

BEFORE THE APPEALS CHAMBER
SPECIAL TRIBUNAL FOR LEBANON

Case No: STL-11-01/A/AC

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

Registrar: Mr David Tolbert, Acting Registrar

Date: 12 January 2021

Filing Party: Defence Counsel – Ayyash

Original Language: English

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THE PROSECUTOR
v.
SALIM JAMIL AYYASH

Notice of Appeal on behalf of Mr Ayyash against Conviction and Sentence

Office of the Prosecutor:
Mr Norman Farrell

Counsel for Mr Salim Jamil Ayyash:
Mr Emile Aoun & Mr Chad Mair

Defence Office:
Ms Dorothée Le Fraper du Hellen



I. INTRODUCTION

1. Pursuant to Article 26 of the Statute of the Tribunal (“Statute”) and Rules 176 and 177 of the Rules of Procedure and Evidence (“Rules”), the Defence for Mr Salim Jamil Ayyash (“Defence”) submits this Notice of Appeal against the Trial Chamber’s judgment of 18 August 2020¹ (“Trial Judgment”) and sentencing judgment of 11 December 2020 (“Sentencing Judgment”).
2. The Trial Chamber committed numerous errors of law and fact throughout the Trial Judgment, in which it convicted Mr Ayyash on counts 1-5 of the Amended Consolidated Indictment, and the Sentencing Judgment, in which it imposed on Mr Ayyash five concurrent life sentences.
3. The Defence is appealing every finding of guilt returned by the Trial Chamber. This Notice sets out the primary errors of law and fact contained in the Trial Judgment and Sentencing Judgment, including relevant paragraphs² and findings, and requested relief for each ground of appeal.³
4. Each error of law invalidates the Trial Judgment. Similarly, each error of fact gives rise to a miscarriage of justice, as no reasonable trier of fact could have made the particular finding beyond reasonable doubt. For each ground of appeal, the Defence requests that the Appeals Chamber overturn the convictions entered for counts 1-5 and return a finding of not guilty on all counts against Mr Ayyash.
5. Regarding the sentence imposed, the Trial Chamber’s errors resulted in a disproportionate punishment. Should it uphold Mr Ayyash’s convictions, the Defence requests the Appeals Chamber impose a single sentence accurately and fairly reflecting Mr Ayyash’s culpable conduct, as found by the Trial Chamber.

¹ All sources referred to in this Notice are in abbreviated form. Annex A is a table of sources and includes the full citation for each of the sources cited.

² Including the footnotes referred to therein.

³ See PD on Appeals, Article 3.

II. STANDING TO APPEAL

6. Pursuant to the Appeals Chamber's order,⁴ the Defence makes these submissions "on the issue of standing of assigned Defence Counsel to lodge an appeal against the Trial Judgment and Sentencing Judgment of the Trial Chamber rendered *in absentia*."⁵ The Defence stands ready to provide additional submissions if requested by the Appeals Chamber, or as necessary to reply to submissions from the Prosecution or Legal Representatives of Victims.
7. Counsel assigned to represent the rights and interests of Mr Ayyash pursuant to Article 22(2)(c) of the Statute⁶ and Rule 57(D)(ix) of the Rules ("Counsel") may exercise the absent convicted person's Article 26(1) right of appeal.

A. The Statute empowers Counsel to lodge an appeal

8. Article 26(1) of the Statute provides that "[t]he Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor".
9. Judges of the Appeals Chamber have observed that Article 26 "is consistent with general principles of criminal law and international human rights law, which recognize a right of appeal of an accused person",⁷ and that "[a]s a general principle of law, and of trial fairness, parties to a case are always allowed to appeal final decisions".⁸
10. The Appeals Chamber has held that the Statute "operates on the premise that Defence counsel have the same powers as the accused they represent, unless there is an explicit provision to the contrary".⁹ No "explicit provision" in Article 26(1)

⁴ Word Limit Order.

⁵ *Id.* at paras 6-7.

⁶ Article 22(2)(c) mandates that, in cases proceeding under Article 22(1)(c), the Defence Office shall assign counsel "with a view to ensuring full representation of the interests and rights of the accused".

⁷ Riachy and Nsereko Joint Opinion, para. 13.

⁸ *Id.* at para. 2.

⁹ Rule 176*bis* Decision, para. 16.

- or elsewhere in the Tribunal’s legal framework¹⁰ precludes assigned Counsel from exercising the convicted person’s right of appeal.
11. The Appeals Chamber previously considered the (then upcoming) judgment, stating “[t]his judgment *will be subject* to an appeal and the Appeals Chamber *will revisit* any legal issue that might be raised by such an appeal under Article 26 of the Statute.”¹¹
 12. In the litigation preceding the above finding, the Prosecution similarly stated that “the Defence will be able to seek whatever relief it deems appropriate before the Appeals Chamber in case of appeal of the final judgment”.¹²
 13. The Appeals Chamber, Prosecution, and Defence therefore appear to agree that, as a Party to proceedings, the Statute permits Defence counsel to exercise the Article 26 right of appeal in the context of *in absentia* proceedings.

B. The Rules confirm Counsel’s mandate to lodge an appeal

14. The Tribunal’s Rules confirm Counsel’s power to exercise the absent convicted person’s right of appeal.
15. Rule 107 provides that “the rules on pre-trial, trial, and appellate proceedings shall apply *mutatis mutandis* to proceedings *in absentia*.” Rules 176 and 177, found in Part 7 of the Rules (Appellate Proceedings), operationalise the right of appeal under Article 26(1).

¹⁰ The Tribunal’s statutory framework includes, *inter alia*, the Statute, Rules, Directive on Counsel, and Code of Conduct.

¹¹ Rule 176*bis* Decision, para. 37 (emphasis added).

¹² Prosecution Consolidated Response, para. 31.

16. When previously considering the standing of *in absentia* Defence counsel to request reconsideration under Rule 176*bis*, the Appeals Chamber held:
- (i) in accordance with the clear text of the provision, Rule 107 applies to appellate proceedings, as well as pre-trial and trial proceedings;¹³
 - (ii) as noted above,¹⁴ the Statute “operates on the premise that Defence counsel have the same powers as the accused they represent, unless there is an explicit provision to the contrary”;¹⁵
 - (iii) per Rule 2(A), where a provision makes “explicit reference to the ‘Defence’”, this further “demonstrates that the drafters envisaged that the right [...] could be asserted by Defence counsel”;¹⁶ and
 - (iv) if there is no explicit provision in the Statute or Rules restricting counsel from exercising the rights accorded to an accused or convicted person, counsel’s exercise of such rights is precluded only where the provisions “either require the physical presence of the accused or can only be read as according rights to the individual accused, rather than to a party”.¹⁷
17. Applying this interpretative framework to Rule 177:
- (i) neither Rule 177 nor another Rule, contains “an explicit provision” rebutting “the premise that Defence Counsel have the same power[] as the [...] [convicted person] they represent” to exercise the Article 26(1) and Rule 177(A)(ii) right of appeal;
 - (ii) Rule 177(A)(ii) refers to the right of a “Party” to lodge an appeal—a term defined in Rule 2(A) as “[t]he Prosecutor or the Defence”;¹⁸

¹³ Rule 176*bis* Decision, para. 15.

¹⁴ See para. 10, *supra*.

¹⁵ Rule 176*bis* Decision, para. 16.

¹⁶ *Ibid.*

¹⁷ *Id.* at para. 17.

¹⁸ See also Riachy and Nsereko Joint Opinion, para. 8 (“The Defence is also defined as the accused, the suspect and/or his counsel.”)

- (iii) lodging an appeal does not require the physical presence of the convicted person in the same way as exercising the rights and powers enumerated in Rules 144(A), 144(C) or 153(C);¹⁹ and
- (iv) Rule 177(A)(ii) is not a provision that “can only be read as according rights to the individual [...] [convicted person], rather than to a party”. Instead, as the Appeals Chamber held in respect of the defence’s Rule 176 *bis*(C) right to request reconsideration, Rule 177(A)(ii) “creates a right that can in fact be discharged by Defence counsel for the”²⁰ absent convicted person.
18. The Plenary of Judges has amended Rule 177 on three occasions.²¹ The last two amendments were adopted while the present *in absentia* proceedings were ongoing. All three amendments consistently maintained Rule 177’s original text that a “Party” may appeal a judgment and/or sentence. If the drafters intended to limit Counsel’s exercise of a fundamental defence right, as indicated in the Rule 176*bis* Reconsideration Decision,²² they would have adopted clear words to this effect. Instead, the drafters’ consistent use of the term “Party” indicates a deliberate, legislative choice to confirm that the defence—as a party—is empowered to exercise the Article 26(1) right of appeal in both *in presentia* and *in absentia* proceedings.
19. The only provision in the Tribunal’s statutory framework²³ that could be viewed as possibly limiting Counsel’s powers under Article 26(1) and Rule 177 is Rule 109. This Rule, which has not been amended since adoption in March 2009, outlines the applicable procedure and consequences arising from the “[a]pppearance of the Accused after Proceedings *in Absentia*”. Rule 109, however, does not address, let

¹⁹ See Rule 176*bis* Decision, para. 17, fn. 45.

²⁰ *Id.* at para. 17.

²¹ Amended 30 October 2009, 20 February 2013, and 8 March 2016.

²² Rule 176*bis* Decision, para. 16.

²³ Article 22(2)(c)’s use of “accused”, in comparison to Article 26’s use of “persons convicted”, is immaterial, and indicates no more than that an individual’s status necessarily changes post-conviction (*contra* Paola Gaeta Article, p. 244, fn. 57). See also Statute, Article 24 (Penalties).

alone explicitly preclude, defence counsel appealing a judgment on behalf of an individual convicted *in absentia*.

20. The “Rules are designed in a logical sequence”.²⁴ Rule 109, which follows Rule 107, does not apply during or otherwise effect the conduct of *in absentia* proceedings. Rule 109 is triggered on the appearance of the “accused”—whether in-person, by video-conference, or by counsel appointed or accepted by the individual (Rule 104)—following the issuance of a Rule 168 judgment *in absentia* and any sentence. At the moment of the “accused’s” appearance, proceedings *in absentia* and Counsel’s mandate are extinguished and Rule 107 ceases to apply.²⁵
21. This fundamental change in the status of proceedings might explain why the drafters did not mention an ongoing or concluded defence appeal in Rule 109: namely, to underline that the mandate of assigned counsel ceases on the “accused’s” appearance. The relevance of Rule 109 to ongoing *in absentia* proceedings is at most to reinforce the general rule against an accused or convicted person acting from ‘outside’ the Tribunal to participate in *in absentia* proceedings.²⁶ Rule 109 does not apply to the current proceedings.
22. Rules 107 and 177(A)(ii) are the “dominant provision[s]” in these *in absentia* proceedings. Accordingly, the Appeals Chamber should “as far as practicable [...] give consistency, homogeneity and due weighting to the different elements of a diverging or heterogeneous set of provisions”.²⁷ For these reasons,²⁸ Rules 107 and 177 must be read as empowering assigned Counsel to exercise the Article 26(1) right of appeal. Rule 109 is made consistent with this position by applying the Appeals Chamber’s previous finding that the prospect of an accused appearing in

²⁴ Riachy Separate Opinion, para. 2.

²⁵ See Decision on Defence Appeals, para. 14 (citing Rules 108 and 109).

²⁶ For the reasons submitted herein, the Defence respectfully disagrees with the position expressed by Judge Riachy. See Ralph Riachy Article, p. 1305 (“Concerning appeal, it appears from a number of provisions contained in the STL RPE that a judgment rendered *in absentia* may be appealed by the Prosecutor, who may appeal from an acquittal or from the sentence imposed following a verdict of guilty (Rule 109(d)). It would seem, however, from the RPE that the accused does not have any right to appeal from a verdict rendered *in absentia* until he appears and submits to the judgment of the Trial Chamber.”)

²⁷ Interlocutory Decision on Law, para. 23.

²⁸ See paras 8-19 *supra*.

the future and exercising a right under the Rules that Counsel presently seeks to exercise is not sufficient ground to deny Counsel's exercise of the right.²⁹ Rule 109 must be properly read as permitting an accused who appears before the Tribunal, following an Article 26(1) appeal lodged by assigned Counsel, to exercise the full panoply of rights provided under Rule 109.³⁰

C. The Statute's spirit, the principle of effectiveness, and the principle of *in dubio mitius*, also support Counsel's mandate to lodge an appeal

23. The Tribunal's Statute and Rules must be interpreted in conformity with the Statute's spirit.³¹ This encompasses the pursuit of truth and justice in relation to the attack on Mr Hariri³² and, relatedly, recognition that accused persons may never appear before the Tribunal, in part justifying the possibility of *in absentia* trials.³³ The Tribunal's first two Presidents similarly opined that international criminal trials "do not boil down to a contest between two parties. Rather, the main goal is the pursuit of truth and justice."³⁴
24. In this context, empowering assigned Counsel to exercise the Article 26(1) right of appeal not only accords with Article 22(2)(c) of the Statute,³⁵ but also serves the pursuit of truth, and impartial and efficient justice, by permitting immediate review of convictions issued *in absentia* by five experienced judges of the Appeals Chamber. The alternative scenario, under which appellate review can never take

²⁹ Rule 176*bis* Decision, para. 18.

³⁰ Rule 109(E)(iv) already envisions, should the accused request it, a second hearing of a Prosecution appeal where an accused was convicted *in absentia* on appeal.

³¹ See *Al Jadeed* Interlocutory Decision, para. 27.

³² UNSC Resolution 1757 (2007), Preamble (evoking the United Nations' "[w]illing[ness] to continue to assist Lebanon in the search for the truth and in holding all those involved in the [Hariri] terrorist attack accountable").

³³ Secretary-General's Report, para. 32 (noting the likelihood of multi-accused cases coming before the Tribunal, and therefore that proceedings *in absentia* "would be crucial to ensure that the legal process is not unduly or indefinitely delayed because of the absence of some accused").

³⁴ See RPE 10 June 2009 – Memorandum, para. 36; RPE 12 April 2012 – Memorandum, para. 39.

³⁵ See fn. 6, paras 10 and 17 *supra*.

- place due to accused persons not appearing before the Tribunal, risks leaving a cloud of uncertainty and perceived unfairness³⁶ over such trial judgments.
25. The Statute and Rules must also be construed in a manner to render the Tribunal's legal framework effective and operational.³⁷ The drafters would have sought to avoid the possibility of a dissonant and unfair outcome arising from a mixed trial verdict in a multi-accused case where some individuals are convicted and others acquitted, or where an individual is convicted on some charges but acquitted on others, and only the Prosecution is permitted to immediately proceed with an appeal.
26. Moreover, no prejudice to the Prosecution or interests of the Victims who participated during trial proceedings can reasonably be asserted in respect of assigned Counsel's exercising a fundamental human right.³⁸ If an appeal lodged by Counsel results in acquittal, proceedings should naturally come to an end. A formerly absent accused instead opting for a retrial, which is an inviolable right under the Statute, would wipe away the *in absentia* proceedings *in toto*—both the trial judgment and any appeal.
27. Finally, if there is any remaining ambiguity on the construction of the Statute and Rules notwithstanding these submissions, the principle of *in dubio mitius* embodied in Rule 3(B) requires resolution by adopting “such interpretation as is considered to be the most favourable to any relevant [...] accused in the circumstances then under consideration”. In this case, the most favourable interpretation permits assigned Counsel to exercise the Article 26(1) right of appeal in accordance with the procedures established under Part VII of the Rules.

³⁶ See Riachy and Nsereko Joint Opinion, para. 2 (“As a general principle of law, and of trial fairness, parties to a case are always allowed to appeal final decisions.”)

³⁷ Interlocutory Decision on Law, paras 28-29.

³⁸ See LRV Appeal Decision, para. 16 (identifying prejudice or lack thereof to the parties as a relevant factor when determining whether to interpret the Rules in a manner that would “give full effect to the rights of the victims as mandated by Article 17 of the Statute”).

III. GROUNDS OF APPEAL

A. Ground related to the 2005 Hajj

Ground 1: The Trial Chamber erred in law and fact in finding beyond reasonable doubt that Mr Ayyash did not leave Lebanon between 15 and 28 January 2005.³⁹

28. The Trial Chamber erred in law and fact by failing to properly exclude all other reasonable inferences consistent with Mr Ayyash's innocence, or by finding beyond reasonable doubt that Mr Ayyash did not travel to Saudi Arabia in January 2005, which no reasonable trier of fact could have made on the basis of the circumstantial evidence before the Trial Chamber, or both.
29. The Trial Chamber erred in law and fact by misapplying the standard of proof for circumstantial evidence, and improperly shifting the burden onto the Defence, concluding there is "insufficient" proof that Mr Ayyash travelled to Saudi Arabia from 15 to 28 January 2005.⁴⁰
30. The Trial Chamber erred in law and fact in its assessment of the evidence, in particular by diminishing or misrepresenting reliable evidence consistent with innocence,⁴¹ and by placing undue weight on unreliable evidence or extraneous factors.⁴²
31. The Trial Chamber erred in law and fact by relying on its erroneous finding, based on insufficient circumstantial evidence, which no reasonable trier of fact could have made beyond a reasonable doubt, that Mr Ayyash was the single or principal user of mobiles 091, 170, Blue 233, Green 300 and Red 741,⁴³ to support the finding that Mr Ayyash did not leave Lebanon between 15 and 28 January 2005. The Trial Chamber then relied on its finding that Mr Ayyash did not leave Lebanon in January

³⁹ TJ, paras 260, 3256-3410.

⁴⁰ TJ, paras 3261, 3356-3409.

⁴¹ TJ, paras 3259, 3284, 3358-3376, 3409.

⁴² TJ, paras 3259, 3282, 3284-3288, 3290-3292, 3295, 3297, 3302-3344, 3358-3362, 3364-3369, 3371-3372, 3376-3386, 3389-3406, 3408-3409.

⁴³ And, by extension, mobiles 165, 935, and Yellow 294. *See* Ground 7.

2005 to confirm the earlier finding that Mr Ayyash was the single or principal user of those phones.⁴⁴

32. Requested relief: The Defence requests the Appeals Chamber to review the evidence related to the 2005 Hajj, applying the proper legal standard for circumstantial evidence, and find it insufficient for establishing beyond reasonable doubt that Mr Ayyash did not leave Lebanon between 15 and 28 January 2005.

B. Ground related to principles of evidence

Ground 2: The Trial Chamber erred in law by misinterpreting the law to require a “holistic assessment” of the evidence without properly considering the weight to be accorded to individual pieces of evidence.⁴⁵

33. The Trial Chamber erred in law by misinterpreting the ICC Appeals Chamber’s majority opinion in the *Ngudjolo* case and separate opinion in the *Bemba* case, leading to its erroneous approach when assessing the evidence. This error, which pervades the Trial Judgment, effectively shifted the burden away from the Prosecution to establish the reliability and probative value of each piece of evidence, improperly placed that burden on the Defence to undermine a presumed reliability for each item of evidence, and resulted in the Trial Chamber’s decisive reliance on weak circumstantial evidence.
34. Requested relief: The Defence requests the Appeals Chamber to find that the Trial Chamber applied the wrong legal standard in its assessment of the evidence in this case and, applying the proper legal standard, determine the evidence insufficient to support findings of guilt.

⁴⁴ TJ, paras 2935, 3252-3255, 3316-3344, 3391-3395, 3397-3406, 3409-3410, 4794.

⁴⁵ TJ, paras 188, 232, 236-255, 274.

C. Grounds related to telecommunications evidence

35. The Trial Chamber committed numerous errors of law and fact in assessing the telecommunications evidence, which serves as the backbone of the Prosecution's case. Taken individually or together, these errors invalidate the entire Trial Judgment.

Ground 3: The Trial Chamber erred in law and fact by relying on evidence from the Lebanese telecommunications networks Alfa and Touch.

Subground 3.1: The Trial Chamber erred in law by failing to establish a legally cognizable definition of "business records".⁴⁶

36. The Trial Chamber misconstrued the purpose for which common law jurisdictions may permit the use of business records as an exception to the prohibition on hearsay, while ignoring generally held requirements for classifying records as business records. In doing so, the Trial Chamber improperly determined that records provided by Alfa and Touch were *prima facie* reliable for purposes of criminal proceedings, and shifted onto the Defence the burden of disproving the reliability of the Prosecution's evidence.⁴⁷
37. Requested relief: As the evidence from Alfa and Touch form an integral part of all findings of guilt, the Defence requests the Appeals Chamber to find that these legal errors invalidate the entire Trial Judgment.

Subground 3.2: The Trial Chamber erred in law and fact in giving undue weight to the evidence of individuals from Alfa and Touch.⁴⁸

38. The Trial Chamber erred in law and fact in finding Witness PRH705 and Witness PRH707 to be reliable, categorising them as "corporate witnesses" while ignoring

⁴⁶ TJ, paras 358-365, 1563-1564, 1614, 1713, 1765, 1831-1851, 1853, 1872, 1875, 1878-1879, 1889, 1899-1900, 1917, 1920, 1926, 1931, 1933, 1935, 1940, 1943, 1947, 1989-2018.

⁴⁷ TJ, paras 358-365, 1563, 1713, 1839-1847, 1853, 1875, 1879, 1889, 1899-1900, 1920, 1926, 1931, 1933, 1935, 1940, 1943, 1947, 1989-2018.

⁴⁸ TJ, paras 1564, 1831-1862, 1868-1879, 1884, 1888-1889, 1891, 1895, 1901, 1908-1909, 1911-1913, 1917-1920, 1922-1927, 1936, 1938-1940, 1942, 1947, 1999-2002, 2014-2017.

- or diminishing the impact of limitations in their ability to provide reliable and probative evidence.⁴⁹
39. The Trial Chamber erred in law and fact by relying on unsourced hearsay from “suitably qualified personnel” from Alfa and Touch to determine the reliability of evidence from those companies, despite receiving little to no information on the identities of these individuals or their qualifications.⁵⁰
40. Requested relief: As the evidence from Alfa and Touch form an integral part of all findings of guilt, the Defence requests the Appeals Chamber to apply the proper legal standard to the evidence of Witnesses PRH705 and PRH707 and, consequently, overturn the convictions entered for counts 1-5 and return a finding of not guilty.

Subground 3.3: The Trial Chamber erred in law and fact in finding that cell site data and associated records provided by Alfa and Touch were reliable and probative.⁵¹

41. The Trial Chamber erred in law and fact by overlooking serious and systemic problems with record keeping at Alfa and Touch⁵² in finding that cell site data and associated records provided by Alfa and Touch were reliable and probative.⁵³
42. The Trial Chamber erroneously determined that some of the cell site data documents were business records,⁵⁴ an error even under the incorrect definition of business records employed by the Trial Chamber.
43. The Trial Chamber erroneously found it had “no reason to doubt the accuracy” of cell site evidence. In doing so, the Trial Chamber erred in law by improperly

⁴⁹ TJ, paras 1564, 1730, 1756-58, 1765, 1775, 1778-1787, 1790-1791, 1842, 1846-1862, 1883-1884, 1887-1891, 1901, 1908-1911, 1917-1918, 1922-1924, 1927, 1936, 1939-1940, 1942, 1947, 1999-2002, 2014-2017.

⁵⁰ TJ, paras 1839-1848, 1851, 1862, 1891.

⁵¹ TJ, paras 1564, 1863-2018.

⁵² TJ, paras 1713, 1724-1726, 1729, 1735-1737, 1739-1740, 1744-1746, 1750-1751, 1753-1754, 1770, 1778-1779, 1783, 1789, 1899, 1927, 1936, 1940, 2002-2003.

⁵³ TJ, paras 1564-1565, 1871-1872, 1875, 1877-1879, 1888-1891, 1899-1901, 1908-1913, 1916-1920, 1922-1927, 1930-1947, 1993-2004, 2006, 2008-2018.

⁵⁴ TJ, paras 1889, 1899-1900, 1903, 1908-1909, 1911.

imposing on the Defence the burden of disproving the reliability of the Prosecution's evidence, rather than requiring the Prosecution to establish the reliability of its evidence.⁵⁵

44. Requested relief: The Defence requests the Appeals Chamber to apply the proper legal standard to the cell site evidence from Alfa and Touch, and determine that the Prosecution has failed to establish its reliability. As this evidence forms the basis of the charges against Mr Ayyash, the Appeals Chamber is requested to overturn the convictions entered for counts 1-5 and return a finding of not guilty.

Ground 4: The Trial Chamber erred in fact by relying to a significant degree on cell site evidence tendered and mapping files created by the Prosecution.⁵⁶

45. The Trial Chamber erred in fact in finding that cell site evidence tendered by the Prosecution had probative value, despite being unsuitable for drawing inferences of guilt in criminal proceedings.⁵⁷
46. The Trial Chamber erred in fact by failing to properly account for the inherent limitations of cell site evidence in general, as well as the specific limitations of cell site evidence tendered by the Prosecution.⁵⁸
47. The Trial Chamber erred in fact by misrepresenting or misstating key aspects of the telecommunications evidence, seriously undermining its assessment of the reliability and probative value of that evidence.⁵⁹

⁵⁵ TJ, paras 1871, 1899, 1911-1914, 1931, 1940, 1943.

⁵⁶ TJ, paras 1564-1565, 1728, 1746, 1833, 1851, 1862, 1863-2018, 2129-2132.

⁵⁷ TJ, paras 1570-1572, 1728, 1989-2018.

⁵⁸ TJ, paras 1572, 1989-2018, 2052-2058, 2102-2104.

⁵⁹ The number of footnotes in the Trial Judgment that appear to some degree to be erroneous are too numerous to list here. As examples, the Defence refers to footnotes: 3647, 3730, 3769, 3770, 3803, 3814, 3815, 3820, 3942, 3970, 4101, 4143, 4149, 4153, 4158, 4176, 4177.

48. The Trial Chamber erred in fact in finding that the composite maps created by the Prosecution and uploaded into the “Electronic Presentation of Evidence” system were reliable.⁶⁰
49. Requested relief: The Defence requests the Appeals Chamber to determine that these factual errors resulted in a miscarriage of justice impacting all findings of guilt against Mr Ayyash.

Ground 5: The Trial Chamber erred in fact by relying on the cell site analysis conducted by Prosecution witnesses.⁶¹

50. The Trial Chamber erred in fact by finding reliable and probative the analysis of cell site evidence conducted by Prosecution witnesses, including Mr Philips and Mr Donaldson, resulting in the Trial Chamber making findings not available from the evidence.⁶²
51. The Trial Chamber did not give sufficient weight to the limitations of cell site analysis, made worse by deficiencies in the underlying cell site evidence referred to in Ground 4.⁶³
52. The Trial Chamber erroneously relied on evidence given by Prosecution witness Mr Philips, despite his lack of knowledge regarding telephone networks in Lebanon generally and deficiencies in cell site records originating from Alfa and Touch specifically.⁶⁴
53. Requested relief: The Defence requests the Appeals Chamber to determine that no reasonable trier of fact would have relied significantly on cell site analysis given its

⁶⁰ TJ, paras 2019-2058.

⁶¹ TJ, paras 1563, 2122-2145, 6900-6902.

⁶² TJ, paras 1571, 2122-2124, 2129, 2143-2145, 2653-2654.

⁶³ TJ, paras 1930, 2002, 2006, 2009-2013, 2124, 2129-2133, 2144.

⁶⁴ TJ, paras 1563, 1591, 1593, 1599, 1742-1743, 2074-2075, 2131, 2134-2145, 2508-2509, 2648.

clear limitations and, consequently, these factual errors resulted in a miscarriage of justice negating all findings of guilt against Mr Ayyash.

Ground 6: The Trial Chamber erred in fact in finding that co-location analysis conducted by Prosecution witnesses was reliable, and further erred in law and fact by conducting its own co-location analysis.

54. The Trial Chamber demonstrated a lack of understanding of co-location analysis, including its purpose, reliability, and available conclusions.⁶⁵
55. The Trial Chamber erred in fact in finding that evidence on co-location given by Prosecution witnesses Mr Philips and Mr Donaldson was reliable.⁶⁶
56. The Trial Chamber erred in law and fact in conducting its own co-location analysis on multiple occasions, despite lacking relevant expertise, and without properly accounting for the limitations of co-location analysis.⁶⁷
57. Requested relief: The Defence requests the Appeals Chamber to find that these errors negate the Trial Chamber's findings on co-location analysis that form the basis for attributing network mobile phones to Mr Ayyash.

⁶⁵ TJ, paras 1565, 1571, 2490-2491, 2501, 2508-2509, 2514, 2547, 2619, 2628, 2642-2647.

⁶⁶ TJ, paras 2520, 2525, 2529, 2533, 2545, 2546, 2564, 2578, 2639-2640, 2649, 2850, 3048-3049, 3054-3055, 3064, 3075.

⁶⁷ TJ, paras 2962, 2987-2996, 3015, 3018, 3022, 3048.

D. Ground related to attribution

Ground 7: The Trial Chamber erred in law and fact in finding that Mr Ayyash was the principal user of the mobile phones attributed to him by the Prosecution.⁶⁸

58. The Trial Chamber erred in law and fact in finding that Mr Ayyash was the principal user of the mobile phones attributed to him by the Prosecution, and that Mr Ayyash used those mobile phones at relevant times during the attribution period.⁶⁹
59. The Trial Chamber erred in law by misapplying the proper legal standard for circumstantial evidence to its findings on attribution of mobile phones to Mr Ayyash, including by failing to apply the principle of *in dubio pro reo*. This error specifically includes the personal mobiles phones 165,⁷⁰ 170,⁷¹ 935,⁷² and 091,⁷³ as well as the network phones.⁷⁴
60. The Trial Chamber erred in law by failing to provide a reasoned decision for attribution, including the failure to address relevant Defence submissions.⁷⁵
61. The Trial Chamber erred in law by relying on material not in evidence as a basis for findings related to the attribution of mobile phones to Mr Ayyash.⁷⁶
62. The Trial Chamber erred in law and fact in finding Mr Ayyash actually lived at two particular addresses, used landlines at those residences, and “made or received some of the calls involving landline 851.”⁷⁷

⁶⁸ TJ, paras 3411-3414.

⁶⁹ TJ, paras 2632, 2756, 2782, 2784, 2882, 2930, 2933-2934, 3028, 3067, 3094, 3138, 3141, 3188, 3255, 3411-3414.

⁷⁰ TJ, paras 2718, 2730, 2742-2756.

⁷¹ TJ, paras 2757-2758, 2776-2784.

⁷² TJ, paras 2862-2882.

⁷³ TJ, paras 2920-2930.

⁷⁴ TJ, paras 2933, 3059-3067, 3129-3141, 3173-3189, 3246-3255, 3411.

⁷⁵ TJ, paras 2690, 2740, 2775, 2856-2859, 2915.

⁷⁶ TJ, fns 5377, 5449, 5542, 5584.

⁷⁷ TJ, paras 2691-2696, 2712-2717, 2732-2735, 2769-2770, 2839-2844, 2902, 3981, 3985.

63. The Trial Chamber erred in its statement of law regarding notice of the Prosecution case to the accused,⁷⁸ failed to properly consider relevant submissions made by the Defence,⁷⁹ and erroneously found a lack of prejudice resulting from the failure to provide adequate notice.⁸⁰ The Trial Chamber exacerbated this error by making findings on allegations not properly notified to the Defence.⁸¹
64. The Trial Chamber erred in law and fact in attributing to specified individuals some phone numbers that were in contact with phones allegedly used by Mr Ayyash.⁸² The Trial Chamber further erred in making unsubstantiated findings as to the motivations of some of those individuals, contrary to the Defence's request to draw an adverse inference, which the Trial Chamber failed to address.⁸³
65. The Trial Chamber erred in law and fact by relying on faulty single user analysis, including co-location referred to in Ground 6, as a suitable method for attribution.⁸⁴
66. Requested relief: These errors, individually or in combination with other errors, invalidate the Trial Judgment and occasion a miscarriage of justice. The Defence requests the Appeals Chamber to determine that the attribution of mobile phones to Mr Ayyash has not been proved beyond reasonable doubt.

⁷⁸ TJ, paras 72-74. *See also*, TJ, paras 145-152, 206; Decision on Alleged Defects in the Indictment, para. 64; Decision on Alleged Defects in 21 June 2013 Indictment, paras 27, 50; Decision on Alleged Defects – Merhi Indictment, paras 18, 45; Decision Dismissing Merhi Indictment Leave to Appeal, para. 6; 20170112_STL-11-01_T_T321_OFF_PUB_EN_1-46, p.24:19-23; 20170207_STL-11-01_T_T331_OFF_PUB_EN_1-113, p.3:3-6.

⁷⁹ TJ, fn. 49.

⁸⁰ TJ, paras 152, 3006, 3089. *See also*, paras 121-127.

⁸¹ TJ, paras 2663, 2936-3030, 3064, 3315-3323, 3394-3395, 3400, 3406, 3409, 3414 (Yellow 669); 2661, 3068-3096, 3413 (Blue 322).

⁸² As some contacts overlap for the different mobile phones attributed to Mr Ayyash, the Chamber repeats this error throughout the attribution section of the Trial Judgment. The Defence highlights footnotes 5389, 5392, 5394, 5397, 5400, 5404, 5408, 5412, 5416, 5420, and 5425 as the primary errors in this regard. These errors also pertain to paras 2707, 2729, 2765, 2836-2837, 2894-2895.

⁸³ TJ, para. 2751.

⁸⁴ TJ, paras 2615-2657, 2845-2861, 2878-2880, 2906-2912, 2927-2928, 2960-2996, 3012-3029, 3044-3055, 3060-3066, 3072-3081, 3090-3095, 3104-3125, 3131-3140, 3151-3169, 3178-3188, 3197-3242, 3246-3254.

E. Grounds related to legal findings

Ground 8: The Trial Chamber erred in law and fact in finding that Mr Ayyash participated in a conspiracy with the aim of assassinating Mr Hariri.

67. The below subgrounds, taken individually or in combination, render the Trial Chamber's findings related to the conspiracy untenable. While directly related to count 1, the findings against Mr Ayyash under counts 2-5 are based entirely on his participation in the conspiracy as found by the Trial Chamber.⁸⁵ The granting of one or more of these subgrounds would therefore result in overturning Mr Ayyash's convictions for counts 2-5.

Subground 8.1: The Trial Chamber erred in law and fact in finding that Mr Ayyash had a role in the conspiracy.⁸⁶

68. The Trial Chamber erred in law and fact in making speculative and unsubstantiated findings that Mr Ayyash participated in the alleged conspiracy by, *inter alia*, leading the assassination team;⁸⁷ using network phones, including during surveillance activities;⁸⁸ and being actively involved in the assassination on the day of the attack, including coordinating people and launching the operation.⁸⁹

69. Requested relief: The Defence requests the Appeals Chamber to apply the proper legal standard to the evidence and determine that no reasonable trier of fact could have found beyond reasonable doubt that Mr Ayyash was a member of the alleged conspiracy.

⁸⁵ TJ, para. 6643.

⁸⁶ TJ, paras 20, 6364, 6380, 6384, 6436-6502, 6628, 6634, 6637-6640, 6644-6645, 6714-6722, 6730, 6755-6756.

⁸⁷ TJ, paras 6380, 6488-6492, 6732-6741, 6805-6806.

⁸⁸ TJ, paras 6380, 6384, 6439-6340, 6484, 6652-6655. *See also*, paras 6714-6722, 6755, 6803-6804, 6806, 6811, 6826.

⁸⁹ TJ, paras 6380, 6440, 6656-6707. *See also*, paras 6715-6717, 6732-6741, 6755-6766, 6804-6805.

Subground 8.2: The Trial Chamber erred in fact in making specific findings on the aim of the surveillance in the absence of any evidence to support that conclusion.⁹⁰

70. The Trial Chamber erred in fact in finding that, on the basis of insufficient circumstantial evidence, the aim of the surveillance was to eventually determine a suitable method to kill Mr Hariri, including finding an appropriate location for the intended attack.⁹¹ No reasonable trier of fact could have concluded that this aim was the only reasonable inference available from the evidence before it.
71. The Trial Chamber erred in making the speculative and unsubstantiated finding that a “final decision to proceed” was taken by some unknown individual or organisation “sometime in early February”, which changed the aim of the surveillance.⁹²
72. Requested relief: The Defence requests the Appeals Chamber to find that no reasonable trier of fact could have reached the conclusions of the Trial Chamber regarding the aim of the surveillance, and that these errors negate the Trial Chamber’s findings on conspiracy to commit a terrorist act.

Ground 9: The Trial Chamber erred in law and fact in finding that Mr Ayyash “must have known” Mr Hariri would be assassinated, and how and when that assassination would take place.⁹³

73. The Trial Chamber erred in law and fact by inferring Mr Ayyash’s mental state from “proven” actions, in the absence of direct evidence. As there were no proven actions, to infer Mr Ayyash’s *mens rea* was an error, particularly for the special intent crime of terrorism.⁹⁴

⁹⁰ TJ, paras 7, 22, 4735, 6364-6368, 6438-6440, 6484-6502, 6652.

⁹¹ TJ, paras 6380 (including the reference to Ch. X(E)), 6438-6440, 6652-6655, 6718-6721.

⁹² TJ, paras 6493-6500, 6718.

⁹³ TJ, paras 6175, 6501, 6754-6770, 6808-6818, 6825-6831, 6837-6839.

⁹⁴ TJ, paras 6175, 6199, 6268-6269, 6308, 6329.

74. Requested relief: Errors relating to Mr Ayyash’s *mens rea* impact all counts against him. The Defence requests the Appeals Chamber to determine that the Trial Chamber failed to properly establish Mr Ayyash’s *mens rea* for the crimes charged.

F. Ground related to sentencing

Ground 10: The Trial Chamber erred in law and fact by imposing on Mr Ayyash five concurrent life terms of imprisonment, a sentence manifestly disproportionate to his culpable conduct, as found by the Trial Chamber.

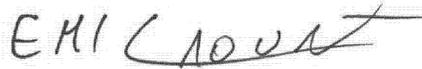
75. The Trial Chamber erred in law and fact by failing to provide sufficient and reasonable justification for imposing five separate sentences on Mr Ayyash, instead of a single sentence, even though all five counts rely on the same set of facts.⁹⁵
76. The Trial Chamber erred in law and fact by impermissibly counting the same factors towards sentence more than once, and taking account of irrelevant or improper factors.⁹⁶
77. The Trial Chamber erred in law and fact by considering the “inherent gravity” of the crime of terrorism when assessing Mr Ayyash’s culpable conduct, and conflating the legal characterisation of Mr Ayyash’s crimes with the specific circumstances of the case.⁹⁷
78. Requested relief: The Defence requests the Appeals Chamber to quash the Trial Chamber’s sentence of five life terms of imprisonment and determine a sentence that accurately and fairly reflects Mr Ayyash’s culpable conduct, if any.

⁹⁵ SJ, paras 214-216, 238-241, 257-258, 307.

⁹⁶ SJ, paras 176-77, 185, 188-190, 194, 197-198, 252-257.

⁹⁷ SJ, paras 130, 169-170, 178, 187, 193, 231, 238-240, 250, 253-258.

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