempted intentional homicide—

[1293] Amended Consolidated Indictment, pp. 1-2.

Mr Merhi's conduct being aimed at shielding the perpetrators of these crimes from justice. We note that the Trial Chamber found and we agree that it has been established that a terrorist act, intentional homicide, and attempted intentional homicide were committed.[1294] The objective element of being an accomplice to the felonies of committing a terrorist act and the intentional homicide of Mr Hariri and 21 others who died as a result of the attack is therefore satisfied. Similarly, Mr Merhi's conduct satisfies the objective element of being an accomplice to the felony of attempted intentional homicide of the 226 persons who were injured in the attack, as the fact that they did not die was due to circumstances outside of Mr Merhi's control and not due to his voluntary withdrawal from the commission of the crime.

643 Mr Merhi actively participated, together with Messrs Badreddine and Ayyash, in the Green Network and he coordinated the preparation and dissemination of the false claim of responsibility. His leading role in coordinating the dissemination of the false claim of responsibility necessarily made him aware of the crime he was coordinating. As submitted by the Prosecution, the only way he could successfully complete his task was if he knew the objective of the plot. It is therefore established beyond reasonable doubt that Mr Merhi knowingly and willingly entered into an agreement to participate in the commission of a terrorist act, namely, the assassination of Mr Hariri by means of an explosive device. Both the objective and subjective elements of the crime of conspiracy to commit a terrorist act, as well as the subjective element of being an accomplice to the felonies of committing a terrorist act and the intentional homicide of Mr Hariri, are therefore satisfied. At the same time, Mr Merhi's knowledge that he was participating in a conspiracy—which was aimed at committing a terrorist act whose target was a prominent political figure, such as Mr Hariri, and which involved the detonation of an explosive device in a public place—made it foreseeable to him that other persons could have died as a result of the terrorist act in which he conspired and participated. The subjective element of being an accomplice to the felonies of intentional homicide of the 21 other persons who died and to the attempted intentional homicide of the 226 persons who were injured is therefore also satisfied.

644 Accordingly, the Appeals Chamber finds beyond reasonable doubt that Mr Merhi is guilty (a) as co-perpetrator of the crime of conspiracy to commit a terrorist act (Count 1); (b) of being an accomplice to the felony of committing a terrorist act (Count 6); (c) of being an accomplice to the felony of intentional homicide of Mr Hariri and 21 other persons (Counts 7

1294 Judgment, paras 6330, 6343.

and 8); and (d) of being an accomplice to the felony of attempted intentional homicide of 226 persons (Count 9).

645 The aggravating circumstances pleaded in the Amended Consolidated Indictment will be assessed at the sentencing stage.

b. Hussein Hassan Oneissi

646 The Prosecution charged Mr Oneissi with the crimes of (a) conspiracy aimed at committing a terrorist act (Count 1); (b) being an accomplice to the felony of committing a terrorist act by means of an explosive device (Count 6); (c) being an accomplice to the felony of intentional homicide of Mr Hariri and 21 other persons with premeditation by using explosive materials (Counts 7 and 8); and (d) being an accomplice to the felony of attempted intentional homicide of 226 persons with premeditation by using explosive materials (Count 9).[1295]

647 The Appeals Chamber has found beyond reasonable doubt that Mr Oneissi and the user of Purple 018 participated, under Mr Merhi's instructions, in the preparation and dissemination of the false claim of responsibility aimed at shielding the perpetrators of the attack from justice. The Appeals Chamber has held that Mr Merhi provided instructions to Mr Oneissi and to the user of Purple 018 and that they communicated with each other in the field and then reported back to Mr Merhi on the developments of their criminal activities. We found that this is the only reasonable inference available from the Purple Phones' movements and activities between December 2004 and February 2005 and the simultaneous abandonment of the Purple Phones soon after the attack.

648 Mr Oneissi's involvement in both the preparation and dissemination of the false claim of responsibility satisfies the form of assistance specified under Article 219 (5) of the LCC with respect to the crimes of committing a terrorist act, intentional homicide, and attempted intentional homicide—Mr Oneissi's conduct being aimed at shielding the perpetrators of the attack from justice. We recall that the Trial Chamber found and we agree that it has been established that a terrorist act, intentional homicide, and attempted intentional homicide were committed.[1296] The objective element of being an accomplice to the felonies of committing a terrorist act and the intentional homicide of Mr Hariri and 21 others who died as a result of the

[1295] Amended Consolidated Indictment, pp. 1-2.
[1296] Judgment, paras 6330, 6343.

attack is thus satisfied. Similarly, Mr Oneissi's conduct also satisfies the objective element of being an accomplice to the felony of attempted intentional homicide of the 226 persons who were injured in the attack, as the fact that they did not die was due to circumstances outside of his control and not due to his voluntary withdrawal from the commission of the crime.

649 Mr Oneissi participated in the preparation and dissemination of the false claim of responsibility under the instructions of Mr Merhi. He was entrusted with this crucial task that was to be carried out right after the attack, as evidenced by the speed with which he and the user of Purple 018 moved after the attack occurred. Had Mr Oneissi not been on standby, he would not have been ready and able to fulfil his task as quickly as he did. Moreover, as submitted by the Prosecution, it is not reasonable that Mr Oneissi's critical role was explained to him only between the moment of the attack and the moment he started performing his task—a mere 76 minutes. The evidence shows that, in those 76 minutes, Messrs Merhi and Oneissi exchanged only one phone call of only 26 seconds. There was also no time to explain to Mr Oneissi and the user of Purple 018 what they needed to do and where they needed to go, nor was there time to provide them with the telecard for the payphones and with the videotape. In addition to the timing, it was crucial to assign the dissemination of the false claim to someone who was loyal and trusted and who would keep the secrecy of the plan and the attack. It is not reasonable that the main perpetrators would come up with such an elaborate plan, including a false claim of responsibility, and task someone they did not trust to disseminate it, thus taking the risk that this person might divulge the plan and the identity of the perpetrators. It is therefore established beyond reasonable doubt that Mr Oneissi knowingly and willingly entered into an agreement to participate in the commission of a terrorist act, namely, the assassination of Mr Hariri. Both the objective and subjective elements of the crime of conspiracy to commit a terrorist act, as well as the subjective element of being an accomplice to the felonies of committing a terrorist act and the intentional homicide of Mr Hariri, are therefore satisfied.[1297]

650 Mr Oneissi's participation in the conspiracy and the fact that he was entrusted with disseminating the false claim of responsibility right after the attack required him to know details about the attack, such as when it would take place, so that he could promptly fulfil this task. In addition, Mr Oneissi's knowledge that the attack would target Mr Hariri, a heavily-guarded prominent political figure, made him aware that the attack would occur in

[1297] The Appeals Chamber recalls that the assassination of a prominent political or military leader can *per se* be liable to cause a public danger, regardless of the weapon used or the place of the attack. *See* 2011 Interlocutory Decision on Applicable Law, para. 127.

circumstances and by means liable to kill and injure bystanders. Based on this, it was foreseeable to Mr Oneissi that other persons could have died as a result of the terrorist act in which he conspired and participated. The subjective element of being an accomplice to the felonies of intentional homicide of the 21 other persons who died and the attempted intentional homicide of the 226 persons who were injured is therefore also satisfied.

651 Accordingly, the Appeals Chamber finds beyond reasonable doubt that Mr Oneissi is guilty (a) as co-perpetrator of the crime of conspiracy to commit a terrorist act (Count 1); (b) of being an accomplice to the felony of committing a terrorist act (Count 6); (c) of being an accomplice to the felony of intentional homicide of Mr Hariri and 21 other persons (Counts 7 and 8); and (d) of being an accomplice to the felony of attempted intentional homicide of 226 persons (Count 9).

652 The aggravating circumstances pleaded in the Amended Consolidated Indictment will be assessed at the sentencing stage.

653 With respect to both Messrs Merhi and Oneissi, the Appeals Chamber recalls that, pursuant to Rule 109 (E), an accused who appears after having been convicted *in absentia* by the Appeals Chamber has a right to: "(i) accept in writing the conviction or sentence; (ii) request a retrial; (iii) accept in writing the conviction and request a new hearing in respect of his sentence; or (iv) accept the Trial Chamber's judgment of acquittal and request a new hearing on appeal".

654 The Appeals Chamber will issue later today arrest warrants for Messrs Merhi and Oneissi and a scheduling order for sentencing proceedings.

XIII. DISPOSITION

FOR THESE REASONS,

PURSUANT TO Articles 2 and 26 of the Statute, Rule 176 of the Rules, and Articles 200, 212, 219 (5), 270, 314, and 547 of the Lebanese Criminal Code,

THE APPEALS CHAMBER hereby:

DISMISSES, by majority, Sub-grounds 1 (D), 5 (E), and 8 (C); and **DISMISSES**, unanimously, Sub-grounds 1 (A)–(C), 1 (E), 2 (B)–(C), 3 (B), 4 (A)–(C), 5 (A)–(B), and 8 (A)–(B);

GRANTS, by majority, Sub-ground 3 (A); and **GRANTS**, unanimously, Sub-grounds 2 (A), 3 (C), 4 (D)–(E), 5 (C)–(D), and 8 (D) and Grounds 6 and 7 of the Prosecution Appeal Brief;

REVERSES, unanimously, the acquittals of Messrs Merhi and Oneissi; and

FINDS, unanimously, Messrs Merhi and Oneissi guilty of the following crimes charged in the Amended Consolidated Indictment: (a) **Count 1** (being a co-perpetrator of conspiracy aimed at committing a terrorist act); (b) **Count 6** (being an accomplice to the felony of committing a terrorist act); (c) **Counts 7 and 8** (being an accomplice to the felony of intentional homicide); and (d) **Count 9** (being an accomplice to the felony of attempted intentional homicide).

Judge Baragwanath and Judge Chamseddine append separate opinions, dissenting in part and concurring in the result.

Done in Arabic, English, and French, the English version being authoritative.
Dated 10 March 2022
Leidschendam, the Netherlands

Judge Ivana Hrdličková, Presiding

Judge Ralph Riachy

Judge David Baragwanath

Judge Afif Chamseddine

Judge Daniel David Ntanda Nsereko

XIV. SEPARATE OPINION OF JUDGE BARAGWANATH CONCURRING IN THE RESULT

A. Introduction

1. The members of this Appeals Chamber are unanimous that the acquittals of Messrs Merhi and Oneissi on all counts against them must be set aside and replaced by convictions. These orders are made in the final two paragraphs, with which I expressly agree, of the Disposition of the Judgment of this Chamber. I also agree with much of the reasoning of that Judgment, to parts of which I have contributed.

2. While preferring the analysis contained in this Separate Opinion, with a single exception that preference does not justify my formally dissenting from the Judgment endorsed by my colleagues. To do so would add to Lebanon's burdens judicial disagreement in these important appeals on issues of law that do not affect the ultimate result. I have therefore signed the Judgment of this Chamber on the basis that my different conclusions on other paragraphs of the Disposition are recorded in the Schedule to this Opinion, which gives the reasons. The exception, as to which I do dissent, is paragraph 179 of the Appeal Judgment, which endorses the Trial Chamber's adoption of four inferences as being the only reasonable ones. Each of these is however rejected elsewhere in the Judgment of this Chamber.

3. Rafiq Hariri, former and potential future Prime Minister of Lebanon, was assassinated on 14 February 2005 by the detonation of military explosive equivalent to some 2½ tonnes of TNT. Carried into central Beirut on a motor vehicle and triggered by its suicidal driver as Mr Hariri's motorcade approached, it also killed 21 and injured 226 other members of the motorcade and citizens going about their lawful affairs.

4. The assassination was the result of a carefully planned conspiracy to achieve political ends, classified by the Security Council of the United Nations as a threat to international peace and security.[1] On a challenge to the legality of the Security Council's Resolution creating the Special Tribunal for Lebanon, this Chamber held such response to be lawful.[2] The skill, care and resources devoted to committing the assassination and attempts to conceal the identity of the assassins required a massive enquiry by the Government of Lebanon and the Prosecution

[1] SC Res. 1757, UN Doc. S/RES/1757, 30 May 2007, p. 2.
[2] 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.

branch of this Tribunal. There followed a Trial Chamber hearing over 6½ years, two of which were devoted to preparation of the extensive judgment under appeal. The meticulous care taken by that Chamber throughout its judgment of some 2600 pages, together with the well-focused submissions of counsel appointed respectively for the Prosecution; to represent Victims; and to represent the Accused all being tried *in absentia*, have helped this Chamber to unmask what may have appeared successful concealment of the identity and conduct of the primary assassins. While we do not share the ultimate conclusions of the Trial Chamber the subject of these appeals, its efforts have clarified much of the great and unusual detail of the case and assisted us to see it in perspective.

[illegible] The Trial Chamber's judgment delivered on 18 August 2020 convicted Salim Jamil Ayyash on Count 1 of the Prosecutor's indictment alleging conspiracy to commit a terrorist act, and on Count 2, committing a terrorist act by means of an explosive device, Count 3 intentional homicide of Rafiq Hariri with premeditation by using explosive materials, Count 4 such homicide of 21 other people, and Count 5 attempt to commit such homicide of 226 other people. The judgment acquitted the present Respondents Hassan Habib Merhi and Hussein Hassan Oneissi, and also Assad Hassan Sabra, against whom there is no Prosecution appeal, of the Count 1 conspiracy allegation, and of Count 6 as accomplice to the terrorist act alleged in Count 2, of Count 7 as accomplice to the homicide of Rafiq Hariri alleged in Count 3, of Count 8 as accomplice to the homicide of 21 other people alleged in Count 4, and of Count 9 attempt to commit such homicide of 226 other people alleged in Count 5.

[illegible] Mr Ayyash's attempt to appeal against his convictions and five life sentences was held by a majority of this Chamber to be unavailable because, tried *in absentia* under Article 22 of the Statute of the Special Tribunal, his remedy was confined to an absolute right to elect retrial in his presence.[3] So we have before us only the Prosecution appeals against the acquittals of Messrs Merhi and Oneissi, asserting that they were both party to the Count 1 conspiracy and also performed related acts, among them attempting to shield the co-perpetrators and themselves from justice. The Prosecution also alleges, solely to provide further context for those appeals,[4] that the Trial Chamber erred in finding that Mustafa Amine Badreddine, whom

[3] STL, *Prosecutor v. Ayyash*, STL-11-01/A-1/AC, F0026, Decision on Admissibility of "Notice of Appeal on Behalf of Mr Ayyash Against Conviction and Sentence", 29 March 2021.
[4] And not to challenge the dismissal of the indictment against Mr Badreddine following the majority decision of this Chamber that he was no longer alive.

it had indicted on the same charges as Mr Ayyash and claimed to be the leader of both the assassination and the shielding attempt, had no criminal role.

B. Our jurisdiction and the approach to questions raised by the Prosecution

7 I write separately from my colleagues on the law because our paths to the same ultimate conclusion of convictions for Messrs Merhi and Oneissi differ. They result from different interpretations of the Article of the Statute of the Special Tribunal which confers jurisdiction on the Appeals Chamber. It states:

> **Article 26**
>
> **Appellate proceedings**
>
> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:
>
> (a) An error on a question of law invalidating the decision;
>
> (b) An error of fact that has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse, or revise the decision taken by the Trial Chamber.

8 The Prosecution Notice of Appeal and its 184 page Appeal Brief pose questions challenging both types of error, which in my view are conveniently considered in relation to each other rather than independently. There is no material difference of views between this Opinion and the Judgment of this Chamber with regard to the Prosecution's challenges to alleged errors of fact in the Trial Chamber's judgment. The differences concern alleged errors of law asserted by the Prosecution, to which the Judgment of this Chamber and this Opinion give different answers. These differences do not affect the ultimate result of the case.

9 It is to be noted that we are not seized of any appeal under Article 26 (2) of the Statute "from persons convicted by the Trial Chamber"; the present appeals are under Article 26 (1) of the Statute and are solely "from the Prosecutor". The difference between the two is material to the answers to be given to the "question[s] of law" posed by the Prosecutor.

10 Because the Prosecution must prove its case beyond reasonable doubt, in other situations, where *a "person[] convicted by the Trial Chamber*" alleges "an error of fact that has occasioned a miscarriage of justice", an appeal will succeed if the appellant can show that some Trial Chamber acting reasonably could have found such reasonable doubt.

11 But for the same reason, where the appellant is *a Prosecutor* who, as in the present cases, appeals against a finding of fact resulting in an acquittal, the appeal can succeed only if this Chamber is satisfied that no Trial Chamber acting reasonably could have found such reasonable doubt.

12 In a convicted person's appeal, which succeeds if a reasonable doubt exists, since the Trial Chamber in such case could reasonably decide either way, it is lawful for that Chamber either to accept or to reject the Prosecution argument. Because the Trial Chamber is entitled to answer the question of guilt either "yes" or "no", neither answer entails any "error on a question of law". But in an appeal by a Prosecutor, who must prove beyond reasonable doubt that it would be unreasonable for *any* Trial Chamber to acquit, if that exacting onus is satisfied, it is unlawful for the Trial Chamber to reject the Prosecution argument: in law it may only answer "yes" to the question of guilt. Since to answer the question of guilt with "no" infringes the law, for reasons stated in the next paragraph such answer in my opinion commits "an error on a question of law" (as well as an "error of fact" for getting the facts wrong). Article 26 of the Statute gives us jurisdiction over both types of error, whichever is or are pleaded.

13 High authority[5] holds that "error of law" exists where there are "mandatory factors which a trial chamber must take into account […] and failure to consider any of [such] factors may amount to a legal error",[6] and also where the judgment must be reversed because it "was premised on an erroneous interpretation of the law".[7] The latter was classically described by Lord Greene M.R. in *Associated Provincial Pictures Houses, Limited v. Wednesbury Corporation*,[8] an English decision which is applied regularly in criminal cases[9] and appropriate for present application.[10] His test has two limbs:

---

[5] The Appeals Chamber of the International Criminal Court and the Supreme Court of the United Kingdom.
[6] ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment', 30 March 2021, para. 26 describing the effect of Rule 145 (1) of the Rules of the International Criminal Court.
[7] ICC, *Prosecutor v. Banda and Jerbo,* ICC-02/05-03/09, Judgment on the Appeals of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", 17 February 2012, para. 29.
[8] England and Wales, Court of Appeal, *Associated Provincial Pictures Houses, Limited v. Wednesbury Corporation,* [1947] EWCA Civ 1, 7 November 1947, 233.
[9] *See, e.g.,* United Kingdom, Supreme Court, *Director of Public Prosecutions (Respondent) v. Ziegler and others (Appellants),* [2021] UKSC 23, 25 June 2021.
[10] Article 38 of the Statute of the International Court of Justice states:
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
[…]
b. international custom, as evidence of a general practice accepted as law;

> The court is entitled to investigate the action of [a decision-maker, there a local authority] with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account.

No more may the fact-finding decision of a criminal court take into account considerations that are irrelevant, nor fail to take into account those that are relevant.

14 Such mandatory factors must, in my opinion, include the findings made by this Chamber in the present case, where, as mentioned at paragraph 11 above the Prosecution proves its allegations on appeal beyond reasonable doubt and it would be unreasonable in law for any Trial Chamber to acquit. That is why I respectfully differ from the approach of the Judgment of this Chamber where, in answering several of the questions of law proposed by the Prosecutor, it gives without reference to the whole of the evidence a response "without prejudice"[11] to a subsequent assessment, which later on the totality of the evidence reaches an inconsistent answer. I prefer instead to make and act upon a single finding on the totality of the evidence of the facts that must be found by any Chamber acting reasonably. Two examples on the present appeals illustrate the point.

15 First, in its judgment the Trial Chamber had not accepted that Mr Merhi was proved to be the sole user of one of the three cellphones of a secret "Green" network (i.e. Green 071) which was confined to two co-accused Messrs Badreddine and Ayyash and himself. The Prosecution's Appeal Brief pleads that the Trial Chamber erred in law by failing to take into account relevant evidence that Mr Merhi was such user.

16 In answer to one of the questions raised by the Prosecution grounds of appeal—Sub-ground 4 (E)—the Judgment of this Chamber ultimately accepts, and I agree, that:

> [w]hen the evidence is reviewed in its totality, the only reasonable inference available is that Green 071 was being used by Mr Merhi during the attribution period.
>
> [Hence] the Trial Chamber was unreasonable in failing to find that Mr Merhi was the user of Green 071.[12]

---

c. the general principles of law recognized by civilized nations;
d. […] judicial decisions […] as subsidiary means for the determination of rules of law.

[11] For example after negative answer to Sub-ground 4 (C), Appeals Chamber Judgment, para. 268.

[12] Appeals Chamber Judgment, paras 304-305.

But that finding is not applied in the negative answer of the Judgment of this Chamber to Sub-ground 4 (C): the Prosecution's claim that the Trial Chamber erred in law by:

> failing to take into account relevant evidence [the pleading includes as to that "Merhi's connection to the conspiracy"] that Merhi used Green 071.[13]

I interpret the allegation as "failing *properly* to take into account".

The answer "no"[14] of the Judgment of this Chamber to the Prosecution's claim in Sub-ground 4 (C) is there given before examining the whole case.

17 Had the Trial Chamber properly taken "Merhi's connection to the conspiracy" into account, I am of the respectful view that the finding of this Chamber at paragraph 627—that Mr Merhi, together with Messrs Badreddine and Ayyash effectively formed the mission command of the attack—means that the correct answer to the question in Sub-ground 4 (C) can only have been "yes". Paragraph 627 states:

> [i]t has therefore been established that (a) the Green Network was used to coordinate and monitor the activities of the other networks in the preparation and execution of the attack; (b) its members were Messrs Badreddine, Ayyash, and Merhi […]

The negative answer to Sub-ground 4 (C) is also required by the aforesaid unanimous answer of this Chamber that a negative conclusion to Sub-ground 4 (E) would be factually unreasonable.

18 A second example is Sub-ground 5 (E), the Prosecutor's pleading on appeal that the Trial Chamber erred in failing to assess whether the inferences it identified regarding the roles of the Green Network and of Mr Badreddine were reasonable in the light of the totality of the evidence.[15] The allusion was to the Trial Chamber's failing to find that the Green Network was used to monitor and coordinate both the assassination against Mr Hariri, and also the false claim as to who were responsible for it. The Judgment of this Chamber answers "no" to the question whether the Trial Chamber erred in its assessment of alternative inferences.[16]

19 Yet again, as recorded at paragraph 17 above, our ultimate conclusion is that any reasonable fact-finder must find that the Green Network was used by Messrs Badreddine, Ayyash and Merhi to coordinate and monitor the assassination against Mr Hariri.[17] In the light

[13] Sub-ground 4 (C).
[14] Appeals Chamber Judgment, paras 266-267.
[15] Sub-ground 5 (E).
[16] Appeals Chamber Judgment, paras 182-183.
[17] Appeals Chamber Judgment, para. 627.

of that conclusion the answer to the question in Sub-ground 5 (E) (final sentence of paragraph 18 above) whether the Trial Chamber erred in law should once more in my opinion be "yes".

C. Context

70. It has been helpful for counsel's submissions to this Chamber to raise a number of questions. While most of these usefully warrant individual analysis for our purpose of explaining the reasons for our conclusions, the answer to a major issue may determine the answers to other questions;[18] or the topic does not require our answer for the determination of the appeals.[19] The questions and the case must be viewed in their overall context.

71. That begins with Lebanon's proud history of contributing to the rule of law which is the over-arching purpose of this Tribunal. The legacy of the great Beirut law school, as of Ulpian's authorship of what became 42% of Justinian's *Digest of Roman Law*, underlay Justinian's description of Beirut as "nurse of laws", adopted as motto by its Bar.

72. The influence of the Roman law is a major contribution to civilisation via influential legal systems—Roman-Germanic, Napoleonic and common law—which including Lebanon's current legal system bear on the work of this Tribunal.

73. Lebanon's example to others includes education of the representatives of Iran, Iraq, Saudi Arabia and Syria which in 1945 joined it in San Francisco in the creation of the United Nations; Charles Malik's role in the creation of the Universal Declaration of Human Rights; and that of Justice Nawaf Salam in the International Court of Justice.

Syria and Hezbollah

74. It is appropriate for Lebanon to have called on the United Nations and international law for assistance with resolving the present case. Syria, Lebanon's immediate and powerful neighbour, has had close historical relations with Lebanon. Syria's determination to remain in effective control of Lebanon following its intervention in the Lebanese civil war had resulted in United Nations Security Council Resolution 1559 of 2 September 2004. That expressed the Council's grave concern at the "continued presence of armed militias in Lebanon, which prevent the Lebanese Government from exercising its full sovereignty over all Lebanese territory"; reaffirmed "its call for the strict respect of the sovereignty, territorial integrity, unity,

[18] Sub-ground 8 (D) determines the answers to Sub-grounds 8 (A) - (C).
[19] Sub-grounds 1 (B), 1 (C) (1), 4 (A) and 4 (B).

and political independence of Lebanon"; and called for "the disbanding and disarmament of all Lebanese and non-Lebanese militias".[20] Both Syria,[21] and the Lebanese military and political organisation Hezbollah,[22] expressed publicly their opposition to the resolution.

75. Increasing tensions between Lebanese supportive of the UN Resolution, headed by Mr Hariri, and those opposed to it provide the broad context of this case. The major issues of these appeals have been whether the Prosecution has proved whether Messrs Merhi and Oneissi were co-perpetrators of the crimes resulting from such tensions that have been alleged against them, together with Mr Badreddine and Mr Ayyash.

Major stages of analysis

76. En route to our verdicts of guilt of Messrs Merhi and Oneissi on all five counts—1 and 6-9—are major stages of analysis, which lead to differences from the Trial Chamber. They are:

(1) The Trial Chamber's error in assessing evidence on vital topics in isolation from, rather than in combination with, the totality of the evidence;[23] that is important in relation to the use by Messrs Merhi and Oneissi of their "Purple phones" following the detonation of the bomb to broadcast a false message as to those responsible;

(2) Similar error in assessing the roles of the Green Network, used to monitor and coordinate the assassination and false claim,[24] and of Mr Badreddine,[25] which is coupled with failure properly to apply Rule 158 as to evidence from witnesses not available for cross-examination;[26]

(3) Failing *properly* to take into account Mr Merhi's connections to the conspiracy,[27] contrary to our finding that, given the totality of the evidence, no reasonable Chamber could have failed to find that Mr Merhi was the user of Green 071;[28]

---

[20] SC Res. 1559, UN Doc. S/RES/1559, 2 September 2004, p. 1.
[21] *See* Speech of President Bashar Al-Assad of 9 October 2004, Exhibit P01782, Narrative Overview of telephone activity and events relevant to the case for the Prosecution ("Chronology"), para. 98.
[22] *See* Speeches of Hassan Nasrallah on 12 November 2004 and 7 February 2005, in Chronology, para. 913.
[23] Sub-ground 1 (C).
[24] Sub-grounds 5 (A), (B) and (E).
[25] Sub-grounds 5 (C), (D) and (E), and Appeals Chamber Judgment, para. 627.
[26] Sub-ground 1 (E).
[27] Sub-grounds 4 (C) and (D).
[28] Sub-ground 4 (E).

(4) Failing to find that, given the totality of evidence, Messrs Merhi and Oneissi disseminated the false claim of responsibility.[29]

D. The major conclusions

77 For the following reasons, I would give these answers to the relevant Grounds and Sub-grounds of Appeal:

1. Ground 1

a. Whether the Trial Chamber erred in law by treating circumstantial evidence as having less evidentiary value than direct evidence

78 While, as the Judgment of this Chamber recognizes, the language of the Trial Chamber contains some infelicities, read as a whole there is no sufficient reason to doubt that its experienced and painstaking judges knew very well that there is no hierarchy between "direct evidence" given by a witness who appears before the Tribunal, and "circumstantial evidence" being the inferences available to be made from direct evidence and such other permitted evidence as certain documents. What matters is its strength. I agree with the answer "no" given to the question by the Judgment of this Chamber.

b. Whether the Chamber erred in law in applying the reasonable doubt standard

79 I find it unnecessary to answer this question. It poses as a matter of *law* what is essentially a question of the relevant *facts* which, if challenged, must be specified in the Notice of Appeal as Rule177 (B) requires. That has not occurred.

c. Whether the Trial Chamber erred in (1) compartmentalizing its assessment of calls between the Accused and other network mobile users and (2) analyzing the Purple phone evidence as to the false claim of responsibility in isolation rather than in totality

80 The Judgment of this Chamber dismisses the whole of Sub-ground 1 (C).[30] I find it unnecessary to answer Sub-ground 1 (C) (1) (alleged errors as to compartmentalizing assessment of calls).

---

[29] Grounds 6, 7 and Sub-ground 8 (D).
[30] Appeals Chamber Judgment, para. 159 and Disposition.

31 However, having correctly stated that evidence must not be analysed in isolation, but considered in its totality, the Trial Chamber in my view reached as to Sub-ground 1 (C) (2) a factual conclusion not reasonably open to a tribunal, in considering in isolation from each other the following:

a) whether evidence showing Mr Oneissi and Purple 018's presence near relevant payphones on the afternoon of 14 February 2004 could *on its own* show that they disseminated the false claim of responsibility;[31]

b) whether evidence showing Mr Oneissi's presence near the tree from which the false claim video was collected could *on its own* show he was watching the tree;[32]

c) whether the simultaneous discarding of the Purple phones after the false claim of responsibility was delivered could *on its own* establish (1) why non-covert phones were used, and (2) their users' overall participation in the dissemination of the false claim.[33]

32 Of particular note is the Trial Chamber's failure to consider *concurrently* the use of the Purple phones during both phases of:

- the COLA operation in which, over a ten day period from 29 December 2004, on nine days Mr Merhi from a distance had supervised Mr Oneissi and the user of Purple 018 in their unprecedented presence near the Mosque served by the COLA mobile telephone network and attended by Mr Abu Adass. He later, having disappeared, featured in a video and as author of a letter, both giving a false identity for the perpetrators of the bombing;
- the subsequent 14 February 2005 afternoon events following the explosion when, under similar supervision by Mr Merhi, Mr Oneissi and the user of Purple 018 were in the vicinity of the four pay phones from which were made calls to media outlets claiming responsibility for the assassination and demanding both recovery from a neighbouring tree and publication of the Abu Adass video and letter with the false claim of responsibility.

33 Taken together, the evidence requires in response to Sub-ground 8 (D) the answer "yes" to the question whether the Trial Chamber erred, as no reasonable chamber could have failed

[31] Trial Judgment, paras 5661-5664.
[32] Trial Judgment, paras 5678-5680.
[33] Trial Judgment, paras 5815-5816, 5818.

to find that the Accused disseminated the false claim of responsibility. It is that answer, as the Appeals Chamber unanimously decides, which convicts Messrs Merhi and Oneissi. Given such factual finding the Trial Chamber must—in answering Sub-ground 1 (C) (2) negatively—have misdirected itself in law by failing to take account of the totality of the evidence, which required the affirmative reply.

d. Whether the Trial Chamber erred by failing to assess the reasonableness of alternative inferences arising from circumstantial evidence in light of the totality of the evidence

34 The Judgment of this Chamber dismisses Sub-ground 1 (D). But once more because of the finding at paragraph 627 of that Judgment, with which I agree, the Trial Chamber's exoneration of the roles of Mr Badreddine[34] and of the Green Network[35] was not reasonably open to it and thus entailed error of both law and fact.

i. Further comment on the evidence against co-conspirator Mr Badreddine

35 For the purposes of the present appeals against acquittal of Messrs Merhi and Oneissi, to show in context the evidence as to their roles establishing why no reasonable judgment could have acquitted them, further reference is added to the evidence about Mr Badreddine. His trial for monitoring and coordinating the surveillance of Mr Hariri, purchase of the Canter van, physical perpetration of the attack, and coordinating the false claim of responsibility terminated with the finding by a majority of this Chamber that he was no longer alive. But despite his dismissal from the indictment for that reason, the Prosecutor retained in the appeal the allegations against Mr Badreddine as a component of the case against Messrs Merhi and Oneissi.

36 One of these challenged the Trial Chamber's important, and in my judgment unreasonable, finding on the merits—in effect that the evidence entitled Mr Badreddine, were he still alive, to acquittal. At paragraphs 6622-6623 of the judgment the Trial Chamber found that it:

> […] cannot exclude as an inference reasonably available from the evidence that Mr Badreddine was a conduit for passing this information [that something was happening, and hence inferentially of the assassination] to someone else, or in various calls doing

[34] Trial Judgment, para. 6622.
[35] Trial Judgment, para. 4743.

> something unrelated to the explosion. There are other inferences available as to his possible role that do not mean that he was the coordinator of Mr Hariri's assassination, including his having a far more passive role. The Prosecution, it is emphasised, argued that he 'masterminded' the attack.
>
> […] Mere knowledge does not equate to participation in a conspiracy […]

37 At paragraph 6624 such conclusion was said to be:

> […] strengthened when considered in tandem with the evidence of the so-called false claim of responsibility and Mr Merhi's [and] Mr Oneissi's […] pleaded roles. Once their roles are removed—on the basis that the underlying evidence is insufficiently reliable to find that they had the roles pleaded—the role of the Green network functioning as a mission command for executing Mr Hariri's assassination, no matter how suspicious its calls might appear, substantially diminishes.

These passages are material to the major grounds of the Appeal[36] that the Trial Chamber erred in law and fact in failing to find that Mr Merhi used Green 071, and in failing to find that the Green network comprising Messrs Badreddine, Ayyash and Merhi was used to coordinate the overall conspiracy.

38 Mr Badreddine's death does not bar the Prosecution challenges, as unreasonable, to the Trial Chamber's conclusions to the contrary—as to his and Messrs Merhi's and Oneissi's actions in support of and in conjunction with proved criminal conduct of Mr Ayyash that is not challenged on these appeals.

39 For the following reasons, I endorse the Prosecution's challenges[37] to the Trial Chamber's affirmative decision—that Mr Badreddine may have been a mere "conduit"—as being unreasonable, excluding inevitable inferences to the contrary going to a fundamental part of its case.

40 In considering the role of Mr Badreddine, a feature unremarked by the Trial Chamber, which said that his calls with Messrs Ayyash and Merhi lacked the context which is "all important",[38] warrants emphasis.

41 Mr Badreddine combined two relationships: one involved his status to engage in high level dealings with Mr Safa of Hezbollah,[39] against whom no allegation is made by the

[36] Prosecution Appeal Brief, Grounds 4 and 5.
[37] Prosecution Appeal Brief, para. 335 and following.
[38] Trial Chamber Judgment, para. 6593.
[39] Of such rank in Hezbollah as to substitute at times for Mr Nasrallah in meetings with Mr Hariri.

Prosecutor; the other was with the Hezbollah supporter the assassin Mr Ayyash. Seen in context, the manner of carefully controlled use of the Green Network's especially covert Hezbollah relationship, as well as the presumption that proven character will continue over time,[40] required this Chamber's rejection as unreasonable of the Trial Chamber's conclusion that in 2004-2005 Mr Badreddine was not playing in the part of Hezbollah's activities which he led the notable military leadership role for which he was celebrated before and after those dates.[41]

42 The finding of this Chamber is that the Green Network was a Hezbollah network, the Green phones being held only by three presumably key persons, at vital stages, for the calls with Mr Ayyash, and also for calls with Green 071 alleged by the Prosecution and found by this Chamber to be used by Mr Merhi, but in every case communicating only with the Badreddine phone. That further evidences Mr Badreddine's seniority in Hezbollah. It evidences deference to him in his additional roles of linking with Mr Ayyash, the leading assassin; and as leader of the cover-up attempt monitored by Mr Merhi. Viewed within the totality of the evidence I am satisfied that each role is proved against Mr Badreddine beyond reasonable doubt.

43 The principle applied by authorities from three leading jurisdictions,[42] argued before us by the Prosecution as to the materiality of the company one keeps,[43] is fundamental to an understanding of this case: the relationships among Messrs Badreddine, Ayyash, Merhi and Oneissi.

44 It is to be emphasised in relation to the role of Mr Badreddine that:

- As well as keeping company with Hezbollah's Head of Coordination and Liaison Mr Safa, Mr Badreddine also kept company with both Mr Merhi and

[40] Colin Tapper, *Cross and Tapper on Evidence*, XII[th] ed. (Oxford University Press 2010), p. 31: "The basic argument for the reception of [circumstantial] evidence is that the occurrence of an act […] or state of affairs in the past justifies an inference that the act was done, or that the state of […] affairs existed at the moment of time into which the court is inquiring".
[41] Prosecution Appeal Brief, Sub-ground 5 (C).
[42] England, Scotland, British Columbia. *See:* United Kingdom, Court of Appeal (Criminal Division), *R. v. Michael Charles Valentine Breen*, 10 December 2003, [2003] EWCA Crim 3817; Canada, British Columbia Court of Appeal, *R. v. Baal*, 4 June 2004, [2004] BCCA 317; United Kingdom, High Court of Justiciary, Appeal Court, *Hetherington v. Her Majesty's Adv*ocate, 6 January 2010, [2010] HCJAC 1; United Kingdom, High Court of Justiciary, Appeal Court, *Wilson James v. Her Majesty's Advocate*, 23 August 2016, [2016] HCJAC 70; United Kingdom, Court of Appeal (Criminal Division), *R. v. Steven Edward Dossett*, 14 May 2013, [2013] EWCA Crim 710; United Kingdom, Court of Appeal (Criminal Division), *R. v. Christopher Derek Williams*, 2 September 2005, [2005] EWCA Crim 2332.
[43] Prosecution Appeal Brief, para. 197.

Mr Ayyash at major stages, at times central to the assassination and its attempted concealment; and did so via the most select of the four groups of interrelated covert cellphones used by the assassins. Some examples include:

- From the day of Prime Minister Hariri's resignation, 20 October 2004, until his assassination on 14 February 2005 he was subject to covert surveillance under the direction of Mr Ayyash, first by the Blue Network around the Hariri residence at Quraitem Palace, and from 21 December 2004 by both Blue and Yellow phones. On 20 October 2004 Mr Ayyash was in South Beirut and had four calls with Mr Badreddine who was in the area of Parliament.
- On 6 November 2004, during the weekend preceding regular calls among Messrs Merhi, Oneissi and the user of Purple 018, Mr Badreddine received Green phone calls from both Messrs Merhi and Mr Ayyash within 20 minutes of each other from different locations; the next Green call between Messrs Badreddine and Merhi being on 23 December preceding the COLA phase, involving Mr Oneissi, from 29 December;
- On 28 January 2005 during the surveillance of Mr Hariri under the direction of Mr Ayyash, which was maintained from October 2004 until the assassination, and has no rational explanation other than as evidencing designs on Mr Hariri, Mr Badreddine was present and near Mr Ayyash in the Faraya area near Faqra where Mr Hariri had a villa, during Mr Ayyash's dual Red phone surveillance of both that and the Quraitem Palace; on the same day the Red phones, controlled by Mr Ayyash and later operative in the assassination process of 14 February 2005, were active from 11:36 to 17:54 near both of Mr Hariri's residences, two areas predominantly using cells immediately surrounding the Quraitem Palace, and four in the Zouk Mosbeh/Faraya area. Mr Ayyash in the latter area had 12 Red calls and four Green with Mr Badreddine, whose presence in the same Zouk Mosbeh /Faraya area and connection to a cell adjacent to that used by Mr Ayyash suggest close interest in the surveillance activity and are consistent with a brief meeting with Mr Ayyash.

- On 8 February, in what appears to have been a rehearsal for the 14 February attack, there was Blue surveillance around the Quraitem Palace before Mr Hariri's convoy left for Parliament, with Mr Ayyash travelling direct to Parliament. Users of Blue phones switched to Red as they entered central Beirut, performing 20 calls in 32 minutes and located among Parliament, the eventual crime scene, and Quraitem Palace before reverting to Blue phones and leaving central Beirut. During and following the complex process Green phone calls were made by Mr Ayyash to Mr Badreddine.

- Study of the Trial Chamber judgment reveals Mr Badreddine's name appearing 33 times in relation to surveillance of Mr Hariri and other events significant to the assassination.

ii. <u>Relations of Mr Badreddine with Co-conspirator Mr Ayyash</u>

45 The Trial Chamber found that telephone metadata linked covert phones associated with key events with non-covert phones which were proved to be owned and used by Mr Ayyash. It was satisfied that Mr Ayyash headed the following phases of the preparation for and conduct of the assassination:

(1) the surveillance of Mr Hariri and his movements, which occurred from 20 October 2004,[44] until his assassination on 14 February 2005. The Trial Chamber considered that the surveillance prior to the weeks before Mr Hariri's death

> […] may have been preparatory to the plan to murder Mr Hariri or they may have been for general intelligence gathering of Mr Hariri's movements for other purposes. Either is equally possible and the Trial Chamber will not make a finding that they were directly connected with the attack on 14 February 2005.[45]

However it then found that the surveillance involving the Red and Blue network mobiles in the weeks before Mr Hariri's death "was clearly connected to the assassination".[46]

46 The Trial Chamber did not however suggest why such surveillance, conducted over a period of twelve weeks and involving much travel by numerous personnel, could until a late

[44] Trial Chamber Judgment, para. 6652.
[45] Trial Chamber Judgment, para. 6654.
[46] Trial Chamber Judgment, para. 6655.

stage have been for any purpose than preparing for, and ultimately conducting, the assassination of a closely protected political leader. Contrary to the totality principle, it did not factor in the other circumstantial evidence later described. I reject as unreasonable the suggestion that the surveillance prior to the weeks before Mr Hariri's death "may have been for general intelligence gathering of Mr Hariri's movements for other purposes",[47] rather than preparatory to the plan to murder Mr Hariri.

(2) Mr Ayyash used his Red 741 cellphone, as he had previously his Blue 233, to "participate[] in the preparations for the attack from at least sometime in early February 2005, until four minutes before its completion"[48] and to play "his leading role in the assassination",[49] "through his central and leading role in the execution of the attack."[50]

47 The Trial Chamber did not address as significant Mr Merhi's association with both Mr Badreddine and Mr Ayyash. But the common-sense of the law supports the Prosecution submission[51] that the fact that Mr Merhi is connected with proven conspirators is a relevant fact that must be considered as part of the totality of the evidence.

48 That evidence includes the following facts:

(1) The three recipients and users of the Green phones comprising a covert network, one of the four such networks that were interconnected and coordinated with each other, were the conspirators Mr Ayyash just described; Mr Badreddine, the leader of the total conspiracy; and, as this Chamber concludes, Mr Merhi.

(2) As this Chamber finds, the Green network was a Hezbollah network.

(3) The Green phones were so tightly controlled that they were used only for calls to or from Mr Badreddine and never between Mr Ayyash and what the Appeals Chamber Judgment finds was Merhi phone 071.

(4) The Trial Chamber found that Messrs Merhi and Ayyash, who exchanged 24 non-Green phone-calls, knew one another.[52]

---

47 Trial Chamber Judgment, para. 6654.
48 Trial Chamber Judgment, para. 6730.
49 Trial Chamber Judgment, para. 6732.
50 Trial Chamber Judgment, para. 6741.
51 Prosecution Appeal Brief, paras 196-197.
52 Trial Chamber Judgment, para. 5537.

(5) Several of these calls occurred at times relevant to the conspiracy, spiking a week before the assassination[53] around the time when the Chamber found the "final decision" to assassinate Mr Hariri was made. Mr Merhi made a (non-Green) call to Mr Ayyash on 5 February 2005[54] and the next day they exchanged four such calls.[55]

(6) On 23 January, during calls between Mr Ayyash and other users of the Blue network which performed surveillance on Mr Hariri, and later as users of the Red phones were implicated in the actual assassination, Mr Ayyash called Mr Merhi (non-Green) twice.

(7) His convictions are unchallenged on these appeals.

49 Given the nature and gravity of those convictions on substantive counts it may be inferred that Mr Ayyash was second in seniority to Mr Badreddine in the conspiracy.

iii. Mr Merhi

50 The identification made by this Chamber of Mr Merhi as user of the third Green phone 071 is borne out by linkages with both Messrs Badreddine and Ayyash. On that basis his role is explicable only as one of the three controllers of the conspiracy having regard to:

(1) his 32 calls with Mr Ayyash spiking a week before the assassination;[56]

(2) his Green 071 calls, all being with Mr Badreddine, 60% being in the period 12-16 January coinciding with the date Mr Abu Adass disappeared; others being:

- 23 December 2004,[57] the day the Blue network surveilling Mr Hariri expanded to six phones which later became the Red phones of the killing operation;
- 27 December,[58] when Mr Merhi and Mr Ayyash each called Mr Badreddine within three minutes from different locations;
- 2 January 2005, while Mr Oneissi and the user of Purple phone 018, and Mr Oneissi and Mr Merhi were in contact, this was the only day between 30 December 2004 and 7 January 2005 that neither Mr Oneissi nor the holder of Purple phone 018 triggered a cell near the Arab University Mosque.[59] On

[53] Trial Chamber Judgment, paras 5509-5511.
[54] Trial Chamber Judgment, para. 5510.
[55] Trial Chamber Judgment, para. 5511.
[56] Trial Chamber Judgment, paras 5509-5511.
[57] Trial Chamber Judgment, para. 6507.
[58] Trial Chamber Judgment, para. 5197.
[59] Trial Chamber Judgment, para. 6542.

each other day, maintaining phone communication with Mr Merhi, they were in the area where Mr Abu Adass, who provided the message seen and heard on the video of which four payphone calls following the explosion on 14 February 2005 sought publicity, lived and regularly visited the Mosque. Seen in conjunction with the conduct of Mr Oneissi and the user of Purple 018, shortly after the detonation and while in communication with Mr Merhi, in the vicinity of the four payphones from which instructions were given to media to retrieve from a nearby tree the video featuring Mr Abu Adass and accompanying letter and to broadcast its false account of responsibility for the bombing, it is evident that the COLA episode was for the purpose of surveillance of Mr Abu Adass.

(3) His participation in both the COLA phase and the making of the four 14 February calls, each linked with Mr Oneissi, in the light of our analyses of the crime of conspiracy to commit a terrorist act and of accomplice liability for committing a terrorist act and international homicide which follow, makes unreasonable the conclusion that Mr Merhi is other than a party to counts 1 and 6-9 of the indictment.

51 I assess his position as third in the hierarchy of the conspiracy.

iv. Mr Oneissi

52. The conclusion in paragraph 50 (3) above carries with it the inevitable consequence that as Mr Merhi's companion in both the COLA surveillance of Mr Abu Adass and the 14 February calls demanding publication of the video featuring Mr Abu Adass and accompanying statement, Mr Oneissi is similarly guilty of counts 1 and 6-9.

53 Just as Mr Merhi's associations with Messrs Badreddine and Ayyash are significant evidence of his involvement with their criminal activity, the same is to be said of Mr Oneissi's associations with Mr Merhi's criminality.

54 In the two phases in which Mr Merhi was monitoring by mobile the conduct of Mr Oneissi and the user of Purple 018, the active role included that of Mr Oneissi.

55. In the COLA phase over nine of its ten days duration, the presence of Mr Oneissi in the area of Mr Abu Adass's Mosque and home satisfies me that Mr Oneissi was regularly reporting to Mr Merhi what can only have been the activity of Mr Abu Adass in the vicinity of his Mosque and his home. The evidence as to the broadcast of Mr Abu Adass's false message makes clear

that the purpose of the COLA was linked to the same man whose message describes him as a martyr following the assassination of that Mr Hariri.

56. It is not reasonably credible that Mr Oneissi was unaware of the reason for both:

- the COLA surveillance, performed in relation to the maker of the false statement about what at the time it was made was to occur at some point in the future; and
- the four payphone calls on the afternoon of 14 February.

57. Mr Oneissi was not a mere message carrier. He and his companion were in close telephone contact with Mr Merhi as well as the recipients of the four payphone calls whom they successfully persuaded to retrieve and broadcast Mr Abu Adass's messages. The common starting and finishing points of their expedition, single use of the same phone card, on top of the lengthy COLA surveillance exercise in the same company for what must have been the same purpose of securing and broadcasting the messages, requires an inference of common purpose with Mr Merhi as well as each other, in an attempt to conceal the authorship of the attack.

58. He was number four in the conspiracy hierarchy.

v. Conclusion as to Messrs Badreddine, Ayyash, Merhi and Oneissi

59. These facts together provide the context rightly demanded by the Trial Chamber.

60. In sum, the evidence proves beyond reasonable doubt that:

- during the period of the indictment Mr Badreddine was the leader of both preparation and performance of the conspiracy, the assassination and the attempt to conceal the identity of the perpetrators;
- Mr Ayyash was sub-leader of the preparation and performance of the assassination;
- Mr Merhi led the attempt at concealment;
- Mr Oneissi participated in that attempt;
- all were parties to the conspiracy charged in count 1.

2. Grounds 2 and 3

61 I endorse this Chamber's conclusions on both Grounds: the Trial Chamber's addition of legal requirements to the crime of conspiracy and the requirements of accomplice liability entailed errors of law as analysed in paragraphs 549-620 of that Decision.

3. Ground 4

62 In Ground 4 the Trial Chamber erred in law in making decisions that were not reasonably open to it given this Chamber's answer to Sub-grounds 4 (E) and 8 (D). In my view, and with respect to the Appeals Chamber's negative answer, the Trial Chamber failed properly to take into account relevant evidence that Mr Merhi used Green 071 (Sub-ground 4 (C)), as well as erring in fact (as the Appeals Chamber Judgment points out) by miscalculating Green 071's cell activations in SFEIR3 (Sub-ground 4 (D)). No decision is required in relation to Sub-grounds 4 (A) and (B).

4. Ground 5

63 In Ground 5 the Trial Chamber erred in failing unreasonably to find that the Green Network was used to coordinate the overall conspiracy:

- as to Sub-grounds 5 (A) and (B) I prefer, to the negative answers of the Appeals Chamber Judgment to the question whether the Trial Chamber erred,[60] the answer of failure properly to take into account relevant evidence on a holistic basis;
- as to Sub-grounds 5 (C) and 5 (D), (as the Appeals Chamber Judgment points out) the Trial Chamber failed unreasonably to find that Mr Badreddine was a Hezbollah military commander during 2004 and 2005 and that the Green Network was a Hezbollah Network; and
- as to Sub-ground 5 (E), contrary to the Appeals Chamber Judgment,[61] in my opinion the Trial Chamber failed unreasonably to find that the Green Network controlled by Messrs Badreddine, Ayyash and Merhi was used by them to commit the crimes alleged against them, as the totality of the evidence required.

64 So I am satisfied not only with the affirmative answer given by the Appeals Chamber Judgment to Sub-grounds 5 (C) and also 5 (D): that the same answer should be given to whether

[60] Appeals Chamber Judgment, paras 342, 366-367, and Disposition.
[61] Appeals Chamber Judgment, paras 182-183, and Disposition.

the Trial Chamber erred by holding that Rule 158 evidence (from a witness unavailable for cross-examination) on contested matters could be given no weight unless corroborated by tested evidence, but would give that answer to Sub-ground 5 (E).

65 While finding error,[62] at paragraph 207 and in its Disposition the Appeals Chamber Judgment dismisses Sub-ground 1 (E),[63] but in the decision on Sub-ground 5 (D) grants relief in respect of the error.[64] I prefer the analysis that paragraph 627 of the Appeals Chamber Judgment shows that the Trial Chamber erred in part under Sub-ground 1 (E) in both law and fact:

> (1) in requiring the Rule 158 evidence of Mr Wissam Al-Hassan to be corroborated because it was contested;
>
> (2) in failing to consider evidence in exhibits P02124 and P02125 corroborating the evidence of Mr Al-Hassan;
>
> (3) In failing to recognize Mr Badreddine's role as Hezbollah military commander during 2004-2005, as we hold in our unanimous affirmative answer to Sub-ground 5 (C).

5. Grounds 6 and 7

66 As to Grounds 6 and 7 I agree with paragraphs 437- 506 of the Appeal Judgment.

6. Ground 8

67 In Ground 8 the Trial Chamber erred in fact and in law in holding that Messrs Merhi, and Oneissi, and the user of Purple 018 did not disseminate the false claim of responsibility, as (which the Appeals Chamber Judgment points out in Sub-ground 8 (D)), such conclusion was not reasonably open to it. It is unnecessary to answer the Prosecution's contentions of errors of law pleaded in Sub-grounds 8 (A), (B), and (C), as the affirmative answer to Sub-ground 8 (D), with which I agree, provides a primary finding for Ground 8 which does not require elaboration.

[62] Appeals Chamber Judgment, para. 205.
[63] Appeals Chamber Judgment, para. 207.
[64] Appeals Chamber Judgment, paras 432-434.

E. Postlude

[illegible] Rule 52 requires Outreach to disseminate accurate and timely information to the public, particularly in Lebanon, about the role and functioning of the Tribunal. It set up in cooperation with 11 Lebanese universities and the Asser Institute in The Hague an Inter-University Programme to teach students in Lebanon International Criminal Law and Procedure. A participating professor[65] described it as:

> the best attempt towards reconciliation in Lebanon […] bring[ing] together universities and students from different backgrounds.[66]

It is to be hoped that the combination of Lebanon and the international community, in addressing what had initially appeared an insoluble problem of identifying responsibility for the assassination, may help Lebanon in the performance of its historic role as exemplar of the rule of law.

[65] Professor Georges Masse, Chairperson of International Affairs Department at American University of Science and Technology, Beirut.
[66] *See* https://www.stl-tsl.org/en/outreach/inter-university-programme.

SCHEDULE

69 In my opinion therefore **THIS CHAMBER SHOULD**:

DISMISS Sub-grounds 1 (A), 2 (B), (C) and 3 (B) of the Prosecution Appeal Brief;

FIND IT UNNECESSARY TO ANSWER Sub-grounds 1 (B), 1 (C) (1), 4 (A), 4 (B) and 8 (A), (B) and (C) of the Prosecution Appeal Brief;

GRANT Sub-grounds 1 (C) (2), 1 (D), 1 (E) (in part), Sub-grounds 2 (A), 3 (A), 3 (C), 4 (C), (D) and (E), 5 (A), (B), (C), (D) and (E), Grounds 6 and 7, and Sub-ground 8 (D) of the Prosecution Appeal Brief

AND SUBJECT TO THE FOREGOING

ENDORSE THE TWO FINAL PARAGRAPHS OF THE DISPOSITION AT SECTION XIII OF THE JUDGMENT OF THE APPEALS CHAMBER

Done in Arabic, English and French, the English version being authoritative.
Dated 10 March 2022
Leidschendam, the Netherlands

Judge David Baragwanath

XV. SEPARATE OPINION OF JUDGE CHAMSEDDINE PARTIALLY DISSENTING AND CONCURRING IN THE RESULT

1 In the Judgment, the Trial Chamber found that, to be an accomplice under Article 219 of the Lebanese Criminal Code ("LCC"), a person must know which particular crime the perpetrator intends to commit.[1] The Trial Chamber added that it is preferable to accept the stricter standard of knowledge proposed by Counsel for Mr Merhi and Counsel for Mr Oneissi, namely, that those charged as accomplices must legally have known, before the crimes were committed, that Mr Hariri was the target of the attack.[2] The Trial Chamber concluded that Messrs Merhi and Oneissi could not be found responsible because, *inter alia*, their advance knowledge that the attack was going to target Mr Hariri was not proven beyond reasonable doubt.

2 The Majority considers that "[t]o satisfy the knowledge element of accomplice liability for terrorism, it is sufficient to demonstrate that the accomplice knew that the perpetrator would use means liable to create a public danger with the intent to cause a state of terror."[3] The Majority concludes that the Trial Chamber erred in law in holding that Messrs Merhi and Oneissi must have known that Mr Hariri was the target of the terrorist act.[4] However, the Majority finds that there is sufficient evidence to prove that Messrs Merhi and Oneissi provided assistance to the perpetrators knowingly and willingly.

3 I believe that the agreement between the perpetrator and the accomplice should also encompass the identity of the target of the terrorist act. It would be illogical and contrary to our interpretation of Article 219 not to require knowledge of the identity of the target of the terrorist act. Without knowledge of the identity of the target of the terrorist act, there could be no agreement on the "particular crime". Furthermore, I believe that the identity of the target is an element distinct from the means, which are the tools to be used in carrying out the terrorist act.

4 Article 219-4 of the LCC provides that "[a]nyone who aids or abets the perpetrator in acts that are preparatory to the offence" shall be deemed to be an accomplice. An accomplice who aids and abets the perpetrator of an offence must know the precise details of the offence to be able to assist in the acts preparatory thereof. Article 219-5 of the LCC provides that

[1] Judgment, para. 6148.
[2] Judgment, paras 6151-6152.
[3] Majority Judgment, para. 607.
[4] Majority Judgment, para. 616.

"[a]nyone who, having so agreed with the perpetrator or an accomplice before commission of the offence, helped to eliminate the traces, to conceal or dispose of items resulting therefrom, or to shield one or more of the participants from justice" shall be deemed to be an accomplice. An accomplice who helps shield the perpetrator from justice must know the precise details of the offence to be committed to be able to assist in eliminating its traces. It follows that an accomplice to a terrorist act must know the precise identity of the target of that act in advance, in order to provide the assistance defined in one of these sub-articles.

[illegible] The Majority reverses the acquittals and exercises its competence to deal with the merits of the case and revise the Judgment of the Trial Chamber. The Majority finds that Messrs Merhi and Oneissi are responsible as accomplices after citing what it considers sufficient evidence to establish beyond reasonable doubt that they knowingly and willingly entered into an agreement to participate in the commission of a terrorist act, namely, the assassination of Mr Hariri. This consideration makes that finding warranted and acceptable.

[illegible] Pursuant to the foregoing, I find that the Trial Chamber did not err in law when it considered that the accomplices must have had advance knowledge of the identity of the target of the terrorist act.

Done in Arabic, English, and French, the English version being authoritative.
Dated 10 March 2022
Leidschendam, the Netherlands

Judge Afif Chamseddine

XVI. ANNEX A: TABLE OF ABBREVIATIONS AND ACRONYMS

Amended Consolidated Indictment	STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3813, Notice of Filing of Updated Redacted Version of F2720 "Amended Consolidated Indictment", filed 12 July 2016, 23 January 2020, Annex: Updated Public Redacted Version of Amended Consolidated Indictment
CDR	Call Data Record
Cell Site Analysis Report	Exhibit P00549, Expert Report of J.E. Philips "An Introduction to Cell Site Analysis as applied to GSM Networks"
COLA cells	COLA 1, COLA2, and COLA3
COLA phase	Purple Phones' activity in the area of the COLA cells between 29 December 2004 and 7 January 2005
CST	Call Sequence Table
ECCC	Extraordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of international Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991
IRMCT	International Residual Mechanism for Criminal Tribunals
ISF	Internal Security Forces
KSC	Kosovo Specialist Chambers and Specialist Prosecutor's Office
LCC	Lebanese Criminal Code
LRV	Legal Representative of Victims
LRV Observations	STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0034, The Legal Representative of Victims Observations on the Appellant and Respondent Briefs, 14 June 2021

Merhi Response Brief	STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0029, *Mémoire de la Défense de Merhi en réponse au «* Prosecution Appeal Brief *» déposé en vertu de l'article 183 du Règlement de procédure et de preuve*, 31 May 2021
Merhi Response to LRV Observations	STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0037, *Réponse de la Défense de Merhi aux «* Legal Representative of Victims Observations on the Appellant and Respondents Briefs *»*, 25 June 2021
Mosque	Arab University Mosque
MSC	Mobile Switching Centre
Oneissi Response Brief	STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0030, Oneissi Defence Response to the Prosecution Appeal Brief, 31 May 2021
Prosecution Appeal Brief	STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0024, Prosecution Appeal Brief, Public with Confidential Annex A and Public Annexes B and C, 29 March 2021
Prosecution Reply Brief	STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0035, Prosecution Brief in Reply, 16 June 2021
Rules or RPE	Rules of Procedure and Evidence of the Special Tribunal for Lebanon
SCSL	Special Court for Sierra Leone
Statute	Statute of the Special Tribunal for Lebanon
STL or Tribunal	Special Tribunal for Lebanon
UN	United Nations
UNIIIC	United Nations International Independent Investigation Commission
VPP	Victim Participating in the Proceedings

XVII. ANNEX B: PROCEDURAL HISTORY

A. Pre-Trial and Trial Proceedings

1. The first indictment in Case No. STL-11-01 was submitted on 17 January 2011 against Mr Ayyash.[1] The Prosecution later filed several amendments and versions of the indictment. The final, operative indictment was filed on 12 July 2016, with a final public redacted version filed on 23 January 2020.[2] The Amended Consolidated Indictment reflects the joinder of Mr Merhi to the case[3] and the termination of the proceedings against Mr Badreddine following his reported death.[4]

2. Before confirming the first indictment filed by the Prosecution, the Pre-Trial Judge submitted, pursuant to Rule 68 (G) of the Rules, 15 questions of law raised by the indictment to the Appeals Chamber.[5] The Appeals Chamber addressed those questions in an interlocutory decision issued on 16 February 2011.[6]

3. The proceedings in the case were held *in absentia*, pursuant to the Trial Chamber's decisions under Article 22 of the Statute and Rule 106 (A) of the Rules.[7] In accordance with Article 22 (2) (c) of the Statute and Rule 105 *bis* (B) of the Rules, the Head of Defence Office assigned Defence Counsel for the accused.[8]

---

[1] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0001, Submission of an Indictment for Confirmation (Rule 68) and (1) Motion for an Arrest Warrant and Order for Transfer (Rule 79); (2) Urgent Motion for the Non-disclosure of the Indictment (Rule 74); and (3) Urgent Motion for an Order for Interim Non-disclosure of the Identities of Witnesses Protection Measures (Rules 77 and 115), 17 January 2011.

[2] Amended Consolidated Indictment.

[3] STL, *Prosecutor v. Ayyash et al.* & *Prosecutor v. Merhi*, STL-11-01/T/TC & STL-13-04/PT/TC, Transcript of 11 February 2014, pp. 91-96; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1424, Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014.

[4] Death of Badreddine Appeal Decision; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2633, Order Terminating Proceedings Against Mustafa Amine Badreddine Without Prejudice and Ordering the Filing of an Amended Consolidated Indictment, 11 July 2016.

[5] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, F0927, Order on Preliminary Questions Addressed to the Judges of the Appeals Chamber Pursuant to Rule 68, Paragraph (G) of the Rules of Procedure and Evidence, 21 January 2011.

[6] 2011 Interlocutory Decision on Applicable Law.

[7] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/TC, F0112, Decision to Hold Trial *In Absentia*, 1 February 2012; STL, *Prosecutor v. Merhi*, STL-13-04/I/TC, F0037, Decision to Hold Trial *In Absentia*, 20 December 2013.

[8] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0113, Assignment of Counsel for the Proceedings Held *In Absentia* Pursuant to Rule 106 of the Rules, 2 February 2012; STL, *Prosecutor v. Merhi*, STL-13-04/I/PTJ, F0039, Assignment of Counsel for the Proceedings Held *In Absentia* Pursuant to Rule 106 of the Rules, 20 December 2013.

4 The Pre-Trial Judge permitted 76 individuals to participate in the proceedings as victims[9] through a legal representative. The trial started on 16 January 2014, with opening statements from the Prosecution, the Defence teams, and the LRV.[10] The Prosecution's case featured 261 witnesses and 2,487 exhibits and closed on 7 February 2018.[11] At the end of the Prosecution's case, Counsel for Mr Oneissi submitted a "no case to answer" application pursuant to Rule 167 of the Rules.[12] On 7 March 2018, the Trial Chamber orally dismissed the application.[13] The Defence case was heard in the months of May and June 2018.

5 At the end of the trial proceedings, the Prosecution, Defence teams, and LRV filed their final trial briefs, following which they orally presented their closing arguments.[14] On 21 September 2018, the Trial Chamber commenced deliberations.[15]

---

[9] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F0236, Decision on Victims' Participation in the Proceedings, Public with Confidential and *Ex Parte* Annex, 8 May 2012; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F0398, Second Decision on Victims' Participation in the Proceedings, Public with Confidential and *Ex Parte* Annex, 3 September 2012; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F0557, Third Decision on Victims' Participation in the Proceedings, Public with Confidential and *Ex Parte* Annex, 28 November 2012; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/PTJ, F1621, Fifth Decision on Victims' Participation in the Proceedings, Public with Confidential and *Ex Parte* Annex, 18 July 2014; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/PTJ, F1737, Sixth Decision on Victims' Participation in the Proceedings, Public with Confidential and *Ex Parte* Annex, 6 November 2014; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/PTJ, F1936, Seventh Decision on Victims' Participation in the Proceedings, Public with Confidential and *Ex Parte* Annex, 5 May 2015; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/PTJ, F3226, Eighth Decision on Victims' Participation in the Proceedings, 13 July 2017.

[10] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, F1257, Scheduling Order, 10 December 2013; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 16 January 2014.

[11] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3549, Scheduling Order Regarding Close of Prosecution Case and Defence Submissions Under Rule 167, 2 February 2018; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 7 February 2018, pp. 68- 69.

[12] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3574, Defence for Hussein Hassan Oneissi Submission Pursuant to the Trial Chamber's Scheduling Order of 8 February 2018, Confidential, 16 February 2018; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcripts of 20 and 21 February 2018.

[13] Rule 167 Decision.

[14] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3687, Order Rescheduling Final Trial Briefs and Closing Arguments, 12 June 2018; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3712, The Legal Representative of Victims Final Trial Brief, with Annexes A and B, Confidential, 16 July 2018; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3715, Revised Order Scheduling Closing Arguments in the Weeks of 3 to 14 September 2018, 27 July 2018; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3713, Corrected Version of the Prosecution Final Trial Brief, Filed 16 July 2018, Confidential, 27 July 2018; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3718, Ayyash Defence Final Trial Brief, Confidential with Confidential Annexes A to D, 13 August 2018; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3719, Final Trial Brief of the Defence for Hassan Habib Merhi, Confidential, 13 August 2018; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3720, Sabra Defence Final Brief, Confidential, 13 August 2018; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3721, Second Corrected Version of "Defence for Hussein Hassan Oneissi Final Trial Brief", Confidential with Confidential Annex A, 27 November 2018.

[15] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 21 September 2018.

6. On 18 August 2020, the Trial Chamber issued its Judgment in the case, convicting Mr Ayyash of all counts against him and acquitting Messrs Merhi, Oneissi, and Sabra.[16]

7. Following the Parties' submissions and the LRV's observations in respect of sentencing,[17] as well as a sentencing hearing held on 10 November 2020,[18] the Trial Chamber issued its Sentencing Judgment on 11 December 2020. The Trial Chamber imposed a sentence of life imprisonment for each count for which Mr Ayyash was convicted. These life sentences were to be served concurrently.

B. Appeal Proceedings

8. On 12 January 2021, Counsel for Mr Ayyash filed a notice of appeal against the Judgment and Sentencing Judgment.[19] On the same day, the Prosecution filed a notice of appeal challenging the acquittals of Messrs Merhi and Oneissi—but not the acquittal of Mr Sabra.[20]

9. The LRV requested the permission of the Appeals Chamber to participate in the appellate phase of the proceedings and filed a notice of appeal challenging the Sentencing Judgment.[21] The Appeals Chamber rendered a decision addressing both the admissibility of the LRV's appeal and the modalities of victim participation in the appeal proceedings.[22] The LRV's appeal was dismissed as inadmissible, and the victims were allowed to participate in the appeal proceedings according to the modalities set out in the decision.

---

[16] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3839, Judgment, 18 August 2020.

[17] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/S/TC, F3845, Prosecution Submissions on Sentence, 1 September 2020; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/S/TC, F3849, The Legal Representative of Victims Submissions on Sentencing, 18 September 2020; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/S/TC, F3850, Ayyash Defence Observations on Sentence, 25 September 2020.

[18] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/S/TC, F3851, Order Scheduling Hearing on Sentencing, Tuesday 10 November 2020, 30 October 2020.

[19] STL, *Prosecutor v. Ayyash*, STL-11-01/A-1/AC, F0002, Notice of Appeal on Behalf of Mr Ayyash Against Conviction and Sentence, Public with Public Annex A, 12 January 2021.

[20] STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0002, Prosecution Notice of Appeal, 12 January 2021. The Prosecution later filed an amended version of its notice of appeal, incorporating changes approved by the Appeals Chamber: STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0023, Prosecution Notice Pursuant to the Appeals Chamber's Order of 16 March 2021, Public with Public Annex A, 17 March 2021, Annex A: Amended Version of Prosecution Notice of Appeal.

[21] STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0003, The Legal Representative of Victims Request to Participate in the Appellate Stage of Proceedings and Submissions on Modalities of Participation, 4 January 2021; STL, *Prosecutor v. Ayyash,* STL-11-01/A-1/AC, F0003, The Legal Representative of Victims' Notice of Appeal Against Sentence, 12 January 2021.

[22] LRV Appeal Admissibility Decision.

10. On 29 March 2021, the Appeals Chamber dismissed the appeal filed by Counsel for Mr Ayyash.[23] The Appeals Chamber held that the notice of appeal was filed by Assigned Defence Counsel against a trial judgment issued *in absentia* and was therefore inadmissible.

11. The Prosecution filed its Appeal Brief on 29 March 2021. Counsel for Mr Merhi and Counsel for Mr Oneissi filed their Response Briefs on 31 May 2021. The Prosecution submitted its Brief in Reply on 16 June 2021. In accordance with the Appeals Chamber's decision on modalities of victim participation in the appeal proceedings, the LRV filed observations to the Parties' submissions on 14 June 2021, to which Counsel for Mr Merhi responded on 25 June 2021.

12. The Appeals Chamber heard oral submissions from the Parties and from the LRV from 4 to 8 October 2021.[24]

[23] STL, *Prosecutor v. Ayyash*, STL-11-01/A-1/AC, F0026, Decision on Admissibility of "Notice of Appeal on Behalf of Mr Ayyash Against Conviction and Sentence", 29 March 2021.
[24] STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0038, Scheduling Order for Appeal Hearing, 12 July 2021; STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0041, Revised Scheduling Order for Appeal Hearing, 10 September 2021.

XVIII. ANNEX C: TABLE OF CASES

A. Special Tribunal for Lebanon

2011 Interlocutory Decision on Applicable Law	STL, *Prosecutor v. Ayyash et al*., STL-11-01/I, F0936, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011
Absence of Authority Appeal Decision	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
Al Jadeed Appeal Judgment	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
Ayyash Jurisdiction Appeal Decision	STL, *Prosecutor v. Ayyash*, STL-18-10/PT/AC/AR90.1, F0008, Decision on Defence Appeal Against "Decision on Defence Preliminary Motion Challenging Jurisdiction", 26 October 2020
Ayyash et al. Jurisdiction Appeal Decision	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
Death of Badreddine Appeal Decision	STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0019, 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
Judgment	STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F3839, Judgment, 18 August 2020
Legality of Transfer of CDRs Appeal Decision	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
LRV Appeal Admissibility Decision	STL, *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC, F0012, Decision on the Admissibility of the LRV Appeal Against Sentence and Modalities of Victim Participation, 24 February 2021

LRV Protective Measures Appeal Decision	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
Personal Jurisdiction in Contempt Proceedings Appeal Decision	STL, *In the case against Akhbar Beirut S.A.L. and Ibrahim Mohamed Ali Al Amin*, STL-14-06/PT/AP/AR126.1, F0004, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 23 January 2015
Rule 167 Decision	STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision on the Oneissi Defence Application for a Judgment of Acquittal under Rule 167 (A), Transcript of 7 March 2018
Sentencing Judgment	STL, *Prosecutor v. Ayyash et al.*, STL-11-01/S/TC, F3855, Sentencing Judgment, 11 December 2020
Victim Applicant Appeal Decision	STL, *Prosecutor v. Ayyash*, STL-18-10/PT/AC/AR86.1, F0004, Public Redacted Version of the Decision on Appeal by Victim Applicant V1001 Against the Pre-Trial Judge's Decision of 17 April 2020, 6 August 2020

B. International Criminal Tribunal for the former Yugoslavia

Aleksovski Decision on Appeal on Admissibility of Evidence	ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999
Blagojević and Jokić Appeal Judgment	ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Judgement, 9 May 2007
Blaškić Appeal Judgment	ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004
Brđanin Appeal Judgment	ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007
Čelebići Appeal Judgment	ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001
D. Milošević Appeal Judgment	ICTY, *Prosecutor v. D. Milošević*, IT-98-29/1-A, Judgement, 12 November 2009
Đorđević Appeal Judgment	ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-A, Judgement, 27 January 2014
Furundžija Appeal Judgment	ICTY, *Prosecutor v. Furundžija,* IT-95-17/1-A, Judgement, 21 July 2000
Galić Appeal Judgment	ICTY, *Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006

Galić Decision on Appeal Concerning Rule 92 *bis* (C)	ICTY, *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002
Hadžihasanović and Kubura Trial Judgment	ICTY, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Judgement, 15 March 2006
Halilović Appeal Judgment	ICTY, *Prosecutor v. Halilović*, IT-01-48-A, Judgement, 16 October 2007
Haradinaj et al. Appeal Judgment	ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgement, 19 July 2010
Kordić and Čerkez Appeal Judgment	ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004
Krajišnik Appeal Judgment	ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009
Krnojelac Trial Judgment	ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, 15 March 2002
Krnojelac Appeal Judgment	ICTY, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, 17 September 2003
Krstić Appeal Judgment	ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Judgement, 19 April 2004
Kupreškić et al. Appeal Judgment	ICTY, *Prosecutor v. Kupreškić et al.,* IT-95-16-A, Judgement, 23 October 2001
Kvočka et al. Appeal Judgment	ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005
Limaj Appeal Judgment	ICTY, *Prosecutor v. Limaj*, IT-03-66-A, Judgement, 27 September 2007
Lukić and Lukić Appeal Judgment	ICTY, *Prosecutor v. Lukić and Lukić,* IT-98-32/1-A, Judgement, 4 December 2012
Martić Appeal Judgment	ICTY, *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008
Martić Decision Adopting Guidelines	ICTY, *Prosecutor v. Martić,* IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, Annex A
Martić Decision on Appeal on Admissibility of Evidence	ICTY, *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006
Mrkšić and Šljivančanin Appeal Judgment	ICTY, *Prosecutor v. Mrkšić and Šljivančanin*, IT-95-13/1-A, Judgement, 5 May 2009

Orić Appeal Judgment	ICTY, *Prosecutor v. Orić*, IT-03-68-A, Judgement, 3 July 2008
Perišić Order for Guidelines	ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 29 October 2008, Annex
Popović et al. Appeal Judgment	ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, 30 January 2015
Prlić et al. Appeal Judgment	ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement, 29 November 2017
Prlić et al. Decision on Appeals on Admissibility of Evidence	ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007
Stakić Appeal Judgment	ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006
Stanišić and Simatović Appeal Judgment	ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015
Stanišić and Župljanin Appeal Judgment	ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Judgement, 30 June 2016
Strugar Appeal Judgment	ICTY, *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008
Tadić Counsel Contempt Judgment	ICTY, *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000
Tolimir Appeal Judgment	ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgement, 8 April 2015

C. International Criminal Tribunal for Rwanda

Bagosora and Nsengiyumva Appeal Judgment	ICTR, *Bagosora and Nsengiyumva v. Prosecutor*, ICTR-98-41-A, Judgement, 14 December 2011
Bizimungu Appeal Judgment	ICTR, *Bizimungu v. Prosecutor*, ICTR-0056B-A, Judgement, 30 June 2014
Gacumbitsi Appeal Judgment	ICTR, *Gacumbitsi v. Prosecutor*, ICTR-2001-64-A, Judgement, 7 July 2006
Kalimanzira Appeal Judgment	ICTR, *Kalimanzira v. Prosecutor,* ICTR-05-88-A, Judgement, 20 October 2010

Kanyarukiga Appeal Judgment	ICTR, *Prosecutor v. Kanyarukiga,* ICTR-02-78-A, Judgement, 8 May 2012
Karera Appeal Judgment	ICTR, *Karera v. Prosecutor*, ICTR-01-74-A, Judgement, 2 February 2009
Munyakazi Appeal Judgment	ICTR, *Prosecutor v. Munyakazi*, ICTR-97-36A-A, Judgement, 28 September 2011
Musema Appeal Judgment	ICTR, *Prosecutor v. Musema*, ICTR-96-13-A, Judgement, 16 November 2001
Nahimana et al. Appeal Judgment	ICTR, *Nahimana et al. v. Prosecutor,* ICTR-99-52-A, Judgement, 28 November 2007
Nchamihigo Appeal Judgment	ICTR, *Nchamihigo v. Prosecutor,* ICTR-01-62-A, Judgement, 18 March 2010
Ndindabahizi Appeal Judgment	ICTR, *Ndindabahizi v. Prosecutor*, ICTR-01-71-A, Judgement, 16 January 2007
Nizeyimana Appeal Judgment	ICTR, *Nizeyimana v. Prosecutor*, ICTR-00-55C-A, Judgement, 29 September 2014
Ntabakuze Appeal Judgment	ICTR, *Prosecutor v. Ntabakuze*, ICTR-98-41A-A, Judgement, 8 May 2012
Ntagerura et al. Appeal Judgment	ICTR, *Prosecutor v. Ntagerura et al.,* ICTR-99-46-A, Judgement, 7 July 2006
Ntakirutimana and Ntakirutimana Appeal Judgment	ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004
Nyiramasuhuko et al. Appeal Judgment	ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015
Rutaganda Appeal Judgment	ICTR, *Rutaganda v. Prosecutor,* ICTR-96-3-A, Judgement, 26 May 2003
Semanza Appeal Judgment	ICTR, *Semanza v. Prosecutor*, ICTR-97-20-A Judgement, 20 May 2005
Setako Appeal Judgment	ICTR, *Prosecutor v. Setako*, ICTR-04-81-A, Judgement, 28 September 2011

D. International Residual Mechanism for Criminal Tribunal

Karadžić Appeal Judgment	IRMCT, *Prosecutor v. Karadžić,* MICT-13-55-A, Judgement, 20 March 2019

Ngirabatware Appeal Judgment	IRMCT, *Ngirabatware v. Prosecutor*, MICT-12-29-A, Judgement, 18 December 2014
Šešelj Appeal Judgment	IRMCT, *Prosecutor v. Šešelj*, MICT-16-99-A, Judgement, 11 April 2018

E. International Criminal Court

Bemba et al. Appeal Judgment	ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Public Redacted Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido Against the Decision of Trial Chamber VII Entitled "Judgment Pursuant to Article 74 of the Statute", 8 March 2018
Lubanga Appeal Judgment	ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction, 1 December 2014
Ngudjolo Appeal Judgment	ICC, *Prosecutor v. Ngudjolo*, ICC-01/04-02/12, 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
Ntaganda Appeal Judgment	ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment on the Appeals of Mr Bosco Ntaganda and the Prosecutor Against the Decision of Trial Chamber VI of 8 July 2019 Entitled "Judgment", 30 March 2021

F. Special Court for Sierra Leone

Brima et al. Trial Judgment	SCSL, *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgement, 20 June 2007
Fofana and Kondewa Appeal Judgment	SCSL, *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Judgment, 28 May 2008
Sesay et al. Trial Judgment	SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgement, 2 March 2009
Taylor Appeal Judgment	SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Judgment, 26 September 2013

G. Extraordinary Chambers in the Courts of Cambodia

Kaing Appeal Judgment	ECCC, *Prosecutor v. Kaing Alias "Duch"*, Case 001/18-07-2007-ECCC/SC, Appeal Judgment, 3 February 2012

H. Domestic Cases

Balamand Monastery Judgment	Lebanon, Judicial Council, Judgment No. 03/94, 26 October 1994
Lebanese Judicial Council Judgment No. 79/1959	Lebanon, Judicial Council, Judgment No. 79/1959, 29 December 1959