



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

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

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

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

**Registrar:** Mr David Tolbert, Acting Registrar

**Date:** 11 December 2020

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**  
v.  
**SALIM JAMIL AYYASH**

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**SENTENCING JUDGMENT**

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## I. INTRODUCTION

1. In its judgment, delivered publicly on 18 August 2020, the Trial Chamber unanimously found Salim Jamil Ayyash guilty beyond reasonable doubt as a co-perpetrator of the five counts charged against him in the amended consolidated indictment.<sup>1</sup>

2. These were for participating in a conspiracy aimed at committing a terrorist act; committing a terrorist act by means of an explosive device; the intentional homicide of the former Lebanese prime minister Mr Rafik Hariri with premeditation by using explosive materials; the intentional homicide of an additional 21 people with premeditation by using explosive materials; and the attempted intentional homicide of 226 people with premeditation by using explosive materials.

3. The Trial Chamber unanimously acquitted the other three Accused, Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra of all counts charged against them.

## II. THE FACTS

4. On Monday 14 February 2005, at around 12:55, the former Lebanese Prime Minister, Mr Rafik Hariri, was murdered in a terrorist attack perpetrated by a suicide bomber who detonated explosives equivalent to 2,500 to 3,000 kilograms of TNT, as Mr Hariri's convoy passed the St Georges Hotel in downtown Beirut. The explosives were concealed on the tray of a Mitsubishi Canter light truck that had been anonymously purchased in Tripoli the month before.

5. Twenty-two people including Mr Hariri were killed and 226 others were injured as a result of the explosion. Many buildings and other property sustained severe damage. The attack was intended to spread terror in Lebanon, and indeed did so. A video-taped false claim of responsibility for the attack was given to media outlets and broadcast within hours of the attack.

6. The attack against Mr Hariri was a political one. He had resigned as the prime minister of Lebanon on 20 October 2004 and was intending to contest elections scheduled for May 2005.

7. Syria had had an overwhelming political, military and economic dominance in Lebanon since the end of the Lebanese civil war in 1990. This was attracting increasing international

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<sup>1</sup> Trial Judgment, disposition.

concern, and in September 2004, a United Nations Security Council resolution, number 1559, had called upon ‘all remaining foreign forces to withdraw from Lebanon’. It expressed 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’. It called for ‘the disbanding and disarmament of all Lebanese and non-Lebanese militias’. It declared ‘its support for a free and fair electoral process in Lebanon’s upcoming presidential elections conducted according to Lebanese constitutional rules devised without foreign interference or influence’.

8. By early February 2005, a broad political coalition that included members of Mr Hariri’s parliamentary block, the Future Movement, was calling for the withdrawal of Syrian forces from Lebanon. The Syrian authorities were growing increasingly concerned by these developments, and on 1 February 2005, the Syrian Deputy Foreign Minister, Mr Walid El-Moallem, visited Mr Hariri at his home, Quraitem Palace in Beirut. During the meeting, Mr Hariri had told him:

We want a pro-Syrian regime in Lebanon. But, at the same time, Lebanon will not be ruled by Syria forever. This is unacceptable because we have reached a point where we are harming ourselves and Syria in everything.<sup>2</sup>

9. Mr El-Moallem’s visit coincided with the third meeting, on 2 February 2005, of the so-called ‘Bristol Group’, a loose political coalition that reflected a broader public opposition to the Syrian presence in Lebanon, and in which some of Mr Hariri’s prominent supporters participated. At this meeting, the Bristol Group called for a total withdrawal of Syrian forces from Lebanon.<sup>3</sup>

10. The Trial Chamber found that the evidence ‘is sufficient to establish that the attack on Mr Hariri most likely had some connection with the Syrian presence in Lebanon and tensions between the Syrian government and opponents of its continuing presence.’<sup>4</sup>

### **A. Mr Ayyash’s criminal conduct**

11. In the months before the attack, from at least 20 October 2004—after the passage of the Security Council resolution—users of three covert mobile networks, colour-coded by the Prosecution as Red, Blue and Yellow networks, had observed Mr Hariri’s and his security details’

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<sup>2</sup> Trial Judgment, para. 673. *See also* Trial Judgment, paras 672, 674-676.

<sup>3</sup> Trial Judgment, paras 678-684.

<sup>4</sup> Trial Judgment, para. 415.

movements. Mr Ayyash used mobiles in each network. Their aim was to obtain information about his whereabouts and security arrangements, and eventually to determine a suitable method to murder him, including finding an appropriate location for the intended attack. The final decision to proceed with the plan to murder Mr Hariri was probably made sometime in early February 2005, in the two weeks before the attack. Users of six Red network mobiles, including Mr Ayyash, were involved in Mr Hariri's assassination.

12. After deliberating on the evidence, the Trial Chamber found Mr Ayyash guilty of participating in the attack. It found that Mr Ayyash, who was the single user of mobiles described as 'Green 300', 'Red 741', 'Blue 233' and 'Yellow 294',<sup>5</sup> had directly contributed to it and had a central role in the execution of the attack. It did not find that he instigated it.

13. Using his Red and Blue network mobiles, Mr Ayyash had been involved in the surveillance of Mr Hariri on five occasions in the two weeks before the attack. These were on Monday 31 January 2005, when Mr Hariri visited the Higher Shiite Council, on Thursday 3 February when he was at the St Georges Marina in Beirut, on Monday 7 February, when Mr Hariri travelled from Beirut Airport to Quraitem Palace, on Tuesday 8 February near the Parliament when Mr Hariri was there, and on Saturday 12 February 2005 when Mr Hariri visited churches in Badaro and Mazraa.<sup>6</sup>

14. The evidence established that the surveillance, in which Mr Ayyash was involved—from at least 3 February 2005—was an act preparatory to the assassination.<sup>7</sup> The Red mobile network, of which he was a member, was integral to the assassination. It functioned as a closed network that ceased operation immediately before the attack, after having been used in the previous month in the surveillance of Mr Hariri and his convoy's movements.<sup>8</sup>

15. The attack occurred at approximately 12:55 on 14 February 2005. The events leading to it that day are briefly summarised below. Mr Ayyash's central role was shown by his participation in what the Prosecution correctly described as the 'assassination team' that perpetrated the attack.<sup>9</sup>

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<sup>5</sup> Trial Judgment, para. 3411.

<sup>6</sup> Trial Judgment, para. 6655.

<sup>7</sup> Trial Judgment, para. 6718.

<sup>8</sup> Trial Judgment, para. 6715.

<sup>9</sup> Trial Judgment, para. 6485.

16. On the morning of the attack, Mr Hariri's convoy travelled first from his home at Quraitem Palace to a session of the Parliament in central Beirut, before leaving the Parliament to return for a luncheon engagement.

17. The Red network operated extensively that day. Red network mobiles were in or near the area of Quraitem Palace just after Mr Hariri had left for the Parliament and were active in monitoring him when he was at the Parliament. The Red network mobiles tracked Mr Hariri and his convoy's movements, alerted other members of the network to his location and prepared for the surveillance and execution of the attack along the route that he was expected to take. These actions were necessarily aimed at ensuring that the explosives detonated at the exact point when the convoy was to pass.<sup>10</sup> The evidence established that the Red network users must also have assisted in preparing the Mitsubishi Canter for the attack at the crime scene.<sup>11</sup>

18. Mr Ayyash's mobile activities started in the early hours of the morning when he was active on his Blue mobile number connecting to cells in southern Beirut.<sup>12</sup> Later that morning he moved to northern Beirut.<sup>13</sup>

19. He made his first call on Red 741 at 11:33, connecting to a cell providing the predicted best server coverage to the Parliament, while Mr Hariri was in the Parliament building.<sup>14</sup> Within half an hour, and using his Blue mobile and connecting to cells north of the Parliament, Mr Ayyash twice called another Blue network mobile user,<sup>15</sup> and then made another two calls on his Red mobile, the first from around 100 metres of the crime scene, and the second connecting to a cell covering an area between the Parliament and the crime scene.<sup>16</sup> The evidence established that Mr Ayyash's calls to the other three Red mobiles—about an hour and a half before the attack—triggered their relocation to the Parliament area, launching the beginning of the operation to assassinate Mr Hariri.<sup>17</sup>

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<sup>10</sup> Trial Judgment, para. 6727.

<sup>11</sup> Trial Judgment, para. 6716.

<sup>12</sup> Trial Judgment, para. 6658.

<sup>13</sup> Trial Judgment, paras 3233, 6659.

<sup>14</sup> Trial Judgment, para. 6662.

<sup>15</sup> Trial Judgment, paras 6667, 6671, 6676.

<sup>16</sup> Trial Judgment, paras 6678-6679.

<sup>17</sup> Trial Judgment, paras 6490, 6739.

20. At around 11:54, Mr Hariri left the Parliament and met journalists in a café opposite. Mr Ayyash was then very close to the crime scene. While he was there he received calls from two other Red mobiles; the first was from near the Parliament, and second from near the crime scene.<sup>18</sup> Mr Ayyash made the last call on his Green mobile a few minutes later, activating cells in the same area.<sup>19</sup>

21. Within the next fifteen minutes, while connecting to a cell between the Parliament and the crime scene, Mr Ayyash had four calls with three other Red network mobiles, which were also nearby.<sup>20</sup> Following a call at 12:16, Mr Ayyash's Red mobile was inactive for almost half an hour.<sup>21</sup> He made his last call on his Red mobile at 12:43. He was then somewhere between the crime scene and the Parliament, and called a Red network user who was near the Parliament.<sup>22</sup>

22. Between 12:49 and 12:50, Mr Hariri departed the Parliament in his convoy to return to Quraitem Palace. Coincidental with this, at 12:50, Mr Ayyash received his final Red mobile call, a ten-second call from a Red mobile user who would have had the best line of sight of the convoy's movements. Mr Ayyash was then still somewhere between the Parliament and crime scene, which are about two kilometres apart.<sup>23</sup>

23. As shown in the slide below, that was Prosecution exhibit P1926 at trial, in the hour before the attack, Mr Ayyash's Red, Blue and Green mobiles connected to cells either in the crime scene area or an area between the Parliament and the crime scene.<sup>24</sup>

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<sup>18</sup> Trial Judgment, paras 6681, 6683. *See also* fn. 11734, para. 4644.

<sup>19</sup> Trial Judgment, paras 4644-4645, 4720, 6687, p. 2092.

<sup>20</sup> Trial Judgment, paras 6692-6693.

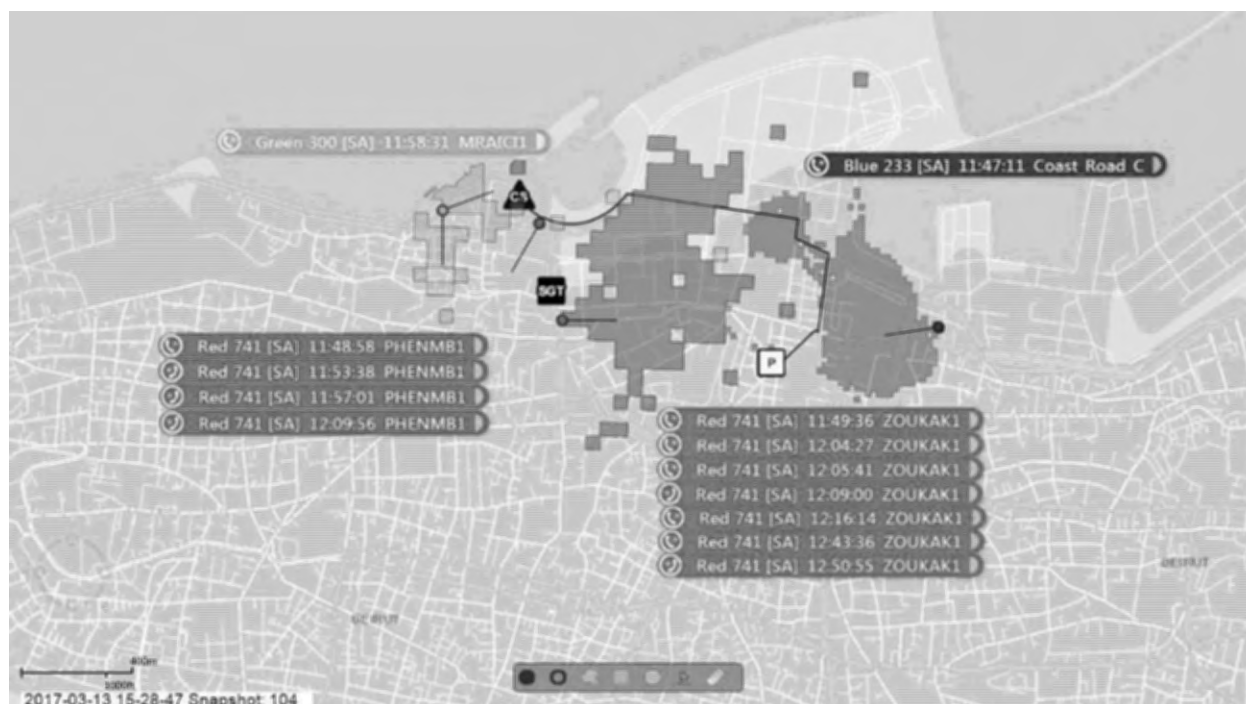
<sup>21</sup> Trial Judgment, para. 6697.

<sup>22</sup> Trial Judgment, paras 6698, 6700.

<sup>23</sup> Trial Judgment, paras 6698-6700, 6730.

<sup>24</sup> Trial Judgment, para. 4720. The Parliament is marked as 'P', the exit of the tunnel as 'SGT' and the crime scene as 'CS', while the convoy route is the black line. The three cells from right to left, are Touch's Coast-Road\_C and Alfa's ZOUKAK1 and MRAICI1. The azimuth and mast of the portable relay cell PHENMB1 is marked between MRAICI1 and ZOUKAK1. *See* Trial Judgment, para. 6680.





*Exhibit P1926 (EPE snapshot related to exhibit P1923, slide 73)—cells activated by Mr Ayyash's attributed mobiles between 11:47 and 12:50 and the route taken by the convoy*

24. At 12:54:57 Mr Hariri's convoy passed the HSBC bank; about a minute earlier a white van, captured on closed circuit TV, had also passed the bank. Eight seconds later, the explosion occurred. The Red network mobiles were never used again.<sup>25</sup> At the time of the attack, only two of the Red network mobiles, including Mr Ayyash's were close to the crime scene.<sup>26</sup>

25. In the two hours before the attack there were 33 calls between the Red network users.<sup>27</sup> Mr Ayyash's Red 741 was the only mobile that day that was in contact with all the other Red mobiles. Its movements and its call patterns show that it had a central role in the attack.<sup>28</sup> Mr Ayyash, as the user of Red 741, coordinated some of the acts that executed the attack. His contacts with the Red network on the day of the attack were uniquely extensive. This shows his central role and that he directly contributed to the attack.

<sup>25</sup> Trial Judgment, para. 6706.

<sup>26</sup> Trial Judgment, para. 6701.

<sup>27</sup> Trial Judgment, para. 6728.

<sup>28</sup> Trial Judgment, para. 6737.

26. On four days before the attack, Red 741 had contact with other Red mobile users while they were conducting surveillance of Mr Hariri's movements.<sup>29</sup> Mr Ayyash's use of Red 741 on Monday 14 February 2005, in combination with his participation in surveillance of Mr Hariri's movements in the preceding weeks using that mobile and Blue 233, revealed his leading role in the assassination.<sup>30</sup>

27. Further, Red 741's user fits the profile of a mobile user in the covert networks with a supervisory role. This meant someone who reported on developments and also coordinated, directed and or supervised others, and must have known more about the mission than the users under their direction. The more extensive the contact that user had with other network mobile users, and with the acts needed to prepare for and then execute the terrorist attack to kill Mr Hariri, the more likely they would know that the mission's overall aim was the attack.<sup>31</sup>

28. The explosion was massive, and the explosives were designed to target an armoured convoy moving at speed. The blast left a crater with a diameter of around 11.4 metres and a depth of around 1.9 metres.<sup>32</sup> The photographs and videos in evidence, accompanied by eyewitness and expert testimony graphically demonstrated the extent of the effect of the explosion, including the colossal damage caused to the buildings in its immediate vicinity. As an example, a section of a 20 centimetres thick reinforced concrete front wall of the Byblos Hotel was pushed back 60 centimetres by the blast.<sup>33</sup> These buildings had people inside them.<sup>34</sup>

29. The photographs below show some of the aftermath of the explosion.

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<sup>29</sup> Trial Judgment, para. 6491.

<sup>30</sup> Trial Judgment, para. 6732. *See also* Trial Judgment, paras 6737, 6751, 6840.

<sup>31</sup> Trial Judgment, paras 6488-6489.

<sup>32</sup> Trial Judgment, para. 1252.

<sup>33</sup> Trial Judgment, para. 1128.

<sup>34</sup> Trial Judgment, para. 6829.



*Exhibit P107 (Photograph of the crime scene taken on 25 February 2005 by Ahmad Ismaili, Al Mustaqbal Newspaper), p. 10*



*Exhibit P112 (Photograph of the crime scene, taken from the St Georges Hotel), p. 285*

## **B. The impact on the victims of the crimes and on Lebanon generally**

30. Terrorism is one of the most serious and heinous crimes and this particular attack was very grave. In stating this, the Trial Chamber noted the political motives involved in this attack, which targeted Mr Hariri, a leading political figure who had been preparing for parliamentary elections in May 2005.

31. The device was of such a powerful explosive, RDX, and so large that it was inevitably going to kill or injure numerous people who were nearby when it exploded. It was detonated by a suicide bomber in a busy public street, in the middle of a weekday, and caused an indiscriminate loss of life and destruction. The device exploded approximately 50 to 80 centimetres above ground

level in a street lined by multi-storey buildings. This created a ‘canyon effect’ that increased its destructive power. The explosion endangered property and anyone who was nearby.<sup>35</sup>

32. It was designed to inflict, and in fact inflicted, terror. It also caused fear and panic among, at least, members of the public in the area of the detonation. The huge explosion attracted enormous publicity and caused many Lebanese to experience fear, insecurity and loss.<sup>36</sup>

33. A renowned victimologist, Professor Rianne Letschert,<sup>37</sup> who interviewed many of the victims of the attack, also provided evidence on the effects of acts of terrorism on a society more generally. She explained that acts of terrorism spread outwards affecting primary, secondary and tertiary victims, in other words the society at large.<sup>38</sup> She pointed to the views of some participating victims she had interviewed that:

the attack affected the entire country and that losing Mr Hariri—a “prime minister that could have guaranteed a stable Lebanon”—amounted to losing “a dream” relating to the country. The attack affected a cross-section of the population.<sup>39</sup>

34. The Trial Chamber also heard evidence from several victims about this broader impact of the attack. They stated that the attack was on the whole country: ‘What happened has affected everyone.’<sup>40</sup> Some other victims feared the prospect of further attacks.<sup>41</sup> The Trial Chamber, in its judgment found:

Inevitably, by virtue of its detonation at that time and place, an explosion of that nature and one killing Mr Hariri in particular, was going to create a state of terror. In this respect, the Trial Chamber has also taken into account that the target of the attack, Mr Hariri, was a prominent political figure whose assassination was likely to, and in fact did, cause feelings of fear, insecurity and loss among the Lebanese people. The Trial Chamber heard abundant evidence during the trial of the assassination’s negative effect on Lebanon.<sup>42</sup>

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<sup>35</sup> Trial Judgment, paras 912, 6330, 6332-6333, 6336-6338.

<sup>36</sup> Trial Judgment, paras 912, 6336, 6338.

<sup>37</sup> Professor of international law and victimology at Maastricht Law School, and *Rector Magnificus* of Maastricht University, the Netherlands. Trial Judgment, para. 839.

<sup>38</sup> Trial Judgment, paras 1557-1560.

<sup>39</sup> Trial Judgment, para. 916.

<sup>40</sup> Trial Judgment, para. 1558.

<sup>41</sup> Trial Judgment, para. 1559.

<sup>42</sup> Trial Judgment, para. 6764.

35. The explosion killed Mr Hariri and eight members of his convoy. To illustrate the power of the explosion: Mr Hariri was identified from his wedding ring. Mr Bassem Fuleihan, who accompanied Mr Hariri in his armoured vehicle, was initially identified from his wedding rings and the fact that he repeated one word, his wife's name 'Yasma'.<sup>43</sup> Mr Fuleihan survived the immediate impact of the explosion. He was transferred from the American University of Beirut Medical Center to France for treatment, where he succumbed to his injuries two months later on 18 April 2005.<sup>44</sup>

36. The bodies of Mr Yahya Al-Arab, one of Mr Hariri's security chiefs, and Mr Talal Nabih Nasser, a personal bodyguard for Mr Hariri and deputy of his security detail, were never recovered. Their convoy vehicle, driven by Mr Mohamed Darwiche, immediately followed Mr Hariri's. It was almost completely destroyed by the explosion.<sup>45</sup> Mr Darwiche's body was mutilated.<sup>46</sup>

37. Additionally, the explosion caused the death of thirteen bystanders.<sup>47</sup> Among them was Mr Zahi Bou Rjeily, who had sustained minor injuries but suffocated in the dust under the rubble on the first floor of an unoccupied building opposite the St Georges Hotel twelve hours after the explosion.<sup>48</sup> The psychological impact of his death, how he died, and that he could have been saved, was devastating for his family.<sup>49</sup> The last body found at the crime scene, under the rubble in front of the Byblos Hotel building, 17 days after the explosion on 2 March 2005, belonged to Mr Abdul Hamid Ghalayini.<sup>50</sup> Ms Lama Ghalayini, one of his daughters, provided oral evidence about her family's traumatic experiences in trying to find her father's body.<sup>51</sup>

38. Eighteen participating victims suffered direct physical, mental and or material harm as a result of the explosion. They suffered from long-lasting and persisting physical injuries and mental illnesses, which required immediate or repeated medical intervention and or long-term medication. Many of them experienced post-traumatic stress disorder, depression and panic attacks.<sup>52</sup>

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<sup>43</sup> Trial Judgment, paras 1015, 1521.

<sup>44</sup> Trial Judgment, paras 1016, 1522.

<sup>45</sup> Trial Judgment, paras 999, 1054, 1057, 1378, 1397.

<sup>46</sup> Trial Judgment, paras 1023, 1397.

<sup>47</sup> Trial Judgment para. 1453; Annex E, para. 3 (1).

<sup>48</sup> Trial Judgment, paras 1386, 1500.

<sup>49</sup> Trial Judgment, para. 1501.

<sup>50</sup> Trial Judgment, paras 1391, 1412, 1497.

<sup>51</sup> Trial Judgment, paras 1391, 1498-1499.

<sup>52</sup> Trial Judgment, paras 1455-1492.

39. Fifty-two indirect participating victims, dependants or relatives of persons who died in the explosion, suffered relevant harm as a direct result of the explosion. They described the psychological effect and grief that they had endured, and the devastating impact that the loss of their loved ones had on their lives, including anxiety and PTSD.<sup>53</sup> They also described their search of the crime scene or going to the hospitals or morgues in Beirut searching for their relatives and the traumatic experience of seeing the damaged bodies of loved ones.<sup>54</sup>

40. Five witnesses, who are not participating victims, suffered relevant harm as a direct result of the explosion. Their harm included permanent or long-lasting physical impairment and mental and emotional distress as a result of the explosion or from losing a family member and friend.<sup>55</sup>

### **C. The counts divided by their differing legal elements**

41. The same facts have proved each of the five crimes committed by Mr Ayyash. Each count has separate legal elements, and these should be distinguished for the purposes of sentencing. Taking in turn each charge and the underlying facts proving them:

#### **Count one—conspiracy to commit a terrorist attack by means of an explosive device**

42. A conspiracy requires an agreement to commit an offence. Here, it meant that the conspirators agreed to kill Mr Hariri by a means liable to create a public danger, namely a large explosive device knowing that the device would be used so as to create a state of terror, and that it would be detonated in a public place, consequently killing and injuring people.<sup>56</sup>

43. The evidence established that Mr Ayyash's mobile and five others in the Red network were involved in the surveillance of Mr Hariri in the weeks preceding the attack. Each agreed to murder Mr Hariri using an explosive device, making them co-conspirators as charged.<sup>57</sup>

44. The Trial Chamber found that Mr Ayyash, as the user of Red 741, Blue 233 and Green 300 must have known of the aim of the conspiracy, namely to commit a terrorist act by means of an explosive device in order to murder Mr Hariri, for some time before the attack. This was most

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<sup>53</sup> Trial Judgment, paras 836, 1449, 1495-1544; post traumatic stress disorder.

<sup>54</sup> Trial Judgment, paras 836, 919, 1017-1024.

<sup>55</sup> Trial Judgment, paras 1545-1556.

<sup>56</sup> Trial Judgment, para. 6363.

<sup>57</sup> Trial Judgment, paras 6484-6485.

likely by mid to late January 2005. He was a member of the conspiracy from at least early February 2005.<sup>58</sup> These facts proved Mr Ayyash's agreement to commit the terrorist attack by means of an explosive device.

### **Count two—committing a terrorist act by means of an explosive device**

45. This count required proof that Mr Ayyash committed a terrorist act by means of an explosive device. The Prosecution had to prove that he knew that the act would be committed using an explosive device that was liable to create a public danger, and that it was intended to cause a state of terror. The Trial Chamber found that Mr Ayyash did not detonate the explosive with his own hands, however he directly contributed to the execution of the terrorist act through his central and leading role in the execution of the attack,<sup>59</sup> including the preparatory acts of surveillance.<sup>60</sup>

46. The evidence established that Mr Ayyash must have known by virtue of his actions on the day of the attack that Mr Hariri was to be murdered by an explosion in a VBIED (vehicle borne improvised explosive device) in a public place and exactly when and where it was to occur. He must have been aware of the circumstances in which the device was to have been detonated, namely, on a public street, in the middle of a weekday, as Mr Hariri's convoy passed along a busy road. This inevitably was going to create a state of terror.<sup>61</sup>

### **Counts three, four and five**

#### **Count three—the intentional homicide of Rafik Hariri with premeditation by using an explosive device**

47. Counts three, four and five required proof that Mr Ayyash intended the homicide of Mr Hairiri, and that the act was premeditated and carried out by using an explosive device. The same evidence established Mr Ayyash's intentions and actions in committing counts three, four and five. These were his actions in participating in detonating a large explosion, aimed at a motor convoy,

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<sup>58</sup> Trial Judgment, paras 6501-6502.

<sup>59</sup> Trial Judgment, paras 6741, 6751, 6800, 6806.

<sup>60</sup> Trial Judgment, para. 6752.

<sup>61</sup> Trial Judgment, paras 6763-6764.



in a public place crowded with people.<sup>62</sup> The evidence established that Mr Ayyash must have been aware of what he was doing.<sup>63</sup> Red network users tracked Mr Hariri's and his convoy's movements, alerted the others of his location, prepared for surveillance and the execution of the attack along the expected route, and ensured the detonation of the explosive at the right moment.<sup>64</sup> By his actions, Mr Ayyash must have been aware of the object of the mission, namely, to assassinate Mr Hariri and that explosive materials were to be used.<sup>65</sup>

**Count four—the intentional homicide of 21 other people in addition to the intentional homicide of Rafik Hariri with premeditation by using an explosive device**

48. To prove this count, the Prosecution had to establish that Mr Ayyash either intended the deaths of people other than Mr Hariri, or at least foresaw that deaths would occur and accepted the risk that this would happen, and that he did so with premeditation and using an explosive device.

49. The evidence established beyond reasonable doubt that in addition to murdering Mr Hariri, Mr Ayyash must have known that the explosives that were to be detonated when the convoy passed the St Georges Hotel may have caused the death of anyone in the convoy or the immediate vicinity. Mr Ayyash was in an area near the crime scene just before the explosion, and must have known, as a result of travelling from the Parliament area to the crime scene, of how many people there were on the streets near the hotel.<sup>66</sup>

50. Detonating a device of that size and power was inevitably going to kill many people. Numerous members of the public could reasonably have been expected to have been within its range. The explosives mounted on a moving VBIED necessarily had to be of a magnitude greater than, for example, those deployed in a car bomb in a stationary vehicle, which is detonated either remotely when the target is in the vehicle, or by the ignition being switched on. That is a targeted explosion designed to cause much less damage.<sup>67</sup> Mr Ayyash therefore intended to kill members

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<sup>62</sup> Trial Judgment, para. 6802.

<sup>63</sup> Trial Judgment, para. 6805.

<sup>64</sup> Trial Judgment, para. 6804.

<sup>65</sup> Trial Judgment, para. 6812.

<sup>66</sup> Trial Judgment, para. 6827.

<sup>67</sup> Trial Judgment, para. 6828.

of Mr Hariri's convoy and members of the general public, or at least foresaw that deaths would occur and accepted the risk that this would happen.<sup>68</sup>

**Count five—attempted intentional homicide of 226 people in addition to the intentional homicide of Rafik Hariri with premeditation by using an explosive device**

51. Proof of this count required the Prosecution to establish beyond reasonable doubt that Mr Ayyash intended the attempted intentional homicide of the 226 people who were injured by the explosion but survived, and that this was done with premeditation and by using an explosive device.

52. The Trial Chamber was satisfied that the act of detonating a truckload of explosives in a busy street near occupied buildings will inevitably kill many people. Some may not die but instead will sustain injury. Some injuries will be severe. However, whether or not these people died from their injuries, the act of participating in the detonation of the explosion was an act likely to cause death. In this respect the conduct amounted to an attempted intentional homicide with premeditation by using explosive materials. Mr Ayyash did not act alone; he had an important role in the operation against Mr Hariri.<sup>69</sup>

53. The evidence established beyond reasonable doubt that Mr Ayyash intended to kill the members of Mr Hariri's convoy and the members of the public who were injured in the attack. Or, alternatively, that he at least foresaw that deaths would occur and accepted that risk.<sup>70</sup>

### **III. SENTENCING AT THE SPECIAL TRIBUNAL FOR LEBANON**

54. The Special Tribunal for Lebanon has 'bifurcated' proceedings in cases when an Accused person pleads not guilty. This means that they are separated into two distinct parts. The first is a trial to establish whether an Accused person is guilty beyond reasonable doubt. If they are found guilty, the Trial Chamber in separate proceedings then imposes a sentence on the convicted Accused.

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<sup>68</sup> Trial Judgment, para. 6830.

<sup>69</sup> Trial Judgment, para. 6838.

<sup>70</sup> Trial Judgment, para. 6837.

55. This is consistent with the presumption of innocence. In practice it means that the Defence of an Accused does not have to make artificial arguments, posed in the alternative at the conclusion of the trial, stating on one hand that the Accused is not guilty, but on the other presenting mitigating or personal information, and or explaining why the offence may have been committed, in the event that they are found guilty of a charge on an indictment. At that stage in the proceedings neither the Prosecution nor Defence can know the result, namely, the findings of fact and law that the Trial Chamber will make. But it is these that should determine the submissions of the Parties on sentencing. In this case—especially as it involved four Accused and a former Accused who was named in the amended consolidated indictment as a co-conspirator—it would have been very challenging for the Prosecution, and especially the Defence, to make informed arguments on penalty without first knowing the factual and legal basis of any convictions.

56. Under Rule 171 (A) of the Special Tribunal’s Rules of Procedure and Evidence, ‘if the Trial Chamber finds the accused guilty of a crime, the Prosecutor and the Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.’ In the sentencing proceedings, participating victims may also be heard or file written submissions relating to the personal impact of the crimes on them, subject to the Trial Chamber’s authorisation, under Rule 171 (B).

57. After the judgment, the Prosecution and, with the Trial Chamber’s authorisation, the Legal Representatives of Victims, filed written submissions, and the Ayyash Defence filed what it termed ‘observations’.<sup>71</sup> The Trial Chamber also filed a list of questions to the Parties and the Legal Representatives of Victims arising from their submissions and asked them to address those in a sentencing hearing.<sup>72</sup> The hearing was held on 10 November 2020.

58. The Trial Chamber was prepared to hear the views and concerns of participating victims in the sentencing—and would have allowed up to three of them to do so—but factors relating to the Covid-19 pandemic made it impractical to organise this.<sup>73</sup>

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<sup>71</sup> Prosecution sentencing submissions; Decision allowing participating victims to participate in sentencing; Legal Representatives of Victims’ sentencing submissions; Ayyash Defence sentencing submissions.

<sup>72</sup> Questions for sentencing submissions; Scheduling order for sentencing hearing.

<sup>73</sup> This was subject to the feasibility of their participation, however, due to the circumstances pertaining to the pandemic and technical reasons this was not possible. T. 10 November 2020, p. 42; Scheduling order for sentencing hearing, para. 7.

59. Finally, the trial and the sentencing proceedings have been conducted in Mr Ayyash's absence. The Trial Chamber found that he was aware of the indictment and had absconded and all reasonable steps taken had not secured his appearance before the Special Tribunal.<sup>74</sup> The practical effect of this is that the Ayyash Defence was unable to obtain any direct instructions from Mr Ayyash in making its sentencing submissions.<sup>75</sup>

#### IV. THE LAW APPLICABLE TO SENTENCING

60. Articles 2 and 24 of the Statute of the Special Tribunal for Lebanon and Rules 171 to 173 of the Special Tribunal's Rules of Procedure and Evidence govern sentencing proceedings. The Prosecution, the Ayyash Defence and the Legal Representatives of Victims made submissions about the applicable law.

61. Article 2 of the Statute, 'Applicable criminal law' states:

The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute:

- (a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and
- (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".

62. Articles 6 and 7 of the 1958 law provide the following:

##### Article 6

Any act of terrorism shall be punishable by hard labour for life. Where the act results in the death of one or more individuals, the total or partial destruction of a building having one or more individuals inside it, the total or partial destruction of a public building, an

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<sup>74</sup> Decision to hold trial *in absentia*, para. 107.

<sup>75</sup> Code of Conduct for Defence Counsel and Legal Representatives of Victims, article 8 (E) ('Defence Counsel who is assigned to an *in absentia* accused shall not have contact with the accused.').

industrial plant, a ship or other facilities, or disrupts the functioning of telecommunication or transport services, it shall be punishable by death.

#### Article 7

Any person who enters into a conspiracy with a view to the commission of any of the offences set out in the preceding articles shall be punishable by hard labour for life.

63. Article 24 of the Statute, 'Penalties' provides:

1. The Trial Chamber shall impose upon a convicted person imprisonment for life or for a specified number of years. In determining the terms of imprisonment for the crimes provided for in this Statute, the Trial Chamber shall, as appropriate, have recourse to international practice regarding prison sentences and to the practice of the national courts of Lebanon.
2. In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

64. Article 25 'Compensation to victims' states:

1. The Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal.
2. The Registrar shall transmit to the competent authorities of the State concerned the judgement finding the accused guilty of a crime that has caused harm to a victim.
3. Based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not such victim had been identified as such by the Tribunal under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation.
4. For the purposes of a claim made under paragraph 3 of this article, the judgement of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person.

65. Rule 171 ‘Sentencing Procedure’ (D) provides:

The Trial Chamber shall impose a sentence in respect of each count in the indictment upon which the accused has been convicted and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose single sentence reflecting the totality of the criminal conduct of the accused.

66. Rule 172 ‘Penalties’ provides (relevantly):

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24 (2), of the Statute, as well as factors such as:

(i) any aggravating circumstances;

(ii) any mitigating circumstances, including substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in Lebanon;

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.

## **A. Submissions**

67. The Prosecution argues that both Lebanese law and international criminal law apply in sentencing a convicted person, while the Legal Representatives submit that the Trial Chamber should also consider the sentencing practice from other countries, specifically, France and the United Kingdom (UK). The Ayyash Defence argues that only international criminal law, and not Lebanese law, applies.

68. The Prosecution submits that, according to Article 2 of the Statute, the Lebanese Criminal Code and the 1958 Law apply to ‘the prosecution and punishment’ of crimes under the Special Tribunal’s jurisdiction.<sup>76</sup> The Lebanese laws provide for specific sentences, which include

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<sup>76</sup> Prosecution sentencing submissions, para. 8.

predetermined aggravating and mitigating factors.<sup>77</sup> Under Article 24 of the Statute, the Trial Chamber should also, where appropriate, have recourse to international practice regarding prison sentences and the practice of national courts of Lebanon.<sup>78</sup>

69. The Ayyash Defence argues that Lebanese sentencing law has ‘limited applicability.’<sup>79</sup> Article 2 states that it is ‘subject to the provisions of the Statute’, and Article 24 establishes the authority and parameters for sentencing.<sup>80</sup>

70. The United Nations Secretary-General’s report on the Special Tribunal’s establishment stated that Lebanese law did not apply to penalties, but only to the crimes in Article 2.<sup>81</sup> Further, the Trial Chamber has ‘already noted that Lebanese law prescribes penalties that are fundamentally incompatible with the Tribunal’s statutory framework and principles of international criminal law,’<sup>82</sup> namely, the death penalty.

71. Comparable provisions in the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been interpreted to mean that a chamber does not need to consider domestic sentencing practices as binding.<sup>83</sup>

72. The Legal Representatives submit that the applicable provisions are in Article 24 and Rules 171 to 173.<sup>84</sup> Given that the crimes would ‘ordinarily’ fall under the jurisdiction of the Lebanese criminal courts, the provisions of the Lebanese Criminal Code on sentence are ‘quintessentially relevant’.<sup>85</sup> They also point to the practice regarding sentencing for acts of terrorism and multiple homicide in ‘the major civil and common law jurisdictions’, referring specifically to France and the UK.<sup>86</sup> The International Criminal Court’s (ICC) Rules of Procedure

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<sup>77</sup> Prosecution sentencing submissions, paras 6, 10, 41.

<sup>78</sup> Prosecution sentencing submissions, para. 9.

<sup>79</sup> Ayyash Defence sentencing submissions, para. 29.

<sup>80</sup> Ayyash Defence sentencing submissions, para. 11.

<sup>81</sup> Ayyash Defence sentencing submissions, para. 11, referring to Secretary-General’s report, para. 22. *See also* Ayyash Defence sentencing submissions, fn. 17.

<sup>82</sup> Ayyash Defence sentencing submissions, fn. 13, referring to Trial Judgment, para. 5892.

<sup>83</sup> Ayyash Defence sentencing submissions, fn. 17.

<sup>84</sup> Legal Representatives of Victims’ sentencing submissions, paras 6, 17.

<sup>85</sup> Legal Representatives of Victims’ sentencing submissions, para. 31. These submissions are under the heading of ‘General practice regarding prison sentences in Lebanon’.

<sup>86</sup> Legal Representatives of Victims’ sentencing submissions, para. 46, and generally, paras 37-45.

and Evidence also offer ‘guidance in determining sentence.’<sup>87</sup> In the sentencing hearing, they submitted that under Article 2, the Lebanese Criminal Code applies to the punishment of crimes.<sup>88</sup>

## **B. Discussion and findings**

73. The law applicable to sentencing is contained in Articles 2, which refers to the ‘prosecution and punishment’ of proscribed crimes and 24 of the Statute, and Rule 172. While Article 2 refers to the Law of 11 January 1958, its relevance is limited. In the judgment, in analysing the applicable law, the Trial Chamber observed that:

Article 6 of the 1958 law provides the death penalty for some acts of terrorism while Article 7 specifies a maximum penalty of hard labour for life for conspiracy to commit an act of terrorism. However, given that Article 24 of the Statute specifies a different maximum penalty, of life imprisonment, for any offence within the Special Tribunal’s jurisdiction, the relevance of the 1958 law to crimes falling within the Special Tribunal’s jurisdiction is unclear.<sup>89</sup>

74. Article 24 of the Statute therefore effectively displaces article 6 of the 1958 Law in specifying a maximum penalty. In the judgment the Trial Chamber held that:

consistent with the international practice that no international criminal court or tribunal has the death penalty, Article 24 of the Statute displaces Article 6 of the 1958 law in the Special Tribunal's proceedings in relation to the death penalty. It provides a maximum penalty of life imprisonment.<sup>90</sup>

75. The 1958 Law is relevant to sentencing only insofar as it prescribes a higher sentence when aggravating features are established. But this in reality has little effect. In the absence of the death

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<sup>87</sup> Legal Representatives of Victims’ sentencing submissions, para. 23. The Legal Representatives make this submission about factors to be considered when determining gravity and aggravating factors. They also refer to international criminal law case law in their submissions on gravity, financial compensation and compensatory mechanisms. Legal Representatives of Victims’ sentencing submissions, paras 20, 47, 49. Further, regarding a reparations mechanism, the Special Tribunal is ‘bound by the principles of international human rights and criminal law’. Legal Representatives of Victims’ sentencing submissions, paras 67, 69-74, 79-85. They also consider a European Union Council Directive regarding fair and proportionate compensation. Legal Representatives of Victims’ sentencing submissions, paras 86-88.

<sup>88</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, p. 44. The Legal Representatives argue that both the Prosecution and the Defence accepted that the Lebanese Criminal Code applies.

<sup>89</sup> Trial Judgment, para. 5871 (footnote omitted).

<sup>90</sup> Trial Judgment, para. 5892 (footnote omitted).



penalty the maximum sentence under Lebanese law and Article 24 of the Statute is life imprisonment. The Secretary-General also appeared to recognise this in his report by stating:

While the Lebanese criminal law is the applicable law, its applicability is limited to the crimes and offences provided for in article 2 of the statute. It is also subject to the provisions of the statute and therefore to the exclusion of penalties (e.g. death penalty and forced labour) otherwise applicable under Lebanese law.<sup>91</sup>

76. In any event, to the extent of any conflict between Lebanese sentencing law and Articles 2 and 24, by virtue of its status as an annex to a Security Council resolution passed under Chapter VII of the United Nations Charter,<sup>92</sup> the Statute applies. Further, there is no contradiction between Articles 2 and 24 on the overall relevance or applicability of Lebanese law as Article 24 (1) states:

In determining the terms of imprisonment for the crimes provided for in this Statute, the Trial Chamber shall, as appropriate, *have recourse to international practice regarding prison sentences and to the practice of the national courts of Lebanon.* (emphasis added)

77. It clearly states that the Trial Chamber should ‘have recourse’ to Lebanese sentencing practices, but only ‘as appropriate’. Additionally, Rule 172 also titled ‘Penalties’, (B) (iii) echoes this by providing that the Trial Chamber should take into account ‘the general practice regarding prison sentences in Lebanon’. Further, Article 24, unlike Article 2, does not address the source of the law governing sentencing. Instead, it merely lists factors which should be considered when determining sentence, including Lebanese sentencing practices and those of international courts and tribunals.

78. The Trial Chamber should also consider, as appropriate, relevant international practice. Given the similarity in sentencing regimes, the Trial Chamber will consider the relevant principles and practice of the other international criminal courts and tribunals.<sup>93</sup> However, this comes with the rider that the international courts and tribunals sentence for international crimes, whereas the Special Tribunal is sentencing for domestically proscribed crimes committed contrary to the Lebanese Criminal Code.

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<sup>91</sup> Secretary-General’s report, para. 22.

<sup>92</sup> Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.

<sup>93</sup> In the trial judgment, the Trial Chamber found international criminal law ‘persuasive’ in the context of setting out factors to be considered when assessing gravity. Trial Judgment, para. 908.

79. The ICTY has held, and the Trial Chamber adopts this reasoning by analogy, that trial chambers must consider the sentencing practices in the former Yugoslavia (here, Lebanon) as an aid in determining the appropriate sentence. However, they are not bound by them.<sup>94</sup> The jurisdiction of the ICTY, ICTR and their successor mechanism, the International Residual Mechanism for Criminal Tribunals (IRMCT), is only over international crimes, although these crimes could also be tried in the courts in the former Yugoslavia, and from at least 2011 in Rwanda.

80. As Article 24 makes no reference to domestic sentencing practice other than those of Lebanon, the Legal Representatives' submission that the Trial Chamber should also consider the sentencing practices of France and the United Kingdom is therefore rejected.<sup>95</sup>

## V. SUBSTANTIVE SUBMISSIONS ON SENTENCING

81. The Prosecution asks the Trial Chamber to impose five concurrent life sentences on Mr Ayyash for each of the five counts for which he was convicted.

82. The Legal Representatives of Victims submit that the appropriate sentence for these crimes should be the highest and should reflect the harm suffered by the victims and the Lebanese community as a whole. In the sentencing hearing, they clarified that this meant a life sentence.

83. Additionally, they submit that the Trial Chamber should impose a significant financial penalty on Mr Ayyash, to be allocated to a fund for the benefit of the participating victims. They also seek an order requesting the Lebanese authorities to freeze his assets for the purpose of their forfeiture to the benefit of the victims of his crimes. This would include all assets in which he has a beneficial interest. Finally, a compensation fund should be created to address the harm suffered by the victims of the attack.

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<sup>94</sup> *Blaškić* Appeal Judgment, para. 681, *Delalić and others (Čelebići)* Appeal Judgment, paras 813, 816; *Kunarac and others* Appeal Judgment, para. 377; *Jelisić* Appeal Judgment, paras 116-117. When a trial chamber is to depart from sentencing practices, it must give reasons for such departure and must go beyond merely reciting the relevant code provisions. *Krstić* Appeal Judgment, paras 260–261 (citing *Kunarac and others* Trial Judgment, para. 829).

<sup>95</sup> If the Legal Representatives are using these examples to attempt to show a general principle of national law, a more comprehensive review of domestic practice would be necessary. *Tadić* Appeal Judgment, para. 225 (where the ICTY Appeals Chamber held that to rely upon domestic legislation and case law as a source of an international principle or rule under the doctrine of the general principles of law recognized by the nations of the world 'it would be necessary to show that, in any case, the major legal systems of the world take the same approach to [a] notion').

84. The Ayyash Defence—emphasising that it intends to appeal the judgment, and that Mr Ayyash is entitled to a retrial should he choose to appear before the Special Tribunal—responds that a single sentence reflecting the totality of Mr Ayyash’s judged conduct is all that could be justified. According to both the Ayyash Defence and the Prosecution, a financial penalty and the freezing of assets are not available to the Trial Chamber as they are not part of the Special Tribunal’s statutory framework.

### **A. Available penalties**

85. The power to impose a term of imprisonment is clearly specified in the Statute. The Legal Representatives of Victims, however, put in issue whether the Trial Chamber’s sentencing powers are confined to imposing a term of imprisonment. They submitted that in addition to imposing a term of imprisonment, the Trial Chamber should impose a fine on Mr Ayyash and order the freezing of his assets. The Prosecution and Ayyash Defence responded to these arguments, opposing them.

#### **1. Submissions**

##### **(a) Sentence of imprisonment**

86. The Prosecution argues that Article 24 permits the Trial Chamber to impose a term of imprisonment for life or a specified number of years.<sup>96</sup> While the specific sentences under Lebanese law—the death penalty and hard labour—are inapplicable under the Statute, the ranking of these offences under Lebanese law offers ‘guidance as to the hierarchy of the penalties’ available to the Trial Chamber.<sup>97</sup> The Prosecution also points out that the death penalty, although it continues to be pronounced by Lebanese courts, has not been carried out since 2004.<sup>98</sup> The only sentence reasonably available to the Trial Chamber is one of life imprisonment.<sup>99</sup>

87. The Ayyash Defence submitted that a single sentence of imprisonment should be imposed.<sup>100</sup>

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<sup>96</sup> Prosecution sentencing submissions, para. 9.

<sup>97</sup> Prosecution sentencing submissions, paras 11, 41, 46, 50.

<sup>98</sup> Prosecution sentencing submissions, para. 10, fn. 7.

<sup>99</sup> Prosecution sentencing submissions, paras 11, 18.

<sup>100</sup> Ayyash Defence sentencing submissions, paras 19, 25-31.

88. The Legal Representatives submit that the statutory provisions and general practice in sentencing in Lebanon demand that the Trial Chamber must impose the highest possible sentence.<sup>101</sup> In the hearing they clarified that this meant a life sentence.<sup>102</sup>

(b) A financial penalty including the freezing of assets

89. In addition to imposing a sentence of imprisonment, the Legal Representatives submit that the Trial Chamber may impose a financial penalty whether a fine, a compensation, restitution or a forfeiture order.<sup>103</sup> The Lebanese Criminal Code envisages the concept of ‘imposing financial penalties upon a person convicted of terrorist or multiple homicide offences concurrently to orders of imprisonment’.<sup>104</sup> That part of the Code relating to the death penalty does not apply, but ‘that is not to say that any order of punishment’ under the Code ‘is off limits to the sentencing Chamber’. Some penalties, however, are obviously impractical, such as probation, community service and suspended sentences.<sup>105</sup>

90. In particular, the Trial Chamber can ‘formulate appropriate punishments by combining the multiple forms of order available under the Code.’<sup>106</sup> Article 138 provides that any perpetrator of a crime must pay compensation.<sup>107</sup> Under article 42 it is possible to impose a fine, and to confiscate property alongside the ‘ordinary’ penalties for felonies.<sup>108</sup> Article 25 of the Statute simply establishes that the Special Tribunal will not itself pay compensation to a victim, and does not prevent the making of a compensation order against a convicted accused.<sup>109</sup>

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<sup>101</sup> Legal Representatives of Victims’ sentencing submissions, paras 36, 62, 91 (b).

<sup>102</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, p. 59.

<sup>103</sup> Legal Representatives of Victims’ sentencing submissions, para. 49. *See also* Legal Representatives of Victims’ sentencing submissions, para. 64.

<sup>104</sup> Legal Representatives of Victims’ sentencing submissions, paras 46, 49. *See also* Legal Representatives of Victims’ sentencing submissions, paras 75-76.

<sup>105</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, pp 44-45.

<sup>106</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, p. 45.

<sup>107</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, pp 45-46, 49.

<sup>108</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, p. 50. The Legal Representatives point to three Lebanese cases which show that fines have been passed alongside other sentences: Case 54 of 2015; Case 52 of 2016; and Case 170 of 2017. Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, pp 50-51.

<sup>109</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, pp 47-49. In their oral submissions, the Legal Representatives of Victims were generally critical of Article 25, describing it as ‘in equal measure trite, otiose, and legally questionable’, and ‘pretty much pointless’.

91. It is unnecessary for the Trial Chamber to undertake a ‘fine-tuned’ assessment of damages, or consider what is known about Mr Ayyash’s specific means.<sup>110</sup>

92. Sentences of imprisonment and financial penalties are imposed concurrently for analogous crimes in France and the UK.<sup>111</sup> The Rome Statute permits the ICC to order a fine or forfeiture of proceeds, property and assets, including in offences against the administration of justice.<sup>112</sup> The ICC has ordered fines even in the absence of participating victims, to be transferred to the trust fund for victims.<sup>113</sup> Following this precedent, the Trial Chamber could order a fine to be allocated to a fund for the benefit of the participating victims.<sup>114</sup> The Special Tribunal’s Rules also provide that a fine not exceeding 100,000 euros may be imposed on a person found to be in contempt of the Special Tribunal.<sup>115</sup>

93. The absence of an express power in the Statute is no bar to imposing a financial penalty. The availability of this remedy is ‘consonant with the spirit of the statute, as well as the general principles of international criminal law and procedure’. The alternative—whereby a lacuna in the Special Tribunal’s legal regime means that a convicted accused could not be ordered to compensate victims—‘would be offensive to any system of justice.’<sup>116</sup>

94. Rule 82 (C) permits the Trial Chamber to request a State or States to adopt provisional measures to freeze the assets of an accused, as shown by their use in contempt proceedings. The measures extend to all assets in which Mr Ayyash has a beneficial interest, including, but not limited to, assets held in joint names with others, assets held by nominees, trustees or immediate family members and corporate assets in which he has a shareholding or directorial interest.<sup>117</sup> These powers are similar to those of the ICC.<sup>118</sup>

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<sup>110</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, p. 46.

<sup>111</sup> Legal Representatives of Victims’ sentencing submissions, paras 37-46.

<sup>112</sup> Legal Representatives of Victims’ sentencing submissions, para. 46.

<sup>113</sup> Legal Representatives of Victims’ sentencing submissions, para. 47.

<sup>114</sup> Legal Representatives of Victims’ sentencing submissions, para. 49.

<sup>115</sup> Legal Representatives of Victims’ sentencing submissions, para. 48.

<sup>116</sup> Legal Representatives of Victims’ sentencing submissions, para. 49.

<sup>117</sup> Legal Representatives of Victims’ sentencing submissions, paras 50, 91 (e); Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, p. 51.

<sup>118</sup> Legal Representatives of Victims’ sentencing submissions, para. 50.

95. The Legal Representatives also made a strong submission in the hearing on what could be seen as the moral imperative of attempting to extract compensation for the victims from Mr Ayyash's assets, arguing:

We submit that to pass simply a sentence of imprisonment upon him and allow him, his associates, his family, to continue to enjoy those assets while the victims suffer, would be, frankly, obscene, and if it is not well, we submit that it must be within your powers, and we have demonstrated how, through the employment of the Lebanese Criminal Code, to make financial orders against him. We know he had property some years ago. It's quite likely it's still there. And, yes, it won't satisfy all of the victims for all of their needs, but it's a step in the right direction.<sup>119</sup>

96. In response to these submissions on a possible financial penalty, the Prosecution argued that the Trial Chamber has no explicit or implicit power to impose one. Referring to fines, counsel argued that under Rule 60 *bis* (J), fines are permitted only in relation to contempt offences, and Lebanese law allows financial penalties in relation to misdemeanours and felonies under certain circumstances—in particular, for the felonies dealt with here, only 'if there had been intention in committing these types crimes to profit or to make financial gain from the offences ... but that's not applicable here'.<sup>120</sup> International and Lebanese sentencing practice further demonstrates that it is 'highly unusual' to impose a financial penalty in addition to a lengthy term of imprisonment.<sup>121</sup>

97. Rules 77 and 82 (C) permit the Pre-Trial Judge to request the Lebanese authorities to freeze assets, and these powers could be extended, under Rule 130 (B), to trial proceedings. However, they seem more orientated towards pre-trial proceedings than sentencing. Further, 'whilst the interpretation being sought by the Legal Representative of Victims could be thought to be purposive and almost beneficial to the spirit of the Statute and for compensation', it would depend upon the financial penalties powers which, the Prosecution submits, are absent.<sup>122</sup>

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<sup>119</sup> Legal Representatives of Victims' oral sentencing submissions, p. 52.

<sup>120</sup> Prosecution oral sentencing submissions, T. 10 November 2020, pp 27-28.

<sup>121</sup> Prosecution oral sentencing submissions, T. 10 November 2020, p. 28. The Prosecution also submits, but without further elaboration, that it the same practice would conceivably exist in other domestic jurisdictions. Further, even if a power to impose a penalty were available to the Trial Chamber, it would not be proper to impose it, because it would risk diverting the resources of the accused away from compensating the victims. Prosecution oral sentencing submissions, T. 10 November 2020, pp 28-29.

<sup>122</sup> Prosecution oral sentencing submissions, T. 10 November 2020, pp 31-32.

98. As to compensation, the Prosecution submits that the power to order it:

is left under Article 25 of the Statute to the national courts or some other competent body in Lebanon, which, basing itself on the convictions here, could then issue appropriate compensation, and that is obviously something which would be, in the submission of the Prosecution, proper and appropriate, it goes without saying.<sup>123</sup>

99. The Ayyash Defence also opposed the Legal Representatives' submissions, arguing that financial penalties and freezing of assets are excluded, as they are not included in the Special Tribunal's legal framework.<sup>124</sup> Article 25 clearly limits the Trial Chamber's powers to the identification of harm, enabling victims to pursue compensation in a national court or other competent body.<sup>125</sup> Rule 82 (C) is a provisional measure aimed at freezing the assets of an accused person, and does not apply to a convicted person.<sup>126</sup>

100. Reference to the ICC's reparations regime is inapposite because, in contrast to the Special Tribunal's Statute, the ICC's Rome Statute expressly provides for fines or the forfeiture of assets.<sup>127</sup>

## 2. Discussion and findings

101. Article 24 of the Statute provides that the Trial Chamber 'shall impose upon a convicted person imprisonment for life or for a specified number of years.' Rule 172 (A) similarly provides that a convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

102. The Prosecution, the Defence and the Legal Representatives correctly argue that the maximum available sentence is one of life imprisonment as specified in the Statute. Under Lebanese law, the applicable penalties for these offences are the death penalty and hard labour for life.

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<sup>123</sup> Prosecution oral sentencing submissions, T. 10 November 2020, p. 26.

<sup>124</sup> Ayyash Defence sentencing submissions, paras 6, 12; Ayyash Defence oral sentencing submissions, T. 10 November 2020, p. 37.

<sup>125</sup> Ayyash Defence sentencing submissions, para. 12; Ayyash Defence oral sentencing submissions, T. 10 November 2020, pp 37-38.

<sup>126</sup> Ayyash Defence oral sentencing submissions, T. 10 November 2020, p. 38.

<sup>127</sup> Ayyash Defence sentencing submissions, para. 12; Ayyash Defence oral sentencing submissions, T. 10 November 2020, p. 38.

103. The Trial Chamber's powers to impose custodial sentences are clearly defined, and permit the imposition of a sentence of either life imprisonment or another defined period. The availability of other penalties in Lebanon under Lebanese law does not affect this. Article 24 expressly displaces Lebanese law insofar as it relates to specific penalties, such as the death penalty and hard (or forced) labour. Furthermore, the requirement to consider Lebanese sentencing practices does not bind the Trial Chamber in imposing a penalty.<sup>128</sup>

104. The Legal Representatives acknowledge that while Article 24 contains no explicit reference to financial penalties, such penalties are nonetheless 'consonant with the spirit' of the Statute.

105. The Trial Chamber has carefully considered their arguments in favour of imposing a financial penalty or compensation, but is unable to accept them.

106. Article 2 specifies that the Lebanese Criminal Code applies to sentencing. Financial penalties and compensation are available under that Code, and fines and compensation orders have been issued in Lebanon in felony sentences.<sup>129</sup> However, Article 2 is subject to Article 24, which specifies only a penalty of a sentence of imprisonment.

107. The Trial Chamber considers that Article 24, entitled 'Penalties', is intended as an exhaustive summary of the sentencing penalties available to the Trial Chamber for convictions against the offences listed in Article 2. Had the Statute's drafters intended to include financial penalties—or indeed any other penalties such as hard (or forced) labour, and say, suspended prison sentences, probation, or community service orders—in the Trial Chamber's view, they would have done so.

108. That is how penal statutes work in practice: the legislator specifies the range of penalties available to a sentencing court. That ensures certainty in the application of the law and is consistent

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<sup>128</sup> See also *Dragan Nikolić* Sentencing Judgment, paras 157-165, establishing that the tribunal was not bound to apply a more lenient penalty available under jurisdictions on the territory of the former Yugoslavia. The same logic would extend to a harsher penalty.

<sup>129</sup> Article 138 provides that a 'perpetrator of a crime that causes material or moral harm to others must pay compensation.' Article 64 provides that fines are applicable to crimes for felonies; while Article 42 lists financial penalties amongst those which may be made in addition to 'ordinary' penalties. A number of Lebanese cases have applied fines alongside sentences of imprisonment or ordered compensation. Assize Court decision 54/2015; Cassation decision 52/2016; Assize Court decision 170/2017.



with the principle of legality known as *nulla poena sine lege* (no punishment without law). Likewise, it is consistent with the prohibition against unwritten judge-made criminal provisions, namely, *nullum crimen, nulla poena sine lege scripta*, which includes penalties.

109. By contrast, the Rules of Procedure and Evidence, in which the Special Tribunal's judges sitting in plenary created the contempt offences specified in Rule 60 *bis*, provide for fines and or imprisonment as penalties.<sup>130</sup> The ICTR, ICTY and IRMCT Rules all contain similar provisions for punishing contempt, albeit with differing maximum fines.<sup>131</sup> This shows that a deliberate distinction has been made between the sanctions for contempt offences and those for crimes specified in the statute of each of these tribunals.<sup>132</sup>

110. While the ICC under Article 77 (2) of the Rome Statute may order a fine or forfeiture of proceeds, property or assets, nothing suggests that this provision alone establishes a broader general principle of international criminal law that the Trial Chamber should apply. The Rome Statute is a treaty binding on its member states, whereas the Special Tribunal's Statute, which is annexed to a Security Council resolution, has no similar provision.

111. The wording of Article 24 strongly suggests that the Security Council did not intend to confer on the Special Tribunal powers to fine Accused persons convicted of offences specified in Article 2. Although the equivalent Articles 22, 23 and 24 of the IRMCT, ICTR and ICTY Statutes expressly state that the penalty 'shall be limited to imprisonment', the Trial Chamber is convinced that nothing in the Statute of the Special Tribunal suggests that the Trial Chamber is empowered to fine a convicted accused person, either in lieu of or additionally to imposing a period of imprisonment.

112. Given these findings, the Trial Chamber need not consider further the arguments about its potential powers in relation to the freezing of assets, or directly ordering compensation or reparations. It is not persuaded, in the absence of an express power to fine a convicted offender, or to directly order compensation or reparations, that it could make any such order.

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<sup>130</sup> Rule 60 *bis* (J).

<sup>131</sup> Respectively, USD10,000, 100,000 euros and 50,000 euros.

<sup>132</sup> The IRMCT Statute differs in that Article 1 (4) creates contempt offences, and Article 22 (1) specifies that the penalty is a maximum sentence of seven years imprisonment, or a fine or both, but leaves it to the Rules to determine the fine. Thus the Rules of each tribunal specify the maximum fine that may be imposed.

## B. The aims of sentencing

113. Sentencing serves different aims and purposes in cases tried according to the principles of international criminal law. The two primary aims are retribution, or imposing a just and appropriate punishment on the offender, and deterrence, both at the individual and societal level. Rehabilitation is another though less important factor.

### 1. Submissions

114. Relying on international criminal law, the Prosecution submits that the two primary purposes of sentencing are deterrence and retribution. Deterrence, which should not be accorded undue prominence, should discourage individual recidivism, but also discourage those who may consider committing similar crimes from doing so.<sup>133</sup>

115. Retribution requires a just and appropriate punishment, which appropriately reflects the culpability of the offender, and is ‘the expression of outrage of the international community at the crimes committed’.<sup>134</sup> Further, referring to a Lebanese Court of Cassation decision from 2014, the Prosecution submits that rehabilitation—the offender’s reintegration in the society—is an additional purpose of sentencing in Lebanon.<sup>135</sup>

116. Retribution and deterrence are met when the sentence is proportional to the gravity of the criminal conduct.<sup>136</sup> Here, however, nothing would render rehabilitation applicable and warrant deviation from a life sentence.<sup>137</sup>

117. The Legal Representatives submit that although the Statute and the Rules are silent on the purposes of sentencing, the Security Council resolutions that led to the creation of the United Nations International Independent Investigation Commission (UNIIIC) and the Special Tribunal’s establishment declared—as a main objective—the need to meet the demand of the Lebanese people to identify, bring to justice and hold accountable those responsible for the offences that killed Mr Hariri and 21 others, and injured 226 people. These texts suggest that the main objectives are

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<sup>133</sup> Prosecution sentencing submissions, para. 15.

<sup>134</sup> Prosecution sentencing submissions, para. 15.

<sup>135</sup> Prosecution sentencing submissions, para. 16, referring to Cassation decision 255/2014.

<sup>136</sup> Prosecution sentencing submissions, para. 15, referring to *Krajišnik* Appeal Judgment, para. 777.

<sup>137</sup> Prosecution sentencing submissions, para. 16.

deterrence and retribution.<sup>138</sup> Further, international precedent exists, at the ICTY, for having recourse to UN resolutions to ascertain the purposes of sentencing in international proceedings.<sup>139</sup>

118. The aim of deterrence is twofold: to prevent the specific offender from re-offending, and to dissuade others from future crimes. Retribution expresses the international community's condemnation of the crimes.<sup>140</sup>

119. Additionally, a proportionate sentence acknowledges the harm caused to victims.<sup>141</sup> A judgment of conviction itself brings some relief to the victims. While the participating victims had different views about an appropriate sentence, all agreed that the perpetrators must be punished. Some victims also believe that the Special Tribunal has the potential to end impunity and deter similar crimes in the future.<sup>142</sup>

120. The Ayyash Defence made no specific submissions on these points.

## 2. Discussion and findings

121. In establishing the Special Tribunal for Lebanon, the Security Council in resolution 1757, and acting under Chapter VII of the UN Charter, stated (relevantly):

*Mindful* of the demand of the Lebanese people that all those responsible for the terrorist bombing that killed former Lebanese Prime Minister Rafiq Hariri and others be identified and brought to justice,

...

*Willing* to continue to assist Lebanon in the search for the truth and in holding all those involved in the terrorist attack accountable and reaffirming its determination to support Lebanon in its efforts to bring to justice perpetrators, organizers and sponsors of this and other assassinations,

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<sup>138</sup> Legal Representatives of Victims' sentencing submissions, paras 6-8.

<sup>139</sup> Legal Representatives of Victims' sentencing submissions, paras 9-10, referring to *Tadić* Appeal Decision on Jurisdiction, para. 72. The passage quoted, however, refers to 'bringing to justice persons responsible for serious violations of international humanitarian law', rather than anything specifically related to sentencing them after conviction.

<sup>140</sup> Legal Representatives of Victims' sentencing submissions, paras 11-12.

<sup>141</sup> Legal Representatives of Victims' sentencing submissions, para. 13.

<sup>142</sup> Legal Representatives of Victims' sentencing submissions, paras 15-16.

*Reaffirming* its determination that this terrorist act and its implications constitute a threat to international peace and security.<sup>143</sup>

122. These statements are consistent with the aims of retribution and deterrence, which are the primary purposes of sentencing in international criminal courts and tribunals.<sup>144</sup> To satisfy these objectives, a sentence must be proportional to the gravity of the criminal conduct.<sup>145</sup>

123. The concept of deterrence is normally divided into two categories, namely, individual and general deterrence. The sentence should be sufficient to discourage the convicted person from offending—defined as ‘individual deterrence’—and also ensure that other potential perpetrators are dissuaded from committing the same or similar crimes in the future—or ‘general deterrence’.<sup>146</sup>

124. In sentencing Mr Ayyash in the circumstances of this case, individual deterrence combined with a limited form of general deterrence is probably more realistic than general deterrence in its widest sense. The Trial Chamber has found and recognises that Mr Ayyash—whose role was essentially that of an assassin in the assassination team—did not instigate the attack on Mr Hariri. It was a political attack that was aimed at eliminating a political obstacle or opponent. Although there was no *direct* evidence of this, it most probably had to have involved state actors. The state with the most to gain from Mr Hariri’s elimination, according to the evidence heard at trial most likely was Syria. Further, the Trial Chamber found that Mr Ayyash was affiliated with Hezbollah.<sup>147</sup> Hezbollah is allied with Syria. Additionally, the Security Council’s resolution number 1757 categorised the attack on Mr Hariri as a ‘terrorist act and its implications constitute a threat to international peace and security’.

125. Evidently, a number of co-conspirators including those who instigated the attack have not been brought to justice. Mr Ayyash is the only one of the six users of the Red network on 14 February 2005 and involved in the attack who was identified and indicted by the Prosecutor.

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<sup>143</sup> Security Council Resolution 1757, p. 2.

<sup>144</sup> *Ntaganda* Sentencing Judgment, paras 9-10; *Krajišnik* Appeal Judgment, para. 775; *Stakić* Appeal Judgment, para. 402; *Delalić and others (Čelebići)* Appeal Judgment, para. 806.

<sup>145</sup> *Krajišnik* Appeal Judgment, para. 777.

<sup>146</sup> *Ntaganda* Sentencing Judgment, para. 10; *Krajišnik* Appeal Judgment, paras 776, 805; *Kordić and Čerkez* Appeal Judgment, paras 1077-1078; ICTY, *Prosecutor v. Nikolić*, IT-94-2-S, Sentencing Judgment, 18 December 2003, paras 45-46.

<sup>147</sup> Trial Judgment, paras 751-755. Moreover, regarding the former co-Accused, Mustafa Amine Badreddine, with whom Mr Ayyash was regularly communicating using their covert Green mobiles, the evidence that he ‘was a long-standing and senior Hezbollah military commander is uncontested and incontrovertible’, Trial Judgment, para. 750.

With the exception of Mustafa Amine Badreddine (and the three acquitted co-accused) the Prosecutor did not name anyone else in the indictments who he considered either to be a conspirator or responsible for instigating the crimes charged.

126. For these reasons, and especially given the highly probable role of a state actor in this terrorist attack, the aim of wider general deterrence in sentencing here, insofar as it extends to the instigators of state sponsored crimes, is less likely to have the intended effect. In other words, this wider form of general deterrence may have less significance in crimes involving state actors where the risk of apprehension for the instigators is slight. Individual and a more limited form of general deterrence for people such as Mr Ayyash may be more pertinent: a severe sentence may act as a warning to potential perpetrators who are engaged by state actors to commit acts of terrorism.

127. Retribution is highly applicable in sentencing for political crimes of this nature. Retribution should not fulfil a desire for revenge but should instead be an ‘expression of the outrage of the international community at the crimes committed’.<sup>148</sup> This is apposite in an attack against a political figure that achieved its intended destabilising effect in spreading terror in Lebanon for political reasons.

128. The aim of retribution requires the imposition of a ‘just and appropriate punishment, and nothing more’.<sup>149</sup> Further, a proportionate sentence acknowledges the harm caused to the victims.<sup>150</sup> As noted above, this is also consistent with the wording of Security Council resolution 1757.

129. Rehabilitation is an additional factor in sentencing in Lebanon.<sup>151</sup> Rehabilitation, however, has not had a predominant role in sentencing international crimes and should not be given ‘undue weight’.<sup>152</sup>

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<sup>148</sup> *Ntaganda* Sentencing Judgment, para. 10. See also *Aleksovski* Appeal Judgment, para. 185; *Kordić and Čerkez* Appeal Judgment, para. 1075.

<sup>149</sup> *Kordić and Čerkez* Appeal Judgment, para. 1075. See also *Mladić* Trial Judgment, para. 5182; *Karadžić* Trial Judgment, para. 6026.

<sup>150</sup> *Ntaganda* Sentencing Judgment, para. 10; *Al Mahdi* Judgment and Sentence, para. 67; *Bemba* Decision on Sentence, para. 11; *Katanga* Decision on Sentence, para. 38.

<sup>151</sup> Cassation decision 255/2014, p. 3.

<sup>152</sup> *Nahimana and others* Appeal Judgment, para. 1057; *Stakić* Appeal Judgment, para. 402; *Nikolić* Sentencing Judgment, paras 133, 282; *Delalić and others (Čelebići)* Appeal Judgment, paras 805-806. See also *Karadžić* Trial Judgment, para. 6025; *Popović and others* Trial Judgment, para. 2130.

130. The objective gravity of Mr Ayyash's crimes necessitates a severe sentence. In these circumstances, the sentencing consideration of rehabilitation could only be given such minimal weight so as not to reduce the sentence. For this reason, the Trial Chamber will give no weight to this factor in deciding the sentence.

### **C. Sentencing factors**

131. Article 24 of the Statute and Rule 172, as noted above, enumerate factors that the Trial Chamber should consider in sentencing. They include gravity, individual circumstances, any aggravating circumstances or mitigating circumstances, the general practice regarding prison sentences in Lebanon, and the extent to which a penalty imposed by a court of any State on the convicted person for the same act has already been served.

#### **1. Submissions**

132. The Prosecution submits that under Article 24 and Rule 172, the Trial Chamber should take into account the five matters listed immediately above.<sup>153</sup>

##### **(a) Gravity**

133. The Prosecution argues that the nature of the crimes committed by Mr Ayyash are extremely grave and justify the most severe punishment available.<sup>154</sup>

134. Gravity is a principal factor in sentencing. Its assessment rests on the particular circumstances of the case, the accused's criminal conduct, the inherent gravity of the crime, including the number of victims, and the impact of the crime.<sup>155</sup> This includes the harm caused to victims directly injured and their relatives, and the harm caused to broader society.<sup>156</sup>

135. Aggravating factors must be established beyond reasonable doubt, and cannot be 'double-counted', that is considered both as aggravation and as part of gravity.<sup>157</sup> The Prosecution submits

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<sup>153</sup> Prosecution sentencing submissions, para. 12.

<sup>154</sup> Prosecution sentencing submissions, paras 3-5, 40; Prosecution oral sentencing submissions, T. 10 November 2020, pp 8-9.

<sup>155</sup> Prosecution sentencing submissions, para. 17.

<sup>156</sup> Prosecution sentencing submissions, paras 17, 24.

<sup>157</sup> Prosecution sentencing submissions, para. 13; Prosecution oral sentencing submissions, T. 10 November 2020, p. 16.

that the death of one or more people, the partial destruction of buildings, premeditation and the use of explosives are aggravating factors prescribed by the Lebanese Criminal Code.<sup>158</sup>

136. Under Lebanese law, the crimes Mr Ayyash committed would result in the most severe penalty. For example in Lebanon, Mr Samir Farid Geagea was convicted for his role in attacks in March 1991 that aimed to assassinate Mr Michel Murr which killed multiple people, injuring many others and creating panic among the population. The Trial Chamber in the judgment found that this Lebanese case most closely compared to the attack against Mr Hariri. Mr Geagea was sentenced to death for each felony, but this was commuted under the Lebanese Criminal Code to a sentence of hard labour for life due to mitigating circumstances.<sup>159</sup>

137. Based on the Trial Chamber's factual findings at trial, the Prosecution argues that the context and gravity of the crimes are significantly higher than those in the El-Murr assassination case,<sup>160</sup> and that this terrorist attack 'surpasses in scale and magnitude any other terrorist incident tried by the Lebanese courts'.<sup>161</sup>

138. In arguing that the crimes were inherently grave, the Prosecution relies on the Trial Chamber's findings that the attack was a terrorist act—'one of the most serious and heinous crimes'—that would necessarily have been expected to kill or injure numerous people and inflict terror and in fact caused an indiscriminate loss of life, destruction and inflicted widespread terror. Additionally, the attack was also calculated to destabilise Lebanon.<sup>162</sup> The Prosecution also submits that the UN Security Council found the attack to constitute a threat to international peace and security justifying the establishment of an international tribunal to prosecute those responsible.<sup>163</sup>

139. The Prosecution further relies on the Trial Chamber's findings that direct and indirect victims of the attack sustained physical, emotional, psychological and financial harm,<sup>164</sup>

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<sup>158</sup> Prosecution sentencing submissions, paras 41, 44-45, 47-49; Prosecution oral sentencing submissions, T. 10 November 2020, p. 9.

<sup>159</sup> Prosecution sentencing submissions, para. 18.

<sup>160</sup> Prosecution sentencing submissions, para. 19.

<sup>161</sup> Prosecution sentencing submissions, paras 4, 39.

<sup>162</sup> Prosecution sentencing submissions, paras 17, 20-22; Prosecution oral sentencing submissions, T. 10 November 2020, pp 8-10.

<sup>163</sup> Prosecution sentencing submissions, paras 4, 20.

<sup>164</sup> Prosecution sentencing submissions, paras 17, 23-34.

underlining that more than half of those killed, and almost all who were injured, were innocent bystanders who had no connection with Mr Hariri's convoy.<sup>165</sup> Further, the 'diverse range of impacts upon individuals, groups and Lebanese society as a whole is relevant to the gravity of the crime.'<sup>166</sup>

140. As to Mr Ayyash's criminal conduct, the Prosecution notes the Trial Chamber's findings that he directly contributed to the execution of the crime of a terrorist attack through his central and leading role in the implementation of the attack, as a result of extensive, sophisticated planning, surveillance and coordination of an assassination team. He also knew that Mr Hariri would be killed by the explosion of a VBIED in a public place and must have known that an explosion of its magnitude—and on a public street in the middle of a week day—would create a state of terror and instability among the Lebanese people.<sup>167</sup>

141. The extreme gravity of Mr Ayyash's crimes, his leading calculating role in their execution and their devastating impact on the victims and Lebanese people justify the imposition of the most severe sentence under Article 24 of the Statute.<sup>168</sup>

142. The Ayyash Defence underlines the Trial Chamber's findings that Mr Ayyash coordinated the execution of the attack and contributed to its preparation by participating in surveillance of Mr Hariri. It emphasises that the same conduct underlies all of the counts on which Mr Ayyash was convicted and the same evidence supports them.<sup>169</sup>

143. It highlights that the Trial Chamber did not find Mr Ayyash criminally responsible as the 'originator, architect or overall coordinator' of the attack on 14 February 2005, nor did it find that he recruited or trained others to participate in it. It also did not find that Mr Ayyash acquired the equipment, or had specific knowledge about the type and quantity of explosives, used in the attack.<sup>170</sup> 'So this justifies imposing a lesser sentence on Mr Ayyash than the most severe penalty

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<sup>165</sup> Prosecution sentencing submissions, para. 3.

<sup>166</sup> Prosecution sentencing submissions, para. 24.

<sup>167</sup> Prosecution sentencing submissions, paras 5, 17, 35-39; Prosecution oral sentencing submissions, T. 10 November 2020, pp 9-10.

<sup>168</sup> Prosecution sentencing submissions, para. 40.

<sup>169</sup> Ayyash Defence sentencing submissions, para. 20.

<sup>170</sup> Ayyash Defence sentencing submissions, para. 21.



available.’<sup>171</sup> Further, the Trial Chamber found that Mr Ayyash ‘did not act alone’, rather he was a single participant in a large, complex network, the majority of whom the Prosecution has been unable to identify.<sup>172</sup>

144. Just because Mr Ayyash’s culpable conduct is ‘in part legally characterised as terrorism’, this does not require the Trial Chamber to impose the most severe sanction under the Statute. Rather the Trial Chamber should assess the gravity of Mr Ayyash’s crimes based on the particular circumstances of this case and the degree of his participation. Moreover, the Trial Chamber should not impose an overly severe sentence on Mr Ayyash because he is the only identified person among the network of actors who the Trial Chamber found contributed to the attack. Under the Statute and the practice of international criminal tribunals, convicted persons must be sentenced on an individual—not a collective—basis.<sup>173</sup>

145. The Ayyash Defence argues that when determining a prison sentence, the Trial Chamber should consider the factors set out in Article 24. International criminal tribunals are granted broad sentencing discretion, but a penalty must be tailored to the individual circumstances of the accused and the gravity of the crime, to ensure that a sentence reflects and is proportionate to culpable conduct.<sup>174</sup>

146. Gravity is ‘the starting point’ for the consideration of an appropriate sentence. Its assessment includes a convicted person’s culpable conduct, namely the degree of participation and intent. The assessment is not objective, but focuses on the particular circumstances of a case, such as the manner in which the crime was committed and its scale.<sup>175</sup> The fact that Mr Ayyash’s

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<sup>171</sup> Ayyash Defence oral sentencing submissions, T. 10 November 2020, p. 34. Lead counsel, in response to a question from the Presiding Judge as to whether in Lebanon this meant that a hitman would always receive a lesser sentence than the person paying them, responded that ‘according to my understanding of the Lebanese law, yes...Mr Ayyash won’t have the most severe penalty, for sure; it will be a lesser sentence.’ Ayyash Defence oral sentencing submissions, T. 10 November 2020, p. 37.

<sup>172</sup> Ayyash Defence sentencing submissions, para. 22. Lead counsel for Mr Ayyash modified this submission in the sentencing hearing to say that ‘large’ could be disregarded, but the network was complex. Ayyash Defence oral sentencing submissions, T. 10 November 2020, p. 41.

<sup>173</sup> Ayyash Defence sentencing submissions, paras 23-24.

<sup>174</sup> Ayyash Defence sentencing submissions, paras 13-14; Ayyash Defence oral sentencing submissions, T. 10 November 2020, p. 39.

<sup>175</sup> Ayyash Defence sentencing submissions, para. 15.

culpable conduct is in part legally characterised as terrorism does not automatically demand the severest penalty.<sup>176</sup>

147. The Ayyash Defence submits that the elements and scale of the crime, and the manner in which a convicted person participated, go to gravity rather than aggravation or mitigation. A factor which has been considered when determining gravity cannot also be considered as aggravation; and *vice versa*. A convicted person should not be punished twice in relation to the same conduct.<sup>177</sup>

148. The Legal Representatives submit that they will make submissions only on the gravity of the offence and the impact of the crimes on the victims, and not the conduct of Mr Ayyash, in order to ‘remain faithful to the rights of the Defence’.<sup>178</sup> The Trial Chamber is obliged under the Special Tribunal’s legal framework to take into account the gravity of the offence and individual circumstances of the accused, as well as aggravating and mitigating circumstances.<sup>179</sup>

149. In their oral closing arguments at the end of the trial they had argued that the impact upon victims is a component of the gravity of the offence and that such findings of fact ‘could equally, in some cases, be aggravating factors’ but that the Trial Chamber should be wary not to engage in double counting.<sup>180</sup>

150. Gravity, according to the Legal Representatives, is one of the most important sentencing factors in international criminal law. In the absence of clear guidelines in the Special Tribunal’s framework, the Trial Chamber should consider the factors specified in the ICC’s Rules. These include the extent of the damage, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour, and the circumstances of manner, time and location.<sup>181</sup>

151. They also point out that in its judgment the Trial Chamber held that it should consider the suffering of the victims when evaluating the gravity of crimes or aggravating circumstances.<sup>182</sup>

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<sup>176</sup> Ayyash Defence sentencing submissions, para. 24.

<sup>177</sup> Ayyash Defence sentencing submissions, paras 15-19.

<sup>178</sup> Legal Representatives of Victims’ sentencing submissions, paras 25-27.

<sup>179</sup> Legal Representatives of Victims’ sentencing submissions, paras 18-19, and referring to Lebanese provisions in relation to premeditation, paras 32, 35.

<sup>180</sup> Legal Representatives of Victims closing submissions, T. 14 September 2018, pp 83-84. They submitted that ‘double-counting would be to assess the gravity of the offence, for example, by reference to the fact that it involved the planting of a bomb and then further to aggravate the sentence by referring to the same circumstance.’ Counsel added, ‘So you aggravate the sentence twice.’

<sup>181</sup> Legal Representatives of Victims’ sentencing submissions, paras 20-21, 23.

<sup>182</sup> Legal Representatives of Victims’ sentencing submissions, para. 24.

Aggravating factors include whether the crime was committed with particular cruelty or whether there were multiple victims.<sup>183</sup> Findings on gravity are important for victims as they enable appropriate and proportional compensation.<sup>184</sup> An assessment of victim harm should include the evidence of participating victims, and the evidence at trial of the victimologist, Professor Letschert.<sup>185</sup>

152. The Legal Representatives submit that the crimes are of extreme gravity.<sup>186</sup> They involved extensive planning and preparation, including covert surveillance and the purchase of the Mitsubishi Canter.<sup>187</sup>

153. The sentence should take into account the harm caused to the victims.<sup>188</sup> The explosive device was intended not only to kill Mr Hariri but also to cause massive destruction, injury and death. The large number of fatalities and injuries—22 people killed and 226 injured—should be taken into consideration when determining the gravity of the offence. The accounts by the participating victims, as well as Professor Letschert’s evidence, show the enduring harm caused to the survivors. Further, the attack ‘transcended identifiable victims and affected Lebanese society as a whole’. The infliction of terror on the overall population must be taken into account.<sup>189</sup>

(b) Aggravating circumstances

154. The Prosecution submits that aside from the inherent gravity of Mr Ayyash’s crimes, the aggravating circumstances in the Lebanese Criminal Code ‘in themselves justify the imposition of the most severe penalty’ under Article 24 (1)—imprisonment for life—for each of the five counts.<sup>190</sup> The Prosecution adds that ‘these circumstances are subsumed within, and far exceeded by, the multitude of factors contributing to the extreme gravity of the crimes’.<sup>191</sup>

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<sup>183</sup> Legal Representatives of Victims’ sentencing submissions, para. 22.

<sup>184</sup> Legal Representatives of Victims’ sentencing submissions, paras 28-30. The Legal Representatives submit that both the ICC and international human rights standards require that compensation is appropriate and proportionate.

<sup>185</sup> Legal Representatives of Victims’ sentencing submissions, para. 59.

<sup>186</sup> Legal Representatives of Victims’ sentencing submissions, para. 4.

<sup>187</sup> Legal Representatives of Victims’ sentencing submissions, paras 54-56.

<sup>188</sup> Legal Representatives of Victims’ sentencing submissions, para. 4.

<sup>189</sup> Legal Representatives of Victims’ sentencing submissions, paras 54-61.

<sup>190</sup> Prosecution sentencing submissions, paras 6, 41, 43, 45-46, 50.

<sup>191</sup> Prosecution sentencing submissions, para. 41; Prosecution oral sentencing submissions, T. 10 November 2020, pp 8-10.

155. In relation to count two—committing a terrorist act by means of an explosive device—the death of one or more people and the partial destruction of buildings having one or more people inside are objective aggravating factors under article 6 of the 1958 Law and would increase the prescribed sentence from hard labour for life to death. The explosion caused deaths and the partial destruction of buildings with people inside, such as the St Georges and Byblos hotels.<sup>192</sup>

156. For counts three, four and five—intentional homicide and attempted intentional homicide—premeditation and the use of explosives are both aggravating factors for these crimes in Lebanese law and justify the most severe punishment under articles 547 and 549 of the Lebanese Criminal Code.<sup>193</sup> Finally, as to count one—conspiracy aimed at committing a terrorist act—article 7 of the 1958 Law states that the sentence for any person who enters into such a conspiracy is ‘hard labour for life’, which is applied as life imprisonment by Lebanese courts.<sup>194</sup> (This is not an aggravating circumstance).

157. The Ayyash Defence submits that according to the Prosecution, factors included in the Lebanese Criminal Code as aggravating circumstances ‘in themselves justify’ imposing multiple life sentences, however the Prosecution also acknowledges that these are subsumed within the gravity of crimes of which Mr Ayyash has been convicted. This amounts to impermissible double-counting.<sup>195</sup>

158. In light of the ‘limited applicability of Lebanese sentencing law under the Tribunal’s framework’, the Trial Chamber’s findings that Mr Ayyash conspired and committed a terrorist act, with an explosive device, and resulting in deaths and destruction of buildings with persons inside cannot be considered as distinct aggravating circumstances to justify an increased sentence. The same applies to premeditation—an aggravating circumstance for intentional homicide and attempted intentional homicide under article 549 of the Lebanese Criminal Code—it extends across all counts on which Mr Ayyash was convicted and should be assessed in relation to the overall gravity of his conduct.<sup>196</sup>

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<sup>192</sup> Prosecution sentencing submissions, paras 44-45, referring to the findings in the trial judgment at para. 6342.

<sup>193</sup> Prosecution sentencing submissions, paras 47-49.

<sup>194</sup> Prosecution sentencing submissions, paras 42-43.

<sup>195</sup> Ayyash Defence sentencing submissions, para. 26.

<sup>196</sup> Ayyash Defence sentencing submissions, paras 29-30.

159. Mr Ayyash should not be punished more than once for his conduct and the Trial Chamber should assess each factor in relation to sentencing only once—in relation to the elements of crimes, the gravity of his culpable conduct or aggravating circumstances.<sup>197</sup>

160. The Legal Representatives argue that the Special Tribunal's Statute and Rules largely leave the determination of the appropriate sentence to the Trial Chamber's discretion. They invite the Trial Chamber to have regard to the ICC's Rules listing the factors aggravating the sentence, such as the fact that the crime was committed with particular cruelty and that there were multiple victims.<sup>198</sup>

(c) Mitigating circumstances

161. Potential mitigation—which the Prosecution submits is not relevant in Mr Ayyash's case—includes factors such as an expression of remorse to the victims, good character with no prior criminal convictions and voluntary surrender.<sup>199</sup> The Trial Chamber need consider only whether mitigating factors are established on a balance of probabilities, and the weight to be attached to them is a matter of discretion.<sup>200</sup> Any application of mitigating factors does not diminish an assessment of gravity, nor preclude the imposition of a life sentence.<sup>201</sup>

162. According to the Prosecution, there are no mitigating circumstances to justify any reduction in sentence.<sup>202</sup> Lebanese criminal records show that Mr Ayyash was convicted of a criminal offence in 1988, and was sentenced to pay a fine. However, given the time elapsed and that the crime was not similar to the crimes in this case, the Prosecution submits that it is not relevant except to show that he does not have 'an entirely unblemished antecedent history'.<sup>203</sup>

163. Even if Mr Ayyash could demonstrate mitigating circumstances, his disregard for the current proceedings and interests of justice evident by refusing to surrender to the Special Tribunal or cooperate and participate in his trial 'negates or outweighs any mitigation otherwise open to him'. The Prosecution argues that mitigating factors do not lead to an 'automatic reduction' in

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<sup>197</sup> Ayyash Defence sentencing submissions, paras 28, 31.

<sup>198</sup> Legal Representatives of Victims' sentencing submissions, paras 20-23.

<sup>199</sup> Prosecution sentencing submissions, para. 52.

<sup>200</sup> Prosecution sentencing submissions, para. 14.

<sup>201</sup> Prosecution sentencing submissions, para. 55.

<sup>202</sup> Prosecution sentencing submissions, paras 7, 51.

<sup>203</sup> Prosecution sentencing submissions, para. 53.

sentence and that regardless, a life sentence should be imposed even if relevant mitigating factors are applied by the Trial Chamber.<sup>204</sup>

164. The Ayyash Defence pointed to Mr Ayyash's role, as found by the Trial Chamber, as not instigating the crimes.<sup>205</sup>

(d) Personal circumstances

165. Given that the Trial Chamber should consider a convicted person's personal circumstances, it invited the Prosecution, Defence and the Legal Representatives to address the following question during the sentencing hearing:<sup>206</sup>

The Statute of the Special Tribunal for Lebanon, under Article 24 (2), 'Penalties', mandates the Trial Chamber to take into account such factors as the individual circumstances of the convicted person in imposing sentence. Trial proceedings, however, are held *in absentia*.

In determining an appropriate sentence, how should the Trial Chamber approach the issue of individual circumstances of Mr Ayyash vis-à-vis *in absentia* proceedings?

166. The Prosecution and the Legal Representatives responded that Mr Ayyash's individual circumstances and personal characteristics have no impact on the sentence.<sup>207</sup> In oral submissions, the Prosecution argued:

With crimes of such extreme gravity as the crimes you are sentencing today, it's difficult to imagine any individual circumstances of sufficient weight to reduce it down from the life sentence which the Prosecution submits is the appropriate penalty.<sup>208</sup>

167. Lead counsel for Mr Ayyash emphasised that Defence counsel had had no contact with Mr Ayyash, and had no instructions to inform and guide the representation of his rights in the proceedings, including any mitigating circumstances. The combination of *in absentia* proceedings and the circumstantial nature of the evidence deprives the Trial Chamber of information needed to fairly evaluate Mr Ayyash's individual circumstances for purposes of sentencing. At a minimum,

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<sup>204</sup> Prosecution sentencing submissions, paras 54-55.

<sup>205</sup> Ayyash Defence oral sentencing submissions, T. 10 November 2020, pp 34-37.

<sup>206</sup> Questions for sentencing submissions, question (4) (footnote omitted).

<sup>207</sup> Prosecution oral sentencing submissions, T. 10 November 2020, pp 17-18, 20-21, 24; Legal Representatives of Victims' oral sentencing submissions, T. 10 November 2020, p. 53.

<sup>208</sup> Prosecution oral sentencing submissions, T. 10 November 2020, p. 23.

the Trial Chamber should recognise this and apply the principle of *in dubio mitius*, ‘more lenient in case of doubt’, in determining the sentence.<sup>209</sup>

## 2. Discussion and findings

### (a) Gravity

168. The Trial Chamber considers that the gravity of the offence is the primary factor in sentencing for these crimes.<sup>210</sup> In the judgment, the Trial Chamber stated that gravity is ‘one of the factors’ in sentencing, however it considered that it was ultimately relevant to assess the factors when calculating and deciding on the sentence, rather than in a judgment determining guilt.<sup>211</sup>

169. The assessment of gravity includes the inherent gravity of the crime and the Accused’s criminal conduct—in its form and the degree of participation—and the impact of the crimes on the victims.<sup>212</sup> The gravity of the crime must be considered in light of the specific circumstances of the case.<sup>213</sup>

170. The international case law also holds that there is no hierarchy of crimes in international criminal law, such as between, say, crimes against humanity and war crimes.<sup>214</sup> This, however, has limited relevance for the Trial Chamber’s determination as it is not sentencing for international crimes. Rather, it is sentencing for crimes proscribed under the Lebanese Criminal Code, which does have a hierarchy of penalties for different crimes (including where there are aggravating circumstances) unlike the statutes of international criminal courts and tribunals. Further, the Trial Chamber is sentencing according to Article 24 of the Statute which specifies a maximum penalty

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<sup>209</sup> Ayyash Defence oral sentencing submissions, T. 10 November 2020, p. 40.

<sup>210</sup> *Galić* Appeal Judgment, para. 442; *Blaškić* Appeal Judgment, para. 683; *Delalić and others (Čelebići)* Appeal Judgment, para. 731; *Aleksovski* Appeal Judgment, para. 182; *Lubanga* Decision on Sentence, para. 36.

<sup>211</sup> Trial Judgment, paras 904, 911, 913.

<sup>212</sup> *Ntaganda* Sentencing Judgment, paras 14-16; *Lubanga* Decision on Sentence, para. 44; *Mrkšić and Šljivančanin* Appeal Judgment, paras 375, 400, 411; *Galić* Appeal Judgment, paras 410, 446, 454-455; *Blaškić* Appeal Judgment, para. 683; *Furundžija* Appeal Judgment, para. 249. *See also* Trial Judgment, para. 905; Rule 145 of the ICC Rules, ‘Determination of sentence’.

<sup>213</sup> *Tadić* Sentencing Appeal Judgment, para. 69, holding that gravity of a crime ‘in any particular case [is] fixed by reference to the circumstances of the case’.

<sup>214</sup> *Kunarac and others* Appeal Judgment, para. 171; *Tadić* Sentencing Appeal Judgment, para. 69. Some cases though have implied that there is some kind of hierarchy in practice (*see for example*, descriptions of genocide as ‘offences beyond human comprehension and of the most extreme gravity’ (*Kayishema and Ruzindana* Trial Judgment, para. 9), and of genocide and crimes against humanity as ‘offences which are particularly shocking to the conscience of mankind’ (*Ndindabahizi* Trial Judgment, para. 499).

of life imprisonment. And it has already held in the judgment that ‘there is no doubt that terrorism is one of the most serious and heinous crimes.’<sup>215</sup>

171. The Trial Chamber found in its judgment that victim harm can be personal to an individual victim, and also collective when suffered by a multitude of people or across a community.<sup>216</sup> The Trial Chamber is only obliged, however, to make findings on the individual harm suffered by the victims, and not on collective harm. It held that its role included identifying the victims and considering any harm suffered.<sup>217</sup> It also held that it would consider ‘any evidence that victims suffered harm collectively or that harm was done to a collective/community’ in assessing the impact of crimes on victims and if necessary the gravity of the crimes.<sup>218</sup> It held that it will make findings on victim harm, in considering the evidence of the participating victims and of Professor Letschert.<sup>219</sup> It also found that her evidence, in ‘summarising views and concerns from the participating victims—adds to the participating victims’ evidence’.<sup>220</sup>

172. In the judgment, the Trial Chamber made findings on the impact of the crimes on the victims but not on gravity, because this was a factor to be determined at sentencing.<sup>221</sup> It also held that it will not make findings about ‘any estimate or pecuniary measure’ relating to harm as this is not its role, and would form the basis of an assessment of compensation or reparations in a national system.<sup>222</sup>

173. According to the ICTY Appeals Chamber, in assessing individual harm it is relevant to consider the consequences of the crimes for the victims who were directly injured and the effects on the immediate victims’ relatives.<sup>223</sup> As an example, in sentencing a senior military commander for committing acts of violence, the primary purpose of which was to spread terror among the

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<sup>215</sup> Trial Judgment, para. 912.

<sup>216</sup> Trial Judgment, para. 915.

<sup>217</sup> Trial Judgment, paras 892, 911.

<sup>218</sup> Trial Judgment, para. 918.

<sup>219</sup> Trial Judgment, paras 908, 914, 917, 1449, 1451.

<sup>220</sup> Trial Judgment, para. 914.

<sup>221</sup> Trial Judgment, para. 914.

<sup>222</sup> Trial Judgment, para. 889.

<sup>223</sup> *Blaškić* Appeal Judgment, para. 683 (‘the effects of the crime on relatives of the immediate victims may be considered as relevant to the culpability of the offender and in determining a sentence’); *Krnojelac* Appeal Judgment, para. 260 (‘the Appeals Chamber considers that, even where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that his victim did not live cut off from the world but had established bonds with others’). See also Rule 145 (1) (c) of the ICC Rules (referring to ‘the harm caused to the victims and their families’); Trial Judgment, para. 905.



civilian population, as a violation of the laws or customs of war, the ICTY considered the degree of terror inflicted, noting that the inhabitants of an entire city (Sarajevo) were terrorised, and hundreds were killed and thousands were wounded and more generally terrorised.<sup>224</sup> This would appear to include an assessment of the collective harm on a community.

174. In its judgment, the Trial Chamber agreed that factors that it could take into account in considering the gravity of the crime cannot also be counted as separate aggravating circumstances. It noted that the submissions from the Legal Representatives, referred to at paragraph 149 above, were relevant to calculating a sentence, which was outside the scope of a judgment under Rule 168.<sup>225</sup>

175. The accused's form and degree of participation is also relevant in assessing gravity.<sup>226</sup> Principal perpetration has generally warranted a higher sentence than aiding and abetting.<sup>227</sup> A chamber may consider whether the accused played a leading role in the commission of the crime, or made a particularly significant contribution.<sup>228</sup>

176. The Trial Chamber received enough evidence during the trial to allow it to find beyond reasonable doubt that this shocking terrorist attack inflicted a form of collective harm on the Lebanese people. Apart from the effects on the immediate victims, direct and indirect, the Lebanese population was collectively harmed by this reprehensible attack on their system of government. Lebanon is a parliamentary democracy in which its politicians and leaders should be removed by the ballot box rather than by the bullet or bombs in terrorist explosions. Mr Hariri in 2005 was a prominent opposition member of parliament and the leader of a parliamentary bloc. The attack was aimed at eliminating a leading political figure, a former prime minister who was to be a candidate in the 2005 parliamentary elections. It undermined the foundations of the Lebanese state.

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<sup>224</sup> *Galić* Appeal Judgment, para. 449. *See also* *Galić* Trial Judgment, para. 764.

<sup>225</sup> Trial Judgment, para. 913.

<sup>226</sup> *Blaškić* Appeal Judgment, para. 683; *Galić* Appeal Judgment, para. 409; *Vasiljević* Appeal Judgment, para. 182; *Furundžija* Appeal Judgment, para. 249. *See also* Trial Judgment, para. 905.

<sup>227</sup> *Nchamihigo* Trial Judgment, para. 388.

<sup>228</sup> *Kupreškić and others* Trial Judgment, para. 852. *See also* Rule 145 (1) (c) of the ICC Rules (referring to 'the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent').

177. The evidence was sufficient for the Trial Chamber to allow it to find beyond reasonable doubt that this attack on democracy could be a circumstance that aggravated the crimes. However, as the Prosecutor did not specifically plead it as an aggravating circumstance, the Trial Chamber will instead treat it as contributing to the gravity of the crimes.

178. On the established facts Mr Ayyash's crimes are objectively grave. He had a central role in the attack and made a significant contribution to it. He was responsible, as a co-perpetrator, for committing these crimes.

(b) Aggravating circumstances

179. Aggravating factors can either form part of proving the crime itself, or be relevant only on sentence. For example, if an offence of committing an aggravated form of assault requires proof of, say, the use of a weapon in committing the offence, this element must be proved to establish that this crime was committed, as opposed to an assault committed without a weapon. In other circumstances, proof of aggravating factors will make a crime more serious and thus operate to justify a higher sentence. Whichever applies depends upon how the elements of the crime are framed.

180. International criminal courts and tribunals have considered a wide range of aggravating factors in sentencing, although they may not be specified in their statutes and rules.

181. It is prohibited to use the same factor to assess the gravity of the offence and again as an aggravating circumstance,<sup>229</sup> or to consider the legal elements of the offence as part of aggravation.<sup>230</sup> Only factors which have been proven beyond a reasonable doubt will be taken into consideration as aggravating circumstances.<sup>231</sup> Premeditation may be a relevant aggravating factor,<sup>232</sup> although this must be distinguished from the *mens rea* (intention) needed to commit some specific crimes. Motive, while generally irrelevant in international criminal law, may become

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<sup>229</sup> *Ntaganda* Sentencing Judgment, paras 13, 17; *Momir Nikolić* Judgment on Sentencing Appeal, para. 58; *Deronjić* Judgment on Sentencing Appeal, para. 106; *Dragomir Milošević* Appeal Judgment, para. 306. *See also* Trial Judgment, para. 913.

<sup>230</sup> *Bemba* Decision on Sentence, para. 24; *Ntaganda* Sentencing Judgment, para. 20.

<sup>231</sup> *Delalić and others (Čelebići)* Appeal Judgment, para. 763.

<sup>232</sup> *Blaškić* Appeal Judgment, para. 686 (citing *Krstić* Trial Judgment, paras 711–712). *See also* *Krstić* Appeal Judgment, para. 258; *Delalić and others (Čelebići)* Appeal Judgment, paras 825, 833.

relevant at the sentencing stage in considering aggravating circumstances (or mitigating ones).<sup>233</sup> The long-term impact of the crimes on the victims may also be an aggravating factor.<sup>234</sup>

182. The ICC's Rules specify some statutory aggravating circumstances on sentence, such as relevant prior convictions, the abuse of power or official capacity, and circumstances where a victim is particularly defenceless, or which involve particular cruelty or multiple victims.<sup>235</sup>

183. The main difference between the sentencing practices of the *ad hoc* international criminal tribunals and the Special Tribunal is that the IRMCT, ICTY and ICTR Statutes, for example, do not specify statutory aggravating features for the purposes of sentencing, whereas Lebanese laws do, like many national penal codes. The international tribunals have identified these factors themselves for the purposes of sentencing. The Trial Chamber may consider the relevant features identified and listed above as aggravating the commission of a crime. The Trial Chamber considers that it may also use as guidance the ICC's statutory list of aggravating conduct. It may also find that other factors aggravate the crimes.

184. In the judgment, the Trial Chamber, in relation to the statutory elements of aggravation, noted that:

Premeditation and use of explosive material are not elements of the crime of intentional homicide under Lebanese law, but are aggravating factors in sentencing a convicted offender. Resolution of this matter is thus one for sentencing proceedings.<sup>236</sup>

185. The Trial Chamber will therefore first consider the codified aggravating factors available under Lebanese law,<sup>237</sup> including the death of one or more people and the partial destruction of buildings having one or more people inside in relation to terrorism,<sup>238</sup> and premeditation and the

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<sup>233</sup> *Blaškić* Trial Judgment, para. 785.

<sup>234</sup> *Vasiljević* Appeal Judgment, para. 167; *Dragan Nikolić* Sentencing Judgment, para. 200. The Trial Chamber also found that it may also consider the victims' evidence of harm as part of its assessment of aggravation. Trial Judgment, para. 907.

<sup>235</sup> Rule 145 (2) (b) of the ICC Rules.

<sup>236</sup> Trial Judgment, para. 6781 (footnote omitted).

<sup>237</sup> In the trial judgment, the Trial Chamber decided that it would consider such aggravating factors during the sentencing proceedings. Trial Judgment, paras 6307 ('premeditation under Article 549 (1) bears only on sentencing'), 6311 ('Thus Lebanese law gives certain attempts to commit an intentional homicide the same legal status as an intentional homicide. It is only in sentencing such attempts that it will take into account the fact that the victim did not die').

<sup>238</sup> Law of 11 January 1958, article 6.

use of explosives in relation to the crimes of intentional homicide and attempted intentional homicide.<sup>239</sup>

186. The trial judgment states at paragraph 6342 that article 6 of the 1958 Law ‘is irrelevant in these proceedings, as it prescribes the death penalty in such circumstances and the punishment does not exist in the Special Tribunal’.

187. A little clarification of this is required. Article 6 of the 1958 Law has pertinence to *sentencing proceedings* to the extent that establishing these facts increases the sentences *in Lebanon* to the maximum available in that country, and the Trial Chamber must consider Lebanese sentencing practices. However, in practice its relevance is limited to the fact that establishing these additional factors, under Lebanese law at least, would attract the highest sentence available to the Trial Chamber, namely of life imprisonment (but without hard labour). Regardless of this, the crimes here are so inherently grave that they could be considered to fall within this category notwithstanding article 6. In this sense, it could be considered as having marginal relevance for sentencing purposes.

188. The following *statutory* aggravating features under Lebanese law have been established for the purposes of sentencing in a Lebanese court:

189. **Count two**—committing a terrorist act by means of an explosive device—in which the maximum sentence available under Lebanese law would be increased from hard labour for life to the death sentence. The terrorist act caused the deaths of 22 people, and the partial destruction of buildings with people inside such as the St Georges and Byblos hotels.<sup>240</sup> One victim died under the rubble in a building opposite the St Georges Hotel.<sup>241</sup> The Trial Chamber is satisfied beyond reasonable doubt that these aggravating circumstances have been established.

190. **Counts three, four and five**—the intentional homicide of Rafik Hariri with premeditation by using an explosive device, the intentional homicide of 21 other people with premeditation by using an explosive device, and the attempted intentional homicide of 226 people with premeditation by using an explosive device. The aggravating circumstances, namely the use of

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<sup>239</sup> Lebanese Criminal Code, articles 200, 549. *See also* first interlocutory decision on the applicable law, para. 182.

<sup>240</sup> Trial Judgment, para. 6342.

<sup>241</sup> Trial Judgment, para. 1386.

explosive materials, have been established beyond reasonable doubt for each count.<sup>242</sup> Similarly, the evidence received at trial establishes beyond reasonable doubt that the commission of each of these offences was premeditated.

191. In Lebanon, proof of the aggravating circumstances increases the maximum penalty available from one of hard labour for a term of between 15 and 20 years for intentional homicide, under article 549 (1) and (7) of the Lebanese Criminal Code, to the imposition of the death sentence.

192. Under article 200, in sentencing for an attempted felony (such as intentional homicide), the penalty may be commuted as follows:

The death penalty may be replaced with hard labour for life or fixed-term hard labour for 7 to 20 years;

Hard labour for life may be replaced with fixed-term hard labour for at least five years; life imprisonment may be replaced with fixed-term imprisonment for at least five years;

Any other penalty may be commuted by one half to two thirds.

193. As with article 6 of the 1958 Law, proof of aggravating circumstances is relevant to the Trial Chamber only insofar as, under Lebanese law, it attracts the highest sentence possible. Again, for the Trial Chamber's sentencing purposes, the crimes are so grave that they could be considered to fall within this category regardless of article 549 (1) and (7) of the Lebanese Criminal Code.

194. Another matter requiring consideration in sentencing is the Prosecutor's pleading of aggravated circumstances. In the judgment, the Trial Chamber noted that the Prosecutor in the amended consolidated indictment had pleaded Mr Ayyash's apparent specific knowledge of the quantity of explosives to be used in the attack,<sup>243</sup> namely in count three, at paragraph 58:

- e. ii. by knowingly bringing about the detonation at 12:55 at Rue Minet el Hos'n Beirut, Lebanon, of explosives equivalent to approximately 2500 kilogrammes of TNT that may cause death.

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<sup>242</sup> Trial Judgment, paras 6354-6355.

<sup>243</sup> Trial Judgment, paras 6772-6781.

This is repeated in count four, at paragraph 60, although not verbatim:

- h. by then knowingly bringing about the detonation at 12:55 at Rue Minet el Hos'n, Beirut, Lebanon, being a public street, of explosives equivalent to approximately 2500 kilogrammes of TNT that may cause death.

And, additionally, for count five, in paragraph 62:

- g. by then knowingly bringing about the detonation at 12:55 at Rue Minet el Hos'n, Beirut, Lebanon, of explosives equivalent to approximately 2500 kilogrammes of TNT that may cause death.

195. The judgment notes that:

Thus, the literal wording of the amended consolidated indictment requires the Trial Chamber to consider whether the Prosecutor has proved that Mr Ayyash knew that the Canter contained 'explosives equivalent to approximately 2500 kilogrammes of TNT' in respect of counts four and five. However, it need only consider this in count three for the purposes of aggravation in sentencing.

Why the Prosecutor chose to plead Mr Ayyash's specific knowledge of the type and quantity of explosives used is unclear, given that the Prosecution led no evidence capable of establishing this.<sup>244</sup>

196. The conclusion for the purposes of sentencing is that the Prosecutor could not establish, from the circumstantial evidence led at trial, that Mr Ayyash had any knowledge of the quantity or type of explosives used in the attack against Mr Hariri. The Prosecution established beyond reasonable doubt that Mr Ayyash knew that Mr Hariri was to be murdered in an explosion directed at his convoy as it passed the St Georges Hotel, but did not prove his knowledge of its type or quantity. This will not affect the sentence imposed.

197. In addition to these statutory aggravating factors, the Trial Chamber also finds that the following two facts that have been established beyond reasonable doubt also aggravate the offence.

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<sup>244</sup> Trial Judgment, paras 6780-6781.

198. First, there were multiple victims: 22 dead and at least another 226 injured. This was not in dispute at trial. Second, the evidence at trial proved beyond reasonable doubt that the explosion had a long-term and continuing effect on numerous victims. The judgment details the harm suffered by 18 participating victims who provided evidence at trial,<sup>245</sup> and establishes beyond reasonable doubt that a number of specified participating victims (including extended families) suffered ‘relevant harm as a direct result of the explosion’.<sup>246</sup> It made the same finding in respect of some identified non-participating victims.<sup>247</sup> The evidence established beyond reasonable doubt that victims suffered long-lasting physical and psychological effects, with some requiring medical intervention or long-term medication.<sup>248</sup> A number suffered post-traumatic stress disorder.

199. The motives of the perpetrators of the attack on Mr Hariri in intending to murder him and thus spread terror could also be considered as an aggravating feature. However, as the Trial Chamber has already relied on this as part of its findings that the attack was terrorist in nature, in counts one and two, this will not be considered as a separate aggravating circumstance on sentencing. In this respect the Trial Chamber found:

Additionally, the Trial Chamber is satisfied that the fact that a suicide bomber targeted Mr Hariri shows that the explosion was intended to cause a state of terror.

Mr Hariri was a former prime minister of Lebanon and a prominent political figure who, at the time of his death, was preparing for parliamentary elections in May 2005. His murder, or attempted murder, in a huge explosion would attract enormous publicity and cause many Lebanese to experience fear, insecurity and loss. The evidence from participating victims and witnesses proves that this occurred. Anyone who knew that the explosion was to be triggered in the street when Mr Hariri’s convoy was passing, must have foreseen that numerous people would be killed or injured, regardless of whether it succeeded in killing him.

It was also foreseeable that the public would learn that a suicide bomber triggered the attack and that this too would frighten and horrify them.<sup>249</sup>

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<sup>245</sup> Trial Judgment, paras 1456-1492.

<sup>246</sup> Trial Judgment, paras 1495-1544.

<sup>247</sup> Trial Judgment, paras 1545-1556.

<sup>248</sup> Trial Judgment, paras 1454-1556.

<sup>249</sup> Trial Judgment, paras 6337-6339.

## (c) Mitigating circumstances

200. Mitigating circumstances which are potentially applicable under international criminal law include voluntary surrender;<sup>250</sup> the expression of remorse or compassion towards victims; and good character with no previous convictions.<sup>251</sup> Mitigating factors will not lead to an automatic reduction of a sentence, and a life sentence may be imposed if the gravity of the offence warrants it.<sup>252</sup> Determining whether a fact amounts to a mitigating circumstance will be reached ‘on a balance of probabilities’.<sup>253</sup>

201. The Trial Chamber has received no evidence of any mitigating circumstances here.

## (d) Mr Ayyash’s individual circumstances

202. The trial against Mr Ayyash was conducted in his absence because he had absconded.<sup>254</sup> Rule 109 (C) provides Mr Ayyash the right to a retrial, including a new hearing in respect of his sentence. The Appeals Chamber held that ‘in principle ... any prejudice that could conceivably arise from the Trial Chamber’s decision to hold a trial *in absentia* is cured by the availability of a retrial.’<sup>255</sup> At the completion of the Special Tribunal’s mandate, a retrial could be conducted by a successor entity or in any state having jurisdiction to do so.

202. Very little evidence of Mr Ayyash’s individual circumstances was put in evidence at trial, and none was adduced during the sentencing hearing. The following information about Mr Ayyash is recorded in the judgment.<sup>256</sup>

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<sup>250</sup> *Hadžihasanović and Kubura* Appeal Judgment, para. 325; *Babić* Sentencing Appeal Judgment, paras 43, 75; *Kordić and Čerkez* Appeal Judgment, para. 1090; *Jokić* Sentencing Judgment, para. 73. In *Rajić*, the ICTY Trial Chamber identified absconding from justice as relevant to limiting the weight to be attributed to certain mitigating factors, particularly the character of the accused. *Rajić* Sentencing Judgment, paras 134-137.

<sup>251</sup> *Blaškić* Appeal Judgment, para. 696; *Dragomir Milošević* Trial Judgment, para. 1002.

<sup>252</sup> *Stakić* Appeal Judgment, para. 407.

<sup>253</sup> *Zelenović* Sentencing Appeal Judgment, para. 11; *Bralo* Sentencing Appeal Judgment, para. 8. The ICC has held that mitigating circumstances must be applied on a balance of probabilities because the principle of *in dubio pro reo* applies in sentencing. *Lubanga* Decision on Sentence, para. 34.

<sup>254</sup> Decision to hold trial *in absentia*, para. 107, disposition.

<sup>255</sup> Decision on Defence appeals against reconsideration of trial *in absentia* decision, para. 14.

<sup>256</sup> Trial Judgment, paras 2658, 2670-2675.



203. He was born on 10 November 1963 in Nabatiyeh, Lebanon. He married Ms Fatimah (Fatmeh) Hajj, who was born in 1966. They had three children. In March 2002, he purchased an apartment in Beirut in Hadath. He also used a family residence in Harouf, in southern Lebanon.

204. Mr Ayyash worked for the Lebanese Civil Defence from 1986 after two years of education at the American University in Beirut. The Civil Defence records specified his first post as a ‘Technical Pharmacist’. As of March 1995 he was classified as a ‘First Technical Assistant’. He first worked at the Al-Doueir station near Harouf until February 2002. From then until November 2004, he was the head of the Markaba Station before he transferred back to Al-Doueir.

205. Mr Ayyash is a Shiite Muslim who performed the Hajj to Mecca in early 2004. He had affiliations with Hezbollah. The evidence also reveals that he had a strong association with motor vehicles. He had no relevant convictions: the Prosecution referred in its submissions to one conviction from 1988, but it has been expunged as a result of the lapse of time.<sup>257</sup> The Trial Chamber has accordingly disregarded it for the purposes of sentencing.

## **VI. SEPARATE SENTENCES OR A SINGLE SENTENCE**

206. Rule 171 (D), as set out above, provides the Trial Chamber may impose either a single sentence ‘reflecting the totality of the criminal conduct of the accused’, or separate sentences on each count, to be served consecutively or concurrently.

207. In preparation for the sentencing hearing, and in response to the Prosecution and Defence written submissions, the Trial Chamber posed the following question to the Prosecution:

Relying on international criminal law case law, the Ayyash Defence submits that the Trial Chamber should impose a single sentence reflecting the totality of Mr Ayyash’s conduct as his convictions on the five counts of the amended consolidated indictment are based on the same facts and culpable conduct.

It also submits that each factor should be assessed once as opposed to both in relation to gravity and aggravating circumstances. To avoid double-counting—and ‘given the connected nature of the crimes in question’ and the limited applicability of Lebanese

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<sup>257</sup> Prosecution sentencing submissions, para. 53 and fn. 165.

sentencing law—potential aggravating factors prescribed by Lebanese law should be assessed in relation to the overall gravity of Mr Ayyash’s conduct.

Conversely, the Prosecution, relying on Article 205 of the Lebanese Criminal Code, moves the Trial Chamber to impose a sentence of life imprisonment for each of the five counts for which Mr Ayyash was found guilty, to be served concurrently. It also submits that aggravating circumstances prescribed by the Lebanese Criminal Code—which in themselves justify the imposition of the most severe penalty for each of the counts—are ‘subsumed within, and far exceeded by, the multitude of factors contributing to the extreme gravity of the crimes’.

What is the Prosecution’s response to the Ayyash Defence’s submission in these respects?<sup>258</sup>

### **A. Submissions**

208. Relying on Rule 171 (D) and article 205 of the Lebanese Criminal Code, the Prosecution submits that the Trial Chamber should impose on Mr Ayyash a sentence of life imprisonment for each of the five counts on which he was convicted, to be served concurrently. This would properly reflect the inherent gravity of each of the crimes committed, their impact and his leading role.<sup>259</sup> Further, Mr Ayyash’s conduct, although based on the same incident, materialised in five distinct criminal offences with distinct elements.

209. The Prosecution also submitted that as a matter of principle, a sentence of life imprisonment on each should be imposed, which should be served concurrently as one overall life sentence. Rule 171 (D)<sup>260</sup> seems to make a presumption in favour of cumulative sentencing, it is the practice in Lebanon pursuant to article 205 of the Lebanese Criminal Code and it is mandatory at the ICC. It is only proportionate to mark distinct offences with individual sentences. In practical terms, should one or more convictions be overturned on appeal, the appellate court would benefit from the Trial Chamber’s assessment if it had imposed cumulative sentences.<sup>261</sup>

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<sup>258</sup> Questions for sentencing submissions, p. 3.

<sup>259</sup> Prosecution sentencing submissions, paras 2, 56-58.

<sup>260</sup> In oral sentencing submissions, Prosecution counsel referred to ‘Article 172’, however it is apparent that he intended to refer to Rule 171 (D), from the context and because Rule 172 does not deal with cumulative or single sentencing. *See* Prosecution oral sentencing submissions, T. 10 November 2020, p. 10.

<sup>261</sup> Prosecution oral sentencing submissions, T. 10 November 2020, pp 8-11.

210. Responding specifically to the Trial Chamber's question extracted above, Prosecution counsel stated that:

whether one looks at the prescribed aggravating circumstances under Lebanese law or other factors outside of those, there are multitude of factors which make these crimes extremely grave, and allowing and avoiding double counting, the only sentence, in my submission, open to the Court properly is a life sentence five life sentences amounting to one overall sentence.<sup>262</sup>

211. The Ayyash Defence agrees that the Trial Chamber may impose either a separate sentence for each count, or a single sentence reflecting the totality of the criminal conduct.<sup>263</sup> Counsel note that the ICTY and ICTR Appeals Chambers have both held that a single sentence is appropriate when an accused's conduct forms a single set of crimes or similar overall behaviour within a closed temporal context.<sup>264</sup> They submit that a single sentence reflecting the totality of his conduct as found by the Trial Chamber should be imposed.<sup>265</sup>

212. According to the Ayyash Defence, the Prosecution omitted to mention the end of article 205 of the Lebanese Criminal Code, which states that when multiple felonies are committed, a penalty shall be imposed for each offence but that 'only the severest penalty shall be enforced'.<sup>266</sup>

## **B. Discussion and findings**

213. The Trial Chamber convicted Mr Ayyash of each of the five counts charged against him in the amended consolidated indictment. The criminality underlying each count is grave. Four of the five counts have different elements: counts three and four of intentional homicide have the same legal requirements of proof, namely intentional homicide with premeditation by using explosive materials.

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<sup>262</sup> Prosecution oral sentencing submissions, T. 10 November 2020, pp 16-17.

<sup>263</sup> Ayyash Defence sentencing submissions, para. 27; Ayyash Defence oral sentencing submissions, T. 10 November 2020, p. 33.

<sup>264</sup> Ayyash Defence sentencing submissions, para. 19, referring to *Blaškić* Appeal Judgment, para. 729; *Kambanda* Appeal Judgment, paras 109-111; *Nahimana and others* Appeal Judgment, para. 1042; Ayyash Defence oral sentencing submissions, T. 10 November 2020, p. 33.

<sup>265</sup> Ayyash Defence sentencing submissions, para. 31.

<sup>266</sup> Ayyash Defence sentencing submissions, para. 25.

214. The underlying criminal conduct proving each count is identical, namely, participating in the detonation of a massive quantity of explosives on a busy Beirut street in the middle of a weekday, aimed at murdering Mr Rafik Hariri. Mr Ayyash knew that, as a co-perpetrator, his acts in using an explosive device were liable to create a public danger, and were intended to cause a state of terror. For the conspiracy pleaded in count one, only an agreement to do this was legally required to prove the crime.

215. The Trial Chamber has the discretion under Rule 172 (D) either to impose a single sentence or alternatively—to reflect the different crimes encompassed by the offending—to impose separate sentences for each of the five counts.

216. This is purely discretionary and neither the Statute nor Rules provide any guidance about its exercise. The Trial Chamber has therefore examined both international and Lebanese sentencing practices for assistance.

217. The statutes of the IRMCT, ICTY, ICTR and the Special Court for Sierra Leone (SCSL) have similar provisions. Article 24 (1) of the ICTY Statute and Article 23 (1) of the ICTR Statute provide that in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia and Rwanda, respectively. Article 22 (2) of the IRMCT Statute provides this for the same countries. Article 19 (1) of the SCSL Statute mandates its trial chambers to have recourse to the practice regarding prison sentences at the ICTR and of Sierra Leone national courts.

218. The Appeals Chambers of each court have affirmed that while trial chambers are obliged to take into account the general practice of the respective national courts, they are not obliged to follow it.<sup>267</sup> However they must give reasons for any departure from these practices.<sup>268</sup>

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<sup>267</sup> *Boškoski and Tarčulovski* Appeal Judgment, para. 212; *Jokić* Judgment on Sentencing Appeal; *Dragan Nikolić* Judgment on Sentencing Appeal, para. 69; *Delalić and others (Čelebići)* Appeal Judgment, paras 813, 816; *Bikindi* Appeal Judgment, paras 148, 154; *Nahimana and others* Appeal Judgment, paras 1038 (1), 1063; *Serushago* Appeal Judgment, para. 30; *Taylor* Appeal Judgment, para. 669.

<sup>268</sup> *Semanza* Appeal Judgment, para. 377; *Kambanda* Appeal Judgment, para. 121; *Serushago* Appeal Judgment, para. 30; *Dragan Nikolić* Judgment on Sentencing Appeal, para. 69; *Blaškić* Appeal Judgment, para. 682. The SCSL's Appeals Chamber in *Fofana and Kondewa* pointed out that while criminal codes of the former Yugoslavia and Rwanda included offences against humanity and international law, Sierra Leone did not criminalise war crimes and crimes against humanity, therefore, there was no relevant practice of the national courts of Sierra Leone to have recourse to. *Fofana and Kondewa* Appeal Judgment, para. 475.

219. The Trial Chamber is not obliged to follow any Lebanese judicial interpretation of the applicable provisions in the Lebanese Criminal Code. However, it has held that Lebanese judicial decisions ‘provide some guidance as to the interpretation of the applicable provisions of the Code.’<sup>269</sup> Ultimately, the Trial Chamber may impose cumulative or a single sentence. However, it must impose a sentence that reflects the totality of the convicted person’s culpable conduct.<sup>270</sup>

220. Rule 171 (D) mirrors Rule 87 (C) of the ICTY’s and ICTR’s Rules of Procedure and Evidence. Conversely, Article 78 of the Rome Statute requires that a distinct sentence is imposed for each offence and a joint sentence specifying the total period of imprisonment when an accused person is convicted of more than one crime. The ICC’s sentencing practice therefore provides limited guidance regarding the factors underpinning cumulative or single sentences.

221. In deciding whether to impose cumulative or a single sentence on Mr Ayyash, so as to reflect the totality of his culpability, the Trial Chamber has therefore looked to the Lebanese Criminal Code—as it fits within Articles 2 (a) and 24 (1) of the Statute—and considered the sentencing practices of the Lebanese courts and the *ad hoc* international criminal tribunals.

#### 1. Lebanese sentencing practices

222. Under Lebanese law, article 181 of the Lebanese Criminal Code, under the heading ‘Notional plurality of offences’,<sup>271</sup> states that:

If an act has several qualifications, they shall all be mentioned in the judgement and the Judge shall impose the heaviest penalty.

However, if both a general provision of criminal law and a special provision are applicable to the act, the special provision shall be applied.

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<sup>269</sup> Trial Judgment, para. 5935.

<sup>270</sup> *Taylor* Appeal Judgment, para. 662, referring to the ‘totality principle’ citing *Sesay and others* Appeal Judgment, para. 1229, namely ‘A Trial Chamber must ultimately impose a sentence that reflects the totality of the convicted person’s culpable conduct. This principle, the totality principle, requires that a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused in the crimes.’ See also *Fofana and Kondewa* Appeal Judgment, para. 546; *Blaškić* Appeal Judgment, para. 683.

<sup>271</sup> Structurally, this subsection, Subsection 2, is in Book I ‘General Provisions, Chapter III ‘Offences’, Section I ‘Legal elements of offences’, following Subsection I — ‘Legal qualification’. In the French version of the Lebanese Criminal Code article 181 is entitled ‘*Du concours idéal d’infractions*’. See also First interlocutory decision on applicable law, para. 276.

223. Regarding the ‘material plurality of offences’,<sup>272</sup> article 205 foresees, relevantly, that:

If multiple felonies or misdemeanours are found to have been committed, a penalty shall be imposed for each offence and only the severest penalty shall be enforced.

The penalties imposed may, however, be consecutive. However, the sum of fixed-term penalties shall not exceed the maximum penalty prescribed for the most serious offence by more than one half.<sup>273</sup>

224. Where someone violates more than one rule simultaneously by a single act, article 181 foresees that a single punishment, the heaviest or the one applicable under a special provision, is imposed.<sup>274</sup>

225. On the other hand, if the perpetrator commits several criminal offences by multiple acts, a sentence for each offence shall be imposed in accordance with article 205, and the most severe will be enforced.<sup>275</sup> Lebanese courts may order that the penalties be served consecutively, however the sum of fixed-term penalties, namely of fixed-term hard labour and fixed-term imprisonment as per article 37 (4) and (5) of the Code, may not exceed the maximum penalty foreseen for the most serious offence by more than one half.

226. The practice of Lebanese courts appears consistent with articles 181 and 205 of the Code in imposing sentences for cumulative convictions. The decisions reviewed by the Trial Chamber also illustrate that Lebanese courts have imposed a single sentence for convictions of intentional homicide (or attempted intentional homicide) of multiple people. Four relevant decisions, summarised below, illustrate this.<sup>276</sup>

227. In the first case, decided in 1999, the Lebanese Court of Justice convicted Mr Samir Farid Geagea and ten others of intentional homicide with premeditation, attempted intentional homicide

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<sup>272</sup> Subsection 3 — ‘Material plurality of offences’, in French ‘*Du concours matériel d’infractions*’, is placed in Book I ‘General Provisions, Chapter III ‘Offences’, Section III ‘Material elements of offences’. The Appeals Chamber termed it also as *concours réel d’infractions*. See First interlocutory decision on applicable law, para. 273.

<sup>273</sup> Article 205 has a third, final paragraph stating that ‘If no ruling has been issued on whether the penalties imposed should run concurrently or consecutively, the matter shall be referred to the Judge for a decision.’

<sup>274</sup> See also First interlocutory decision on applicable law, para. 277.

<sup>275</sup> See also First interlocutory decision on applicable law, paras 273-274.

<sup>276</sup> See also *Al-Halabi Judgment*, pp 24, 63-65.

committed with premeditation and by using explosive materials, and committing a terrorist act.<sup>277</sup> This concerned the assassination of the former Lebanese Prime Minister, Mr Rashid Karami, in 1987 by the remote detonation of an explosive device placed on the helicopter transporting him and thirteen others between Tripoli and Beirut. Minutes after take-off, the explosive charge of around 300 to 400 grams of TNT equivalent, placed immediately behind Mr Karami's seat, detonated and killed him. Each convicted person received separate sentences for each felony, and the court ordered that only the most severe sentence imposed for Mr Karami's assassination be served.<sup>278</sup>

228. In the second case, in 1997, the Lebanese Judicial Council found Mr Geagea and five others guilty for their role in a criminal plan to assassinate the Minister of Defence, Mr Michel Murr, with two car-bombs. In the first bombing, in March 1991, the bomb exploded as the minister's motorcade passed, killing seven people and injuring him and thirty others. Nine days later, a second booby trapped car exploded killing four and injuring twenty-five people. Mr Geagea and his co-accused received separate sentences for each felony, namely intentional homicide and attempted intentional homicide committed with premeditation and by using explosive materials, and partly to conceal the traces of the commission of a felony and committing a terrorist act. They had to serve the heaviest sentence.<sup>279</sup>

229. The third case was decided in 2015, when the Lebanese Judicial Council convicted six brothers from the Chamas family of the felonies of abduction to seek revenge<sup>280</sup> and intentional homicide committed with premeditation and as an act of revenge,<sup>281</sup> and the misdemeanour of carrying unlicensed firearms<sup>282</sup> for abducting and shooting to death a man and a young boy in April 2007. An accomplice, who provided the brothers with information, was convicted for the

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<sup>277</sup> Four of the defendants, including Mr Geagea, were also convicted for the misdemeanour of violating the Weapons and Ammunitions Act.

<sup>278</sup> *Karami* Judgment, pp 24-25, 122-124, 138-142.

<sup>279</sup> *Murr* Judgment, pp 16, 52-57, 62-63.

<sup>280</sup> Article 569 (1) and (2) of the Lebanese Criminal Code.

<sup>281</sup> As per article 549 (1) and (6) of the Lebanese Criminal Code.

<sup>282</sup> Article 72 of the Weapons and Ammunitions Act.

same felonies.<sup>283</sup> The council imposed separate sentences for each felony and the misdemeanour, and ordered the sentences served concurrently, meaning that the most severe was enforced.<sup>284</sup>

230. In the fourth case, also decided in 2015, the Lebanese Court of Cassation convicted two people for intentional homicide committed with premeditation and ‘having planned it carefully and reasonably’,<sup>285</sup> and the misdemeanour of possessing an unlicensed weapon<sup>286</sup> for shooting dead the owners of a jewellery shop. It imposed the death sentence on both for the aggravated homicide, reduced to hard labour for life, and a sentence of one year of imprisonment for the misdemeanour. It converged the two sentences and ordered that only the heaviest sentence be enforced, in accordance with article 205 of the Lebanese Criminal Code.<sup>287</sup>

231. Although these decisions are relevant as Lebanese sentencing precedents, the Trial Chamber has been unable to find any Lebanese decisions relating to crimes comparable to those committed by Mr Ayyash in the attack on Mr Hariri’s life. As it noted in the trial judgment:

This attack is also larger in magnitude than other terrorist incidents tried by the Lebanese courts under Article 314. The attack perhaps most closely compares to the car-bombing intended to assassinate Mr Michel Murr in 1991, which likewise ‘created panic among the population, killed and injured a number of persons, and destroyed ... buildings.’ In the present case, however, each impact was on a greater scale, and foreseeably so.<sup>288</sup>

## 2. International sentencing practices

232. From their initial judgments the ICTY and ICTR practices evolved towards imposing single sentences for convictions on multiple counts.<sup>289</sup> The ICTY and ICTR’s Rule 87 (C), as

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<sup>283</sup> In accordance with article 219 (1) of the Lebanese Criminal Code.

<sup>284</sup> *Mohammed Chamas and others* Judgment. Further nine accused were acquitted of charges of being accomplices to the felonies and of concealment crimes.

<sup>285</sup> In violation of article 549 (1) and (2) of the Lebanese Criminal Code.

<sup>286</sup> Pursuant to article 72 of the Weapons and Ammunitions Act.

<sup>287</sup> Cassation decision 283/2015.

<sup>288</sup> Trial Judgment, para. 6341, footnoted (fn. 11458) to the *Murr* Judgment, p. 53.

<sup>289</sup> In the early cases, multiple sentences were imposed. *Tadić* Sentencing Judgment; *Akayesu* Sentencing Judgment. Rule 87 (C) of both courts originally stated that ‘If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the penalty to be imposed in respect of each finding of guilt.’ This was replaced with the current text cited above in the ICTY’s Rules with the amendment of 19 January 2001, and included in the ICTR’s Rules on 14 March 2008. However, before the amendment both ICTY and ICTR appeals chambers had interpreted this Rule to not preclude imposing a single sentence for multiple convictions. *See for example, Kunarac and others* Appeal Judgment, para. 342.



noted, are similar to the Special Tribunal's Rule 171 (D), and do not require that a trial chamber imposes multiple sentences.<sup>290</sup>

233. The ICTY Trial Chamber in *Jelisić* considered that a single sentence is appropriate for 'a single set of crimes committed over a brief time span which does not allow for distinctions between their respective intention and motives'.<sup>291</sup> The *Blaškić* Trial Chamber also imposed a single sentence for multiple crimes. It found that the crimes were committed in a given geographic region during a relatively extended time-span and 'the very length of which served to ground their characterisation as a crime against humanity, without its being possible to distinguish intent from motive'. This made it 'impossible to identify which acts would relate to which of the various counts'.<sup>292</sup>

234. The ICTR Appeals Chamber in *Kambanda* agreed with the *Blaškić* Trial Chamber's approach and applied it to dismiss a ground of appeal, stating that an overall sentence was appropriate for the accused's acts of six counts of genocide and crimes against humanity that 'were carried out in Rwanda during a specific time period (1994) and formed part of a single set of crimes related to the widespread and systematic attack against the Tutsi civilian population of Rwanda, the purpose of which was to kill them'.<sup>293</sup> The Appeals Chamber in *Nahimana* reaffirmed this approach.<sup>294</sup>

235. The ICTY Appeals Chamber in *Blaškić*, however, found the Trial Chamber's reasoning with respect to the imposition of a single sentence insufficient and held that:

Either an accused person is guilty of different crimes constituted by different elements which may sometimes overlap (but never entirely), or the accused is convicted of that crime with the most specific elements, and the remaining counts in which those elements are duplicated are dismissed as impermissibly cumulative.

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<sup>290</sup> *Kunarac and others* Appeal Judgment, para. 342.

<sup>291</sup> *Jelisić* Trial Judgment, para. 137.

<sup>292</sup> *Blaškić* Trial Judgment, para. 807.

<sup>293</sup> *Kambanda* Appeal Judgment, paras 111-112. See also *Rutaganda* Trial Judgment, para. 463; *Akayesu* Trial Judgment, para. 41.

<sup>294</sup> *Nahimana and others* Appeal Judgment, paras 1042-1043.

236. It added that imposing a single sentence must not be arbitrary; ‘due consideration must be given to each particular offence in order for its gravity to be determined, and for a reasoned decision on sentence be provided.’<sup>295</sup>

237. The SCSL Trial Chamber in *Fofana and Kondewa* noted that the practice of imposing global sentences at both tribunals makes it difficult to ascertain the sentence imposed for each individual crimes. It chose to impose concurrent sentences for each of the crimes for which the accused had been found guilty because such sentencing better reflects the accused’s culpability, given that distinct crimes were committed by each accused in discrete geographical areas.<sup>296</sup>

### 3. Conclusion and findings

238. Having considered Lebanese sentencing practice and the international case law, the Trial Chamber will exercise its discretion to impose separate sentences on each count. This approach is consistent with the practice of the Lebanese courts. It allows the Trial Chamber to avoid double-counting, to clearly set out its assessment and findings with respect to the gravity of each crime for which it convicted Mr Ayyash, and to impose distinct sentences for each to reflect his culpability in a precise manner.

239. Additionally, each of the crimes for which Mr Ayyash has been convicted are objectively seriously enough taken alone to justify the imposition of the maximum sentence available.

240. Imposing a separate sentence for each crime allows public understanding that each crime is by itself grave. This applies equally for count five—that in which no deaths occurred—of the attempted intentional homicide of 226 people with premeditation by using explosive materials. All of these victims were injured, some very seriously, as a result of Mr Ayyash’s role in exploding 2,500 to 3,000 kilograms of TNT equivalent explosives.

241. Finally, imposing separate sentences also has the advantage, in the event of an appeal (including possible acquittals on individual counts) of allowing the Appeals Chamber to address the penalty imposed for each crime without having to engage in an appellate resentencing by

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<sup>295</sup> *Blaškić* Appeal Judgment, paras 718-719, 721-723.

<sup>296</sup> *Fofana and Kondewa* Sentencing Judgment, paras 41, 97. See also *Fofana and Kondewa* Appeal Judgment, paras 546-547, 565. In *Brima and others* and in *Taylor*, trial chambers imposed a global sentence on the accused. *Brima and others* Sentencing Judgment, para. 12; *Taylor* Sentencing Judgment, para. 11.

attempting to separate the criminal conduct reflected in individual counts. This also avoids an Appeals Chamber having to act as a first instance sentencing chamber but from which no appeal would lay, thus possibly breaching international human rights law's requirement that an accused person may appeal a sentence.<sup>297</sup> The alternative would be to remit the case for resentencing to a Trial Chamber that may no longer exist.

## VII. THE APPROPRIATE SENTENCE

242. The Trial Chamber must balance all relevant factors in imposing the appropriate sentence. These include the gravity of the criminality, any aggravating factors, the aims of sentencing in deterrence, retribution and rehabilitation, and any mitigating circumstances present in Mr Ayyash's personal circumstances. Gravity must be separated from aggravating factors. This is because aggravating circumstances are either elements of an offence, or those that make it more serious for sentencing, and they must be proved beyond reasonable doubt.

### A. Submissions on the total sentence

243. The Prosecution submits that under Lebanese law, someone convicted of the crimes for which Mr Ayyash was found guilty could be sentenced to the death penalty or hard labour for life.

244. While sentences of death and hard labour are not applicable under Article 24 (1) of the Statute, they represent the most severe penalty under Lebanese law and should result in the highest possible penalty under the Statute for Mr Ayyash—a sentence of life imprisonment.<sup>298</sup> Further, article 205 of the Lebanese Criminal Code states that when multiple felonies are committed, a penalty shall be imposed for each offence.<sup>299</sup> Five concurrent sentences of life imprisonment,

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<sup>297</sup> See for example, Article 14 (5) of the ICCPR, which provides that 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'. See also *Galić* Appeal Judgment, Partially Dissenting Opinion of Judge Pocar, at para. 2: 'Thus, the modalities of the Appeals Chamber's intervention under Article 25(2) of the Statute of the International Tribunal to correct errors committed by a Trial Chamber must be interpreted so as to comply with the fundamental human rights principle that any conviction *and or* sentence must be capable of review by a higher tribunal according to law.' Judge Pocar also referred to the Human Rights Committee of the ICCPR's Communication No. 1095/2002, *Gomarić v. Spain*, 26 August 2005 that determined that even where a higher court sentenced at first instance, 'this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a higher court.' Judge Pocar made similar pronouncements elsewhere, see in *Semanza* Appeal Judgment, Dissenting Opinion of Judge Pocar; *Rutaganda* Appeal Judgment, Dissenting Opinion of Judge Pocar; *Mrkšić and Šljivančanin* Appeal Judgment, Partially Dissenting Opinion of Judge Pocar; and *Šljivančanin* Review Judgment, Partially Dissenting Opinion of Judge Pocar.

<sup>298</sup> Prosecution sentencing submissions, paras 10-11.

<sup>299</sup> Prosecution sentencing submissions, para. 56.

which lead to one overall life sentence, do not equate to five times the punishment for Mr Ayyash. Instead, it is the only proportionate sentence for Mr Ayyash's culpable conduct.<sup>300</sup>

245. The Legal Representatives argue that the Trial Chamber should pass the highest possible sentence available under international criminal law and the Special Tribunal's Rules.<sup>301</sup> The Lebanese legal system regards offences against the person as the most serious under its jurisdiction, and crimes of terrorism are met with the highest penalty available under Lebanese law—namely, death or hard labour for life.<sup>302</sup> While the French and UK systems do not have capital punishment, these jurisdictions regard the offences as equally grave, and adopt sentences of life imprisonment.<sup>303</sup>

246. It is also appropriate for the Trial Chamber to impose a financial penalty upon Mr Ayyash to be allocated to a fund for the benefit of the participating victims.<sup>304</sup> The Lebanese Criminal Code and Lebanese case-law provide that perpetrators are liable to pay compensation for death and injury, including a maximum compensation of 100,000 Lebanese pounds for incapacity to work.<sup>305</sup> Further, as examples of state practice, the French and UK laws also provide for financial compensation, when sentencing for respectively terrorism and multiple homicide.<sup>306</sup> At the ICC, the fine must reflect the culpability of the convicted person and any aggravating and mitigating circumstances.<sup>307</sup>

247. The Lebanese authorities should be requested to trace, identify and freeze 'any and all assets belonging to Mr Ayyash to be forfeited to the benefit of the victims of his crimes.'<sup>308</sup>

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<sup>300</sup> Prosecution oral sentencing submissions, T. 10 November 2020, pp 10-11.

<sup>301</sup> Legal Representatives of Victims' sentencing submissions, para. 36.

<sup>302</sup> Legal Representatives of Victims' sentencing submissions, paras 32-35, 91 (a).

<sup>303</sup> Legal Representatives of Victims' sentencing submissions, paras 37, 42-44. In the UK, if a crime is exceptionally serious and the offender was aged over 21, the minimum term served is governed by a 'whole life order'. An exceptionally serious crime for these purposes includes the murder of two or more persons, involving a substantial degree of premeditation or planning, committed for the purpose of advancing a political, religious, racial or ideological cause. Legal Representatives of Victims' sentencing submissions, para. 45. *See also* Legal Representatives of Victims' sentencing submissions, para. 91 (a). The Legal Representatives of Victims made no further oral submissions regarding the computation of the sentence of imprisonment. Legal Representatives of Victims' oral sentencing submissions, T. 10 November 2020, p. 43.

<sup>304</sup> Legal Representatives of Victims' sentencing submissions, paras 64, 91 (c).

<sup>305</sup> Legal Representatives of Victims' sentencing submissions, paras 75-76.

<sup>306</sup> Legal Representatives of Victims' sentencing submissions, paras 37-45.

<sup>307</sup> Legal Representatives of Victims' sentencing submissions, para. 46. *See also* Legal Representatives of Victims' sentencing submissions, para. 28.

<sup>308</sup> Legal Representatives of Victims' sentencing submissions, para. 91 (d).

248. The Ayyash Defence respond that a sentence of five terms of life imprisonment would be grossly disproportionate to the particular circumstances of this case. Because all counts for which Mr Ayyash is convicted are based on the same facts and culpable conduct, the Trial Chamber should impose a single sentence reflecting the totality of his conduct.<sup>309</sup> Further, the financial penalty and freezing of assets ‘find no place in the statutory regime of the Tribunal’ and should be dismissed by the Trial Chamber.<sup>310</sup>

## **B. Discussion and findings**

249. Mr Ayyash participated in committing a serious terrorist attack against the Lebanese people. His criminality is so grave that the only appropriate sentence is the maximum available, namely imprisonment for the remainder of his life.

250. The offences are so serious that very few circumstances could equate to mitigating features that could reduce the appropriate sentence. There are none here. The Trial Chamber has considered Mr Ayyash’s individual circumstances based on the evidence put before it in trial. Where the evidence was circumstantial, the Trial Chamber applied the relevant standard before using it to make adverse findings. However, nothing in Mr Ayyash’s personal circumstances, of which the Trial Chamber has very little information, could reduce the sentence.

251. Mr Ayyash participated in an act of terrorism that caused mass murder. His role and that of the others in the Red network was vital to the success of the attack. Contrary to the Ayyash Defence’s submissions, the mere fact that Mr Ayyash did not himself instigate the crimes, will not of itself lessen the gravity of the crimes so as to reduce the sentence. Mr Ayyash played a leading role in Mr Hariri’s assassination; he participated in the crimes as a co-perpetrator.

252. The aggravating features in counts two to five were established beyond reasonable doubt for the purposes of sentencing under Lebanese law. These were, in count two, the death of one or more people and the partial destruction of buildings having one or more people inside, and for counts three, four and five, the premeditation and the use of explosive materials. These aggravating factors put the offences into a higher category for the purpose of sentencing. Additionally, the

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<sup>309</sup> Ayyash Defence sentencing submissions, para. 5. *See also* Ayyash Defence oral sentencing submissions, 10 November 2020, p. 33.

<sup>310</sup> Ayyash Defence sentencing submissions, para. 6.

large number of victims, 22 dead and 226 injured, and the long-term effects on the victims aggravate the crimes.

253. Mr Ayyash's crimes are grave. Participating in the detonation of a massive explosion in the circumstances described elevates their gravity. Mr Ayyash knew that explosives—regardless of whether he knew their precise type or quantity—were to be detonated as Mr Hariri's heavily protected convoy passed the St Georges Hotel. By his actions as a co-perpetrator of these crimes on 14 February 2005, 22 people lost their lives, including the former prime minister, Mr Hariri. At least another 226 were injured, some very seriously. Many families were bereaved. Many are still suffering the effects of the explosion.

254. In noting the aggravating factors and making positive findings on gravity, the Trial Chamber is not 'double-counting' them. While the use of explosives in counts three to five are aggravating factors that will elevate the penalty if the convicted person is sentenced in Lebanon, their use and their effect could also contribute to the overall gravity of the crimes, such as to increase the sentence.

255. The Trial Chamber emphasises that it has not counted these factors twice in determining the sentence, namely, as separate aggravating features and as factors contributing to the gravity of the crimes. However, in the circumstances of this case it is somewhat artificial to distinguish between aggravating features that must be proved beyond reasonable doubt for sentencing purposes in Lebanon, and findings which are made on the overall gravity of the crimes.

256. To illustrate: the use of a much smaller quantity of explosives having a lesser impact than the attack against Mr Hariri, for example, while still very serious and constituting an aggravating factor, would not be as objectively grave as what occurred on Monday 14 February 2005. For this reason, the use of a large quantity of explosives could be considered as either an aggravating circumstance of an offence for the purposes of penalty, or something that makes it graver and thus deserving a higher sentence. As can the number of victims and the long-term effects on them

257. The crimes here are so grave that the Trial Chamber could consider each of the statutory aggravating circumstances as factors contributing to their gravity. In other words, even if no statutory prescription of the use of explosives existed as an aggravating feature, the Trial Chamber could nonetheless consider it as aggravating the crimes or contributing to its gravity. Either way,

whichever route is taken the result is the same; the crimes are so serious as to attract the maximum sentence.

258. In the circumstances, the Trial Chamber is satisfied that it should impose the maximum sentence for each of the five crimes. Had Mr Ayyash been convicted of only one of any of the five counts, each is individually serious enough to attract such a sentence. The sentences cannot be cumulative, thus they should be served concurrently.

259. Finally, few of the victims of this heinous attack have received just compensation for their loss and harm. For this reason the Trial Chamber has examined the issue in some detail in the hope that some amends can be made.

## **VIII. COMPENSATION FOR THE VICTIMS OF THE ATTACK**

260. During the trial, the Trial Chamber received a significant amount of evidence from victims participating in the proceedings. The issue of just compensation for the harm to the victims and their families featured prominently. Some participating victims stated that they had received some form of compensation, either from the Hariri family or an *ex gratia* scheme run from the Lebanese Prime Minister's office. Some had insurance against which they could claim. Some had medical expenses paid for them. However, it appears that most victims received either inadequate or no just compensation.

### **A. Submissions**

261. The Legal Representatives seek the establishment of a trust fund for victims of Mr Ayyash's crimes. Referring to the lack of a general victims' compensation scheme in Lebanon, they ask the Trial Chamber to recommend the creation of one.

262. Their arguments enlarge on submissions made in their final trial brief on compensation mechanisms.<sup>311</sup> The Trial Chamber in its judgment held that by virtue of the victims' participation at the Special Tribunal, it may make broader findings.<sup>312</sup> The Legal Representatives stated that

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<sup>311</sup> Legal Representatives of Victims' sentencing submissions, paras 5, 67.

<sup>312</sup> Legal Representatives of Victims' sentencing submissions, para. 68, referring to Trial Judgment, para. 921.

their ‘submissions on possible ways to address these views’ were intended for the Trial Chamber, the Lebanese authorities and the international community.<sup>313</sup>

263. They refer to two United Nations General Assembly resolutions on victims’ rights, and in particular on the ‘Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law’. Relying on these, they submit that if a person liable to pay reparations is unable or unwilling to do so, a ‘State should undertake efforts to provide the victim with such compensation’.<sup>314</sup> They acknowledge, however, that these basic principles and guidelines are ‘a recommendation for States and do not entail new international or domestic legal obligations’.<sup>315</sup>

264. The Legal Representatives also argue that their mandate allows them to present observations ‘on the applicable laws and principles of international human rights law and international criminal law envisaging the creation of mechanisms that could provide the participating victims with some compensation’.<sup>316</sup>

265. Under Lebanese law, the perpetrators of offences causing harm are liable for paying compensation, and in practice, reparations are ordered against them. However, no general national compensation scheme exists for victims in Lebanon. The Legal Representatives therefore invite the Trial Chamber to recommend that the Lebanese authorities consider implementing a compensation mechanism when convicted persons are unwilling or unable to do so themselves.<sup>317</sup>

266. In their submission, either Lebanon or an internationalised body should establish a fund for compensation or a compensation scheme to address the harm suffered by the victims of the attack against Mr Hariri. But the Trial Chamber should still order Mr Ayyash to pay a fine or compensation to the participating victims.<sup>318</sup>

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<sup>313</sup> Legal Representatives of Victims’ sentencing submissions, para. 67.

<sup>314</sup> Legal Representatives of Victims’ sentencing submissions, paras 69-73, referring to UN Doc. A/RES/40/34/Annex (1985) and UN Doc. A/RES/60/147/Annex. *See also* Legal Representatives of Victims’ sentencing submissions, para. 92 (d).

<sup>315</sup> Legal Representatives of Victims’ sentencing submissions, para. 74.

<sup>316</sup> Legal Representatives of Victims’ sentencing submissions, para. 74.

<sup>317</sup> Legal Representatives of Victims’ sentencing submissions, para. 77. *See also* Legal Representatives of Victims’ sentencing submissions, para. 92 (c)-(d).

<sup>318</sup> Legal Representatives of Victims’ sentencing submissions, paras 77, 92 (d).



267. As an example, a fund was created in France to provide victims of acts of terrorism with reparations, which also allows the heirs of the deceased to apply for compensation.<sup>319</sup> At the ICC, compensation is made either through an order against the convicted person or an application to its Trust Fund for Victims.<sup>320</sup> The trust fund has compensated victims in a number of cases where the convicted persons were unable to compensate the victims fully.<sup>321</sup> This is analogous to Mr Ayyash's case, where he is absent and *prima facie* unable or unwilling to provide compensation to victims.<sup>322</sup>

268. The Legal Representatives also pointed to a European Union Council Directive, which requires each EU member state to establish a national scheme on compensation of victims, and stipulates cooperation between member states to facilitate access to compensation.<sup>323</sup> Similarly, in the Middle East the Arab League's Convention for the Suppression of Terrorism specifies that state parties (which includes Lebanon) 'shall endeavour to extend necessary assistance to victims of terrorism'. Such a compensation scheme could be supported by the Lebanese government as well as other institutions or donors.<sup>324</sup>

269. In response to a judicial invitation to elaborate on the content of any possible Trial Chamber recommendations, the Legal Representatives suggested a 'multi layered approach'. This begins with a 'broader recommendation for a criminal injury scheme to be put in place in Lebanon which is effective'. This, they suggest, could be 'a turning point in relation to the way in which the victims of terrorism generally are treated'. They also suggest recommending the creation and the administration of a trust fund to compensate the victims of this case, including those who did not participate in these proceedings or the Trial Chamber did not identify as victims.<sup>325</sup>

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<sup>319</sup> Legal Representatives of Victims' sentencing submissions, para. 78.

<sup>320</sup> Legal Representatives of Victims' sentencing submissions, para. 79. *See also* Legal Representatives of Victims' sentencing submissions, para. 80, describing how the trust fund is funded.

<sup>321</sup> Legal Representatives of Victims' sentencing submissions, paras 81-84.

<sup>322</sup> Legal Representatives of Victims' sentencing submissions, para. 85.

<sup>323</sup> Legal Representatives of Victims' sentencing submissions, paras 86-88, referring to Council of Europe, Council Directive 2004/80/EC of 29 April 2004. The Legal Representatives argue that the Trial Chamber, with reference to this Directive, 'agreed that victims of crimes should be entitled to receive a form of statutory compensation, such as those mandated by the EU.' Legal Representatives of Victims' sentencing submissions, para. 86, referring to Trial Judgment, para. 963.

<sup>324</sup> Legal Representatives of Victims' sentencing submissions, paras 89-90.

<sup>325</sup> Legal Representatives of Victims' oral sentencing submissions, T. 10 November 2020, pp 54, 56, 58.

270. The Trial Chamber should, in their view, direct this second recommendation to the Lebanese authorities and to all the States who support the Special Tribunal. Further, ‘at a more operational level’, as ‘is frequently done ... certainly at the ICC ... a directive is sent to the Registrar of the Court to explore the possibility of the creation of a temporary fund’.<sup>326</sup> According to the Legal Representatives, such a trust fund ‘must be capable of standing alone’ when ‘the business of the Tribunal comes to an end’.<sup>327</sup>

271. Replying to another judicial question<sup>328</sup> as to whether such a recommendation should aim at establishing a trust fund solely for the victims of the attack against Mr Hariri or, instead, a trust fund for the victims of any act of terrorism, the Legal Representatives submitted that ‘this case is a starting point’. While the Trial Chamber ‘cannot deal with all of the victims of terrorism that there have been in Lebanon for the past 40 years’ and cannot know about all of them—it is within its gift and power to make a recommendation about these victims whom it has identified and of whom it knows ‘how they have suffered’.<sup>329</sup>

272. Prosecution counsel responded to a judicial invitation to express views on the Trial Chamber making ‘a recommendation that a fund be established for the victims, a statutory compensation fund in Lebanon, or a fund for the victims of terrorist actions in general’, by submitting that:

It’s a matter for the Trial Chamber what it recommends and can recommend, but, of course, on behalf of the Prosecution, we endorse any measure that is available, properly available, under the law or otherwise, which could and would properly compensate all of the victims that have suffered as a result of these crimes.<sup>330</sup>

273. The Ayyash Defence, as noted above, opposed orders imposing financial penalties and the freezing of assets for Mr Ayyash, which it submits have no place in the Special Tribunal’s statutory regime.<sup>331</sup> However, ‘to the extent that the LRV’s proposal is not directed at Mr Ayyash’, it ‘does not oppose the Trial Chamber’s consideration and potential endorsement of the proposal’—namely

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<sup>326</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, p. 54.

<sup>327</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, p. 57.

<sup>328</sup> From the Presiding Judge.

<sup>329</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, p. 58.

<sup>330</sup> Prosecution oral sentencing submissions, T. 10 November 2020, p. 30.

<sup>331</sup> Ayyash Defence sentencing submissions, para. 6.

‘that a general compensation fund or strategy is established by Lebanon or an internationalised body to address the harms suffered by the recognised victims of the 14 February 2005 attack’.<sup>332</sup>

## **B. Findings and recommendations**

274. The Special Tribunal, unlike the ICC, has no statutory compensatory or reparations mechanism. In this respect it may suffer from the ‘lacuna’ identified by the Legal Representatives in its sentencing regime.

275. While the Statute does not authorise the Trial Chamber to make financial orders against a convicted accused person, such as to pay compensation or reparations to a victim of crimes within its jurisdiction, it does not expressly prohibit the Special Tribunal from establishing or administering any such scheme that does not involve making orders against a convicted person. Further, in addition to imposing sentence, the Trial Chamber may make relevant recommendations on matters of concern that it has encountered in the proceedings. The participation of victims in the proceedings, in this sense, widens the scope of findings that a chamber would otherwise make.

276. Article 25 (3) of the Statute provides that:

based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not such victim had been identified as such by the Tribunal under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation.

277. In the hearing—and it is important to stress that this was argued in support of a compensation order—the Legal Representatives submitted that Article 25 (3) was ‘pretty much pointless. All it does is direct victims to go and seek compensation, if they want to, against bodies and entities such as they might identify in courts of national jurisdiction’.<sup>333</sup> This submission has some merit as the article creates no legal or enforceable rights and does no more than inform victims that they may pursue actions for compensation before a competent entity. But more importantly, if a victim cannot enforce a right to compensation because, for example, the offender

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<sup>332</sup> Ayyash Defence oral sentencing submissions, T. 10 November 2020, pp 38-39.

<sup>333</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, pp 48-49.

is impecunious or cannot be brought before a court, this provision is effectively meaningless. Moreover, it also requires a conviction, for without this the victims get nothing.

278. Regarding Article 25 (4), which states, ‘For the purposes of a claim made under paragraph 3 of this article, the judgement of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person’, the Legal Representatives submitted that it was ‘was *ultra vires* the Statute’ (meaning, literally ‘beyond the powers’).<sup>334</sup> The Article appears to be ambiguous, and if the Legal Representatives are correct, this submission too has some legal merit: it is difficult to see how the Statute of the Special Tribunal could legally bind every national court or compensation body on the issue of the criminal responsibility of a convicted accused person and presumably hence their liability to pay compensation in that country.

279. Regarding the issue of reparations raised by the Legal Representatives at trial: a chamber cannot order reparations but it may identify victims. The Trial Chamber did this in its judgment, and this may assist them in claiming compensation before a national court or another competent body.<sup>335</sup> In support of these findings, the Trial Chamber pointed to the Explanatory Memorandum on the Rules of Procedure and Evidence,<sup>336</sup> which states that:

Notwithstanding that the trial proceedings in the Tribunal are not aimed at determining compensation but rather at establishing whether an accused is guilty or innocent, the drafters of the Rules of Procedures and Evidence deemed it fair and appropriate to grant extensive participation in proceedings to victims.

Based on the Tribunal’s “identification”, victims may later bring an action for compensation before a national court and, for the purpose of such “identification”, the participation of victims in the criminal proceedings before the Tribunal may prove of enormous value.<sup>337</sup>

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<sup>334</sup> Legal Representatives of Victims’ oral sentencing submissions, T. 10 November 2020, p. 48.

<sup>335</sup> Trial Judgment, para. 896.

<sup>336</sup> Trial Judgment, para. 798.

<sup>337</sup> Rules of Procedure and Evidence (as of 12 April 2012) — Explanatory Memorandum by the Tribunal’s President, para. 16; Statute, Article 25. As noted in the Trial Judgment (at para. 799), the text is in part legally incorrect because it states, incorrectly, ‘establishing whether an accused is guilty or innocent’, whereas the Trial Chamber, consistent with the principles of international human rights law, is only required to determine whether guilt was established beyond reasonable doubt. Article 16 (3) (c) of the Statute provides that ‘In order to convict the accused, the relevant Chamber must be convinced of the guilt of the accused beyond reasonable doubt’. According to Rule 148, ‘A finding

280. The Trial Chamber also agreed with the Legal Representatives' arguments that the identification of the victims and the acknowledgement of their harm in the judgment is a form of symbolic reparation.<sup>338</sup> However, it held that as the Special Tribunal cannot order reparations, accordingly it cannot provide guidance to State authorities on financial schemes for reparations—as the Legal Representatives had argued<sup>339</sup>—or on the criteria and scales that a trust or body should use.<sup>340</sup>

281. These particular observations, it is stressed, relate to the technical details of possible schemes rather than the merits of general recommendations for their establishment. Nothing prevents the Trial Chamber from making *general* recommendations on establishing trust funds or mechanisms for compensating victims of crimes, as opposed to going into the more mechanical details of their operation, such as payment scales.

282. In the judgment, the Trial Chamber recognised the absence of an independent statutory mechanism for determining compensation for victims of crime in Lebanon generally, but specifically for victims of the crimes charged (and proved) on the amended consolidated indictment. It is useful to reproduce the relevant passages here, from paragraphs 941 to 945 of the judgment:

The 'Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law', adopted by the United Nations General Assembly Resolution 60/147, provide for a right to 'adequate, effective and prompt reparation for harm suffered' by victims of serious human rights violations. Reparation should be proportional to the gravity of the violations and the harm suffered.<sup>341</sup> These principles also establish that, in accordance with its domestic laws and international legal obligations, a State must provide reparation to victims and should endeavour to establish national programs for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

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

<sup>338</sup> Trial Judgment, paras 954, 960.

<sup>339</sup> Trial Judgment, para. 949, referring to Legal Representatives of Victims' final trial brief, paras 654-655.

<sup>340</sup> Trial Judgment, para. 961.

<sup>341</sup> UN Doc. A/RES/60/147/Annex, principle IX, paras 15-16.

Further, according to Article 8 of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:

offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.<sup>342</sup>

Under Article 12 of this declaration, ‘when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to: (a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; and (b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimizations’. Finally, under Article 13:

the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.<sup>343</sup>

In domestic laws, depending on whether a State provides for a national statutory compensation scheme, two channels may exist for a victim to claim compensation for the injuries or damages they have suffered: from the offender during criminal proceedings—or other legal proceedings—or from the state, namely from a compensation authority or any relevant body. For example, a European Union Council Directive requires each European Union member state to establish a national scheme on compensation to victims of violent intentional crimes committed in their respective territories.<sup>344</sup> They must

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<sup>342</sup> UN Doc. A/RES/40/34/Annex (1985), paras 8, 11-13.

<sup>343</sup> UN Doc. A/RES/40/34, Annex (1985), paras 8, 11-13.

<sup>344</sup> Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, Article 7. In Italy, for example, according to the national law implementing the directive, compensation can be claimed for medical and assistance costs—except in instances of sexual assault or homicide, in which case the victims are paid a fixed amount of compensation, determined by a Ministerial decree, even if there are no medical and assistance costs to be paid. A claim must be submitted within 60 days following an order finding that the offence was committed by a person or persons unknown, or following the last step in enforcement proceedings undertaken without success, or following the

establish or designate one or several authorities or any other bodies to be responsible for deciding upon applications for compensation.

Under Lebanese law, there is no general national compensation scheme for victims of crimes. A victim of an offence can claim compensation for the damages suffered by initiating a civil action,<sup>345</sup> either before the same criminal court where the alleged perpetrators and accomplices are prosecuted or, separately, before the competent civil authority.<sup>346</sup> Article 138 of the Lebanese Criminal Code provides that ‘the perpetrator of any offence causing harm, be it material or moral, to another person shall be held liable for compensation’. Under Article 129 of the same code, the civil sanctions that a criminal court judge can impose are: restitution, damages, confiscation, publication of the judgment and court fees. According to Article 134 of the Lebanese Code of Obligations and Contracts, reparations due to a victim of an offence must correspond to the entire damage the victim has sustained. Moral damage as well as material damage is taken into account.

283. At paragraph 963 of the judgment, it reached the following conclusions:

The Trial Chamber has heard about a dramatic disparity in treatment among the participating victims as to ‘compensation’—meaning the pecuniary remedy, for the loss or damage suffered, not depending on prosecutorial charges or judicial accountability, that participating victims received, or not, or applied for after the attack.<sup>347</sup> The Trial Chamber underlines that compensation should be appropriate and proportional to the gravity of the harm suffered. The Trial Chamber notes the sense of injustice perceived by some victims because some were compensated while most, it appears, were not. Compensation should not depend on the circumstances of the victims, their connections, employment relationship

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date that a criminal conviction becomes final. Italian Law no. 122 of 7 July 2016, Article 11. In England and Wales, according to ‘The Criminal Injuries Compensation Scheme 2012’, the types of payments that may be made include those for injuries, loss of earning, bereavement and dependency. The amount of an injury payment is determined in accordance with a set tariff (Article 33, annex E). An award will be withheld unless the incident has been reported to the police as soon as reasonably practicable. A person may be eligible for an award whether or not the incident giving rise to the criminal injury has resulted in the conviction of an assailant. The application must be submitted within two years after the date of the incident. A claims officer may defer determination of an application until satisfied that the applicant has taken all reasonable steps to obtain any social security benefits, insurance payments, damages or compensation to which the applicant may be entitled in respect of the same injury (Article 98 (b)).

<sup>345</sup> Lebanese Code of Criminal Procedure, article 5.

<sup>346</sup> With regard to crimes falling within the jurisdiction of military courts, actions on personal civil rights can be brought only before a civil court, which will render its decision after a final criminal judgment has been issued. Lebanese Military Code, article 25.

<sup>347</sup> The evidence and information the Trial Chamber heard on this matter is set out in chapter VI ‘Explosion on 14 February 2005’, (G) ‘Victim harm’.

or insurance scheme.<sup>348</sup> Finally, as a general proposition, the Trial Chamber agrees that victims of crimes should be entitled to receive a form of statutory compensation, such as those mandated by the European Union, referred to above.<sup>349</sup>

284. Consistent with these findings in the judgment, the Trial Chamber maintains its position that Lebanon should introduce a statutory mechanism to compensate the victims of crime generally. Such a scheme should be independent and involve the neutral determination, free from political considerations, of compensating the victims of established crimes.

285. As the judgment notes,<sup>350</sup> by initiating a civil action under Lebanese law, the victim of an offence can claim compensation for the damages suffered,<sup>351</sup> either before the same criminal court where the alleged perpetrators and accomplices are prosecuted or, separately, before the competent civil authority.<sup>352</sup> Article 138 of the Lebanese Criminal Code provides that ‘the perpetrator of any offence causing harm, be it material or moral, to another person shall be held liable for compensation’. Under article 129, the civil sanctions that a criminal court judge can impose are: restitution, damages, confiscation, publication of the judgment and court fees. According to article 134 of the Lebanese Code of Obligations and Contracts, reparations due to a victim of an offence must correspond to the entire damage the victim has sustained.

286. In Lebanon—which must recognise the binding nature of the Special Tribunal’s judgments—victims should be able to initiate a civil action to claim compensation before a Lebanese court based upon this judgment. However, if such a claim for compensation against Mr Ayyash is unsuccessful—and recognising here that he has been neither located nor apprehended—or alternatively if orders for compensation cannot compensate all the victims of the attack, they would have no further options for claiming, and receiving, compensation.

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<sup>348</sup> According to Article VIII of the ‘Revised Guidelines of the Committee of Ministers of the Council of Europe on the protection of victims of terrorist acts’, adopted on 19 May 2017, ‘victims should receive fair, appropriate and timely compensation for the damages which they suffered’.

<sup>349</sup> See para. 944.

<sup>350</sup> Trial Judgment, para. 945.

<sup>351</sup> Lebanese Code of Criminal Procedure, article 5.

<sup>352</sup> With regard to crimes falling within the jurisdiction of military courts, actions on personal civil rights can be brought only before a civil court, which will render its decision after a final criminal judgment has been issued. Lebanese Military Code, article 25.



287. Some victims informed the Trial Chamber of attempts to seek compensation from the Lebanese High Relief Commission, and one victim even successfully received a cheque.<sup>353</sup>

288. The Trial Chamber understands that this body is a public agency that reports to the Lebanese prime minister. The prime minister or the cabinet may ask it to compensate, as a matter of urgency, people affected by catastrophes, floods, acts of war or famines.<sup>354</sup> According to the Legal Representatives, it receives donations made to the government, and its main purpose is to distribute aid, but the council of ministers (cabinet) may request it to consider certain aid programs. This occurred after the war with Israel in July 2006 when it provided monetary compensation for some people whose houses, cars or businesses had been destroyed. However, victims cannot ask it for compensation as such. Its nature differs from the compensation provided by judicial authorities or criminal injuries compensation boards or trusts.<sup>355</sup>

289. In effect, this means that it is an *ex gratia* scheme, which by its nature is discretionary, and made according to governmental decisions. These may be political. It is neither a national victims compensation scheme nor one that complies with the relevant UN declarations.

290. The UN General Assembly's 1985 Basic Principles of Justice for Victims of Crimes and Abuse of Power declare that victims of crime have a right to a remedy regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted, stating that:

Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedure that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.<sup>356</sup>

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<sup>353</sup> Some victims of the attack applied for compensation. Victim 30 received a cheque. Exhibit 1V45 (Rule 154 documents Legal Representatives of Victims), pp 528-529 (ERN V030-E051); Maria Al-Kasti, T. 29 August 2017, pp 74-83; Robert Aoun, T. 30 August 2017, p. 26; V016, T. 30 August 2017, p. 72 (where Victim 16 stated that he was not aware that a mechanism to ask for compensation existed).

<sup>354</sup> Legal Representatives' co-counsel, Mr Mohammed Matter explained this in court. T. 29 August 2017, pp 78-79, 83-84. According to Mr Mattar, awarding compensation depends on the discretion of the government, although decisions on individual claims will be taken by the higher council.

<sup>355</sup> Legal Representatives of Victims' final trial brief, paras 676-678.

<sup>356</sup> UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34 (1985), 29 November 1985, Article 5.

Article 3 states that the Basic Principles should be:

applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth, or family status, ethnic or social origin, an disability.

291. Article 12, as noted above, provides that if compensation is not fully available from the offender or other sources, States should endeavour to provide compensation to victims, their families, and to establish national compensation funds.

292. The UN General Assembly's 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law developed these principles. Article 25 'Non-discrimination' states that their application 'must be consistent with international human rights law and international humanitarian law and without any discrimination of any kind or on any ground, without exception'. Victims should be provided with full and effective reparation, which includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Examples are listed. They must also have proper access to justice.

293. The evidence in the trial revealed a real inequality in how victims of Mr Ayyash's crimes were treated and compensated. Unfortunately, most victims remain uncompensated.

294. This contrary to the application of the UN Basic Principles and is unfair. In these circumstances, and having heard the evidence of some participating victims and Professor Letschert, the Trial Chamber is firmly of the view that it has a moral and legal duty to the victims of crimes found to fall within the Special Tribunal's jurisdiction to do anything it can to help them obtain redress. However, it has no power to make formal orders against Mr Ayyash or the Government of the Lebanese Republic. All it can do, in an attempt to ensure the consistent application in Lebanon of the UN Basic Principles, and thus fairness to the victims, is to make recommendations.

295. At issue here—and the participating victims expressed strong views and concerns—is the effectiveness of their ability to claim and obtain compensation. They identified an ineffectiveness in their right to seek redress for the harm suffered, as recognised in the UN resolutions. The Trial

Chamber will therefore take steps to highlight the ongoing injustice and to do what it can to assist them. This is in an effort to remedy the ongoing injustice to most of the victims and to allow them to assert their rights and interests in a manner consistent with these two important UN Declarations.

296. The Trial Chamber therefore strongly recommends to the Government of the Lebanese Republic that it establishes a national victims compensation scheme that conforms to these UN principles.

297. Such a scheme could of course determine just compensation for victims of any of the crimes falling within the Special Tribunal's jurisdiction. There are many national schemes that would provide a useful model. The essence of such a scheme is that the scheme itself—whatever model is chosen—rather than a convicted offender, would compensate eligible victims. Recovery from an offender is a separate matter. The Trial Chamber also notes that victims' compensation need not be only a direct financial payment as a form of damages, but can include a range of associated expenses such as medical, counselling, funeral and burial, legal, travel and moving costs, and also compensate for lost opportunities such as lost employment, wages, education and social benefits. These benefits are regulated by individual national schemes.

298. The other issue raised by the Legal Representatives of Victims is establishing a dedicated trust fund for the victims of the attack of 14 February 2005. The Legal Representatives sought orders against Mr Ayyash of a fine and the freezing of his assets to fund it. The Trial Chamber lacks the power to do this, and in any event, such orders would be unrealistic. The Trial Chamber received evidence of Mr Ayyash, at most, owning two apartments and several motor vehicles, but this was at least 15 years ago. The Legal Representatives' arguments in the hearing that he may have other assets, and in other countries, are speculative.

299. Nothing in the Statute prevents the Special Tribunal from establishing and administering such a special trust fund. It would have to be funded by international donors. Over the years the Special Tribunal has received donor funding separate to its annual budget for specific projects, such as funding internships, outreach activities and the Inter-University Programme on International Criminal Law and Procedure (for Lebanese students) and some victim-related projects. Although outreach is a statutory function of the Special Tribunal under Rule 52, funding

a victims' trust fund could be seen as falling into a similar ancillary category of the Special Tribunal's work.

300. Such a trust fund could be administered by the Registrar with international trustees, who would be responsible for determining just compensation. An appeal could lie on a point of law to a specially constituted chamber of the Special Tribunal. To do this, changes to the Rules of Procedure and Evidence would be needed. This is achievable. These are merely possibilities.

301. The Trial Chamber is of the view that establishing such a trust fund for victims of any crimes falling within the Special Tribunal's jurisdiction is consistent with the Special Tribunal's objectives and would provide a just and neutral mechanism to compensate victims of crimes determined to be within its jurisdiction.

302. The Trial Chamber therefore recommends—independently of its recommendation to Lebanon to establish a victims' compensation mechanism—the establishment of a special trust fund for victims of crimes determined to be within the Special Tribunal's jurisdiction.<sup>357</sup>

303. Finally, on the issue of psychological support for the victims of crimes testifying in an international setting, the Legal Representatives in their final trial submissions asked the Trial Chamber to make certain recommendations, based upon Professor Letschert's observations that psychological support was not available for victims and witnesses in Lebanon.<sup>358</sup>

304. In response, the trial judgment states the following, which is worth reiterating for the purposes of the sentencing judgment:

As to the Legal Representatives of Victims' request that the Trial Chamber make recommendations—based on Professor Letschert's and the participating victims' views—on the need for professional psychological support in Beirut in future proceedings, the Trial Chamber endorses any improvement in supporting the participating victims' needs. It refers the matter of Professor Letschert's recommendation—based on the participating

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<sup>357</sup> The Trial Chamber stated this publicly in the oral pronouncement of its judgment on 18 August 2020, stating: 'The Trial Chamber—at the invitation of the Legal Representative of Victims—reminds the Lebanese Government of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, of the need for just 'compensation' for the victims of crime. It also reminds the Lebanese government of the importance of having an adequate compensation scheme for victims. As an alternative, a voluntary trust fund could be established to compensate the victims in the cases within the Tribunal's jurisdiction', T. 18 August 2020, p. 24.

<sup>358</sup> Trial Judgment, para. 980.

victims' views—to the Registrar and the Victims' Participation Unit, for their consideration. This is an ancillary matter, as it is not a formal finding for the purpose of determining whether the Accused are guilty, or for any other purpose accepted by the Trial Chamber to be within its mandate as set out above.<sup>359</sup>

## **SURRENDER OF SALIM JAMIL AYYASH**

305. Mr Ayyash has been shielded from justice and the Lebanese authorities have been unable to apprehend him and transfer him to the seat of the Special Tribunal since it issued an international warrant for his arrest in June 2011. The Lebanese Prosecutor-General regularly updates the Special Tribunal, informing it of continuing unsuccessful attempts to locate Mr Ayyash.

306. Those who are shielding Mr Ayyash from justice should surrender him to the Special Tribunal.

## **IX. DISPOSITION**

### **SENTENCE**

307. For the reasons above and having considered the submissions of the Prosecution, the Ayyash Defence and the observations of the Legal Representatives of Victims, and pursuant to Article 2 and Article 24 of the Statute of the Special Tribunal for Lebanon and Rules 171 and 172 of the Special Tribunal's Rules of Procedure and Evidence, the Trial Chamber imposes the following sentences—to be served concurrently—on

### **SALIM JAMIL AYYASH**

**COUNT 1**—Conspiracy aimed at committing a terrorist act (Articles 270 and 314 of the Lebanese Criminal Code), imprisonment for life;

**COUNT 2**—Committing a terrorist act by means of an explosive device (Article 314 of the Lebanese Criminal Code), imprisonment for life;

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<sup>359</sup> Trial Judgment, para. 986.

**COUNT 3**—Intentional homicide of Rafik Hariri with premeditation by using explosive materials (Articles 547 and 549 (1) and (7) of the Lebanese Criminal Code), imprisonment for life;

**COUNT 4**—Intentional homicide (of 21 persons in addition to the intentional homicide of Rafik Hariri) with premeditation by using explosive materials (Articles 547 and 549 (1) and (7) of the Lebanese Criminal Code), imprisonment for life; and

**COUNT 5**—Attempted intentional homicide (of 226 persons in addition to the intentional homicide of Rafik Hariri) with premeditation by using explosive materials (Articles 200, 547 and 549 (1) and (7) of the Lebanese Criminal Code), imprisonment for life.

## **RECOMMENDATIONS**

308. The Trial Chamber also makes the following recommendations:

### **A. A statutory victims compensation scheme in Lebanon**

Consistent with Article 8 of the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Government of the Lebanese Republic should establish an independent and neutral statutory compensation scheme for the victims of crimes that have occurred in Lebanon. Such a scheme should act independently of political considerations.

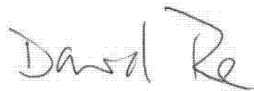
### **B. Establishment of a special trust fund for victims of attacks determined to be within the Special Tribunal's jurisdiction**

A trust fund for victims of attacks determined to be within the Special Tribunal's jurisdiction should be established. The fund should be administered by the Special Tribunal's Registrar and international trustees, who should decide a form of just compensation for any recognised victim of such an attack. International donors should fund the trust fund. Appeals from the decisions on points of law should be permitted. The Rules of Procedure and Evidence should be amended to permit this.

309. The Presiding Judge appends a short separate and concurring opinion and a declaration on some issues of judicial integrity.

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

Leidschendam,  
The Netherlands  
11 December 2020



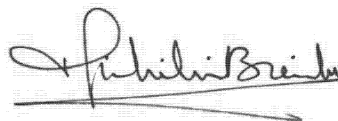
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Judge David Re, Presiding



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Judge Janet Nosworthy



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Judge Micheline Braidy

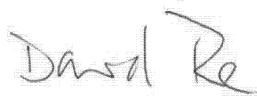


## **X. SEPARATE AND CONCURRING OPINION OF JUDGE DAVID RE**

1. On 17 August 2011, the Special Tribunal for Lebanon publicly announced the indictment of Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra. The same day, the Secretary-General of Hezbollah made a speech in which he described Mr Ayyash and the other three Accused as ‘four honourable resistance men’.

2. He had already stated of the Special Tribunal, in another speech in November 2010, that, ‘Mistaken is he who believes that we will allow the arrest or detention of any of our mujehedeem. The hand that attempts to reach them will be cut off’. The two speeches are referred to in the trial judgment.<sup>360</sup> These were strong words from the leader of an organisation that has both political and military arms.

3. In the intervening years, despite the best efforts of the Lebanese authorities, Mr Ayyash has not been apprehended. In my view, a strong inference is available from the above as to who has been shielding him from justice for all these years.<sup>361</sup>



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Judge David Re  
Presiding Judge

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<sup>360</sup> Trial Judgment, paras 398, 736.

<sup>361</sup> Sentencing Judgment, para. 305.

