



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRE-TRIAL JUDGE

Case No.: **STL-13-04/I/PTJ**

The Pre-Trial Judge: **Judge Daniel Fransen**

The Registrar: **Mr Daryl Mundis**

Date: **11 October 2013**

Original language: **French**

Classification: **Public**

THE PROSECUTOR
v.
HASSAN HABIB MERHI

**PUBLIC REDACTED VERSION OF THE “DECISION RELATING TO THE
EXAMINATION OF THE INDICTMENT OF 5 JUNE 2013 ISSUED AGAINST
MR HASSAN HABIB MERHI” DATED 31 JULY 2013**

Office of the Prosecutor:
Mr Norman Farrell



I. The subject of the decision

1. By way of the present decision, the Pre-Trial Judge of the Special Tribunal for Lebanon (the “Tribunal”) rules on the merits of the Indictment dated 5 June 2013 (the “Indictment of 5 June 2013”) issued by the Prosecutor against Mr Hassan Habib Merhi (“Mr Merhi” or the “suspect”) in the context of the case relating to the attack carried out on 14 February 2005 against Mr Hariri and other persons¹ (the “Hariri case”), to which he made two corrigenda, on 5 June and 25 July 2013. The Pre-Trial Judge also rules on the Prosecution motion to not disclose the Indictment of 5 June 2013 to the public and to redact it so that it might be served on Mr Mehri in accordance with Article 18 (2) of the Statute and Rules 61 (iv), 74 and 77 (A) of the Rules of Procedure and Evidence (the “Rules”).

2. The Pre-Trial Judge shall rule separately on the Prosecution’s motion requesting him, pursuant to Article 18 (2) of the Statute and Rules 14, 61 (iv), 68 (J) (i), 76, 77 (A), 79, 84 and 101 (G) of the Rules, to issue: (i) upon confirmation of the Indictment of 5 June 2013, a national and international arrest warrant including an order/request for the transfer of Mr Merhi to the Tribunal; and (ii) an order for his detention in the Tribunal’s detention facility in the Kingdom of the Netherlands.

II. Procedural background

3. On 17 January 2011, pursuant to Rule 68 of the Rules, the Prosecutor forwarded to the Pre-Trial Judge an Indictment against Mr Ayyash relating to the Hariri case.² On 11 March,³ 6 May⁴ and 10 June 2011,⁵ the Prosecutor filed new versions of the Indictment in which three new suspects, Mr Badreddine, Mr Oneissi and Mr Sabra, were added.

¹ The term “attack” originates from Article 1 of the Statute. It carries no legal characterisation in the context of the present decision.

² STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, Submission of an Indictment for Confirmation (Rule 68); and (1) Motion for an Arrest Warrant and Order for Transfer (Rule 79); (2) Urgent Motion for the Non-Disclosure of the Indictment (Rule 74); and (3) Urgent Motion for an Order for Interim Non-Disclosure of the Identities of Witnesses Pending the Implementation of Appropriate Witness Protection Measures (Rules 77 and 115), confidential and *ex parte*, 17 January 2011, (the “Indictment of 17 January 2011”). A public redacted version of the combined submission (without the Annexes) was filed on 5 April 2012 pursuant to the Pre-Trial Judge’s Order of 8 February 2012.

³ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, Submission of an Amended Indictment for Confirmation (Rules 68 and 71) and Motion for Arrest Warrants and Orders for Transfer (Rule 79), confidential and *ex parte*, 11 March 2011. This Submission (without the Annexes) was made public pursuant to the Pre-Trial Judge’s Order of 6 December 2011.

⁴ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, Combined Motion of the Prosecutor (1) Submission of an Indictment for Confirmation (Rule 68), (2) Motion for Continuation of Pre-Trial Judge’s Order
Case No.: STL-13-04/I/PTJ

4. On 28 June 2011, the Pre-Trial Judge issued a decision relating to the examination of the Indictment of 10 June 2011 issued by the Prosecutor (the “Indictment of 10 June 2011”) and authorised the indictment of Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra (the “Decision of 28 June 2011”).⁶ This case, entitled “*The Prosecutor v. Ayyash et al.*”, bears the reference “STL-11-01”.

5. On 8 February 2012, the Prosecution sought leave from the Pre-Trial Judge to amend the Indictment of 10 June 2011.⁷ Among the principal amendments made to this Indictment, the Prosecution proposed the indictment of a fifth person, Mr Merhi.

6. On 13 March 2012, the Pre-Trial Judge dismissed the Prosecution’s request of 8 February 2012, considering that it could not request, by way of amendments, the indictment of an individual who was not initially accused in the Indictment of 10 June 2011.⁸

dated 19 January 2011 pursuant to Rule 96 (B), and (3) Motions in the event of confirmation of the Indictment pursuant to Rules 74, 77 and 79, confidential and *ex parte*, 6 May 2011. Public redacted versions of the Combined Motion and Annex A were filed on 16 February 2012 pursuant to the Pre-Trial Judge’s Order of 8 February 2012. Annex C was made public pursuant to the Pre-Trial Judge’s Order of 6 December 2011.

⁵ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, Submission of an Amended Indictment for Confirmation under Rule 71 and in Response to the Order of the Pre-Trial Judge dated 9 June 2011, confidential and *ex parte*, 10 June 2011 (the “Indictment of 10 June 2011”). This document was made public (except for Annex A) pursuant to the Pre-Trial Judge’s Order of 6 December 2011. Annex A was filed confidentially pursuant to the Pre-Trial Judge’s Decision of 10 February 2012.

⁶ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, Decision Relating to the Examination of the Indictment of 10 June 2011 issued against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra, confidential, 28 June 2011. A public redacted version dated the same day was filed on 16 August 2011. This decision confirms the counts contained in the Indictment of 10 June 2011 with the exception of the attempted homicide of 231 other persons which does not fall under the constituent elements of a terrorist act but under those of intentional attempted homicide. See para. 53.

⁷ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Request for Leave to Amend the Indictment Pursuant to Rule 71(A) (ii), Submission of an Amended Indictment, and Related Prosecution Applications, confidential and *ex parte*, 8 February 2012.

⁸ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision relating to the Prosecution Request of 8 February 2012 for Leave to File an Amended Indictment, confidential, 13 March 2012.

7. On 8 October 2012, the Prosecutor forwarded to the Pre-Trial Judge, for confirmation, an Indictment, accompanied by supplementary evidentiary materials, issued against Mr Merhi in the context of the Hariri case (the “Indictment of 8 October 2012”).⁹
8. On 27 November 2012, the Pre-Trial Judge held a meeting with the Prosecutor, pursuant to Rule 68 of the Rules, during which a number of issues relating to the Indictment of 8 October 2012 were discussed.
9. On 7 December 2012, the Prosecutor withdrew the Indictment of 8 October 2012.¹⁰
10. On 5 June 2013, the Prosecutor signed an Indictment issued against Mr Merhi. This case, entitled “*The Prosecutor v. Merhi*”, bears the reference “STL-13-04”.
11. On 24 June 2013, the Pre-Trial Judge was seized of the Prosecution’s submission for confirmation of the Indictment of 5 June 2013, as well as the accompanying evidentiary materials (the “Submission”).¹¹ The same day, the Pre-Trial Judge was also seized of a corrigendum to the Indictment of 5 June 2013.¹²
12. On 26 June 2013, the Prosecutor requested the withdrawal of two exhibits from the list of evidentiary materials filed in support of the Indictment of 5 June 2013.¹³ On 25 July 2013, the Pre-Trial Judge authorised that withdrawal.¹⁴
13. On 26 June 2013, the Pre-Trial Judge sought explanations from the Prosecutor regarding the Indictment of 5 June 2013.¹⁵

⁹ STL, *The Prosecutor v. Merhi*, Case No. STL-12-03/I/PTJ, Prosecution’s Submission of an Indictment for Confirmation and Order to Keep the Filing and its Annexes Confidential and *Ex Parte*; and Motion for an Arrest Warrant, Order for Transfer and Detention; and Order for non-Disclosure, confidential and *ex parte*, 8 October 2012.

¹⁰ STL, *The Prosecutor v. Merhi*, Case No. STL-12-03/I/PTJ, Withdrawal of the Indictment against Hasan (sic) Habib Merhi, confidential and *ex parte*, 7 December 2012.

¹¹ STL, *The Prosecutor v. Merhi*, Case No. STL-13-04/I/PTJ, Prosecution’s Submission of an Indictment for Confirmation and Order to Keep this Filing and its Annexes Confidential and *Ex Parte*; and Motion for an Arrest Warrant, Order for Transfer and Detention; and Order for Non-Disclosure, confidential and *ex parte*, 5 June 2013.

¹² STL, *The Prosecutor v. Merhi*, Case No. STL-13-04/I/PTJ, Corrigendum to Annex A of “Prosecution’s Submission of an Indictment for Confirmation and Order to Keep this Filing and its Annexes Confidential and *Ex Parte*; and Motion for an Arrest Warrant, Order for Transfer and Detention; and Order for Non-Disclosure”, confidential and *ex parte*, 20 June 2013.

¹³ STL, *The Prosecutor v. Merhi*, Case No. STL-13-04/I/PTJ, Prosecutor’s Request to Withdraw Two Internal Memoranda from Supporting Materials, confidential and *ex parte*, 26 June 2013.

¹⁴ STL, *The Prosecutor v. Merhi*, Case No. STL-13-04/I/PTJ, Decision Authorising the Withdrawal of Two Internal Memoranda from the Prosecution Exhibit List, confidential and *ex parte*, 25 July 2013.

¹⁵ Correspondence from the Pre-Trial Judge to the Prosecutor, *Questions relatives à l’acte d’accusation du 5 juin 2013 dans l’affaire STL-13-04*, confidential and *ex parte*, 26 June 2013.

14. On 3 July 2013, by virtue of his authority under Rule 68 (E) and (F) of the Rules, the Pre-Trial Judge held a meeting with the Prosecutor in order to obtain a number of clarifications as well as information regarding the Indictment of 5 June 2013. On 16 July 2013, the Prosecutor completed his verbal response to those questions with a written note.¹⁶

15. On 15 July 2013, the Prosecutor filed a corrigendum to Annex F to the Submission by way of which he added eight files to the list of exhibits filed in support of the Submission, which had been omitted in error.¹⁷

16. On 16 July 2013, the Pre-Trial Judge sought explanations from the Prosecutor regarding a number of evidentiary supporting documents for the Indictment of 5 June 2013¹⁸ to which the Prosecutor replied on 22 July 2013.¹⁹

17. On 19 July 2013, at the request of the Prosecutor,²⁰ the Pre-Trial Judge ordered the Registry to file a certificate indicating that the evidentiary documents filed on 6, 11 and 20 May 2011 in the STL-11-01 case file are also evidentiary documents for the STL-13-04 case file, without it being necessary for them to be filed again in that file (the “Supporting Documents for the Indictment of 10 June 2011”).²¹ On 23 July 2013, the Pre-Trial Judge received that certificate.²²

¹⁶ Correspondence from the Prosecutor to the Pre-Trial Judge, reference IOP/O/L/NF/2013/0083, confidential, 16 July 2013.

¹⁷ STL, *The Prosecutor v. Merhi*, Case No. STL-13-04/I/PTJ, Corrigendum to Annex F to “Prosecution’s Submission of an Indictment for Confirmation and Order to Keep this Filing and its Annexes Confidential and *Ex Parte*; and Motion for an Arrest Warrant, Order for Transfer and Detention; and Order for Non-Disclosure”, confidential and *ex parte*, 15 July 2013 (the “Corrigendum of 15 July 2013”).

¹⁸ Correspondence from the Pre-Trial Judge to the Prosecutor, Questions to the Office of the Prosecutor related to the documents filed in support of the Prosecution’s Submission of an Indictment of 5 June 2013, confidential and *ex parte*, 16 July 2013.

¹⁹ Correspondence from the Prosecutor to the Pre-Trial Judge, Response to Pre-Trial Judge’s Questions related to documents filed in support of the Prosecution’s Submission of an Indictment of 5 June 2013, reference IOP/O/L/2013/NF/0086, 22 July 2013.

²⁰ STL, *The Prosecutor v. Merhi*, Case No. STL-13-04/I/PTJ, Prosecution’s Request for a Certificate to be Filed in Lieu of Filing the Supporting Materials from Case IT-01-11 (sic) *Ayyash et al* in the Present Case, confidential and *ex parte*, 15 July 2013.

²¹ STL, *The Prosecutor v. Merhi*, Case No. STL-13-04/I/PTJ, Decision on “Prosecution’s Request for a Certificate to be Filed in Lieu of Filing the Supporting Materials from Case IT-01-11 (sic) *Ayyash et al* in the Present Case, confidential and *ex parte*, 19 July 2013.

²² STL, *The Prosecutor v. Merhi*, Case No. STL-13-04/I/PTJ, Certificate, confidential and *ex parte*, 22 July 2013.

18. On 25 July 2013, the Prosecution filed a further corrigendum to the Indictment of 5 June 2013.²³

19. On 29 July 2013, the Prosecution sought leave to file 12 additional items of evidence in support of the Indictment of 5 June 2013.²⁴ Amongst these, the Prosecution is of the opinion that three items replace those that it had filed previously.

III. The Submission

20. The Prosecution seeks confirmation of the Indictment of 5 June 2013 against Mr Merhi in relation to the Hariri case. It also seeks the non-disclosure to the public of that Indictment and the supporting documents until a subsequent order is issued at its request, pursuant to Article 18 (2) of the Statute and Rules 61 (iv), 77 (A) and 96 (B) of the Rules.

21. The Prosecution requests the issuance of a national and international arrest warrant against Mr Merhi, should the Indictment of 5 June 2013 be confirmed, and states its intention to seek the joinder of this case with the case of “*The Prosecutor v. Ayyash et al.*”.

IV. Jurisdiction of the Pre-Trial Judge

22. In accordance with Article 18 of the Statute and Rule 68 of the Rules, the Pre-Trial Judge reviews the Indictment forwarded to him by the Prosecutor for confirmation, as necessary. Moreover, in accordance with Rule 74 of the Rules, at the request of the Prosecutor, he may order, in the interests of justice and in exceptional circumstances, the non-disclosure to the public of an indictment.

23. As a consequence, the Pre-Trial Judge has jurisdiction to rule on the Submission.

V. Applicable Law

24. The Pre-Trial Judge recalls that, in the context of the review of the Indictment of 17 January 2011, he forwarded to the Appeals Chamber preliminary questions relating to the crimes and modes of responsibility mentioned in that Indictment, as well as on cumulative charging.²⁵

²³ STL, *The Prosecutor v. Merhi*, Case No. STL-13-04/I/PTJ, Second Corrigendum to the Merhi Indictment, confidential and *ex parte*, 25 July 2013 (the “Corrigendum of 25 July 2013”).

²⁴ STL, *The Prosecutor v. Ayyash et al.* (sic), Case No. STL-13-04/I/PTJ, Prosecution Application to Present Additional Material in Support of the Indictment filed on 5 June 2013, confidential and *ex parte*, 29 July 2013 (the “Application of 29 July 2013”).

25. On 16 February 2011,²⁶ the Appeals Chamber responded to the aforementioned questions by explaining the applicable law with respect to a terrorist act,²⁷ to intentional homicide,²⁸ attempted homicide,²⁹ modes of responsibility,³⁰ cumulative charging,³¹ as well as aggravating circumstances.³²

26. Insofar as the crimes and the modes of responsibility decided upon by the Prosecutor in the Indictment of 5 June 2013 are similar to those mentioned in the initial Indictment in the case of *The Prosecutor v. Ayyash et al.*, for the purposes of the present decision, it should be recalled that the Appeals Chamber concluded:

i. With respect to the terrorist act:

Article 314 of the Lebanese Criminal Code and Article 6 of the Law of 1958, interpreted in the light of international rules binding upon Lebanon, provided such interpretation does not run counter to the principle of legality, require the following elements for the crime of terrorism [...]:

- a. the volitional commission of an act or the credible threat of an act;
- b. through means that are likely to pose a public danger;³³ and
- c. with the special intent to cause a state of terror;

If the perpetrator of a terrorist act uses for example explosives intending to kill a particular person but in the process kills or injures persons not directly targeted, then that perpetrator may be liable for terrorism *and* intentional homicide (or attempted homicide) if he had foreseen the possibility of those additional deaths and injuries but nonetheless willingly took the risk of their occurrence (*dolus eventualis*, namely advertent recklessness or constructive intent) [...].³⁴

²⁵ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, Order on Preliminary Questions addressed to the Judges of the Appeals Chamber pursuant to Rule 68, paragraph (G) of the Rules of Procedure and Evidence, 21 January 2011.

²⁶ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 (the “Interlocutory Decision of the Appeals Chamber”).

²⁷ *Id.*, Disposition, paras 1-4.

²⁸ *Id.*, Disposition, paras 9-12.

²⁹ *Ibid.*

³⁰ *Id.*, Disposition, para. 13.

³¹ *Id.*, Disposition, paras 14-15.

³² *Id.*, paras 59, 145, 170 and 175.

³³ The Appeals Chamber “notes that whether certain means are liable to create a public danger within the meaning of Article 314 should always be assessed on a case-by-case basis, having regard to the non-exhaustive list in Article 314 as well as to the context and the circumstances in which the conduct occurs. This way, Article 314 is more likely to be interpreted in consonance with international obligations binding upon Lebanon” (*Id.*, Disposition, para. 3).

³⁴ *Id.*, Disposition, paras 3-4.

ii. With regard to conspiracy:

Article 270 of the Lebanese Criminal Code and Article 7 of the Law of 11 January 1958 provide the following elements for the crime of conspiracy [...]:

- a. two or more individuals;
- b. who conclude or join an agreement of the type described in paragraph 196 [of the Interlocutory Decision of the Appeals Chamber];
- c. aiming at committing crimes against State security (for purposes of this Tribunal, the aim of the conspiracy must be a terrorist act);
- d. with an agreement on the means to be used to commit the crime (which for conspiracy to commit terrorism must satisfy the “means” element of Article 314 [of the Lebanese Criminal Code]); and
- e. criminal intent relating to the object of the conspiracy.³⁵

iii. With regard to intentional homicide:

Articles 547-549 of the Lebanese Criminal Code require the following elements for the crime of intentional homicide [...]:

- a. an act or culpable omission aimed at impairing the life of a person;
- b. the result of the death of a person;
- c. a causal connection between the act and the result of death;
- d. knowledge of the circumstances of the offence (including that the act is aimed at a living person and conducted through means that may cause death); and
- e. intent to cause death, whether direct or *dolus eventualis*.³⁶

iv. With regard to attempted homicide:

Articles 200-203 of the Lebanese Criminal Code require the following elements for the crime of attempted homicide [...]:

- a. a preliminary action aimed at committing the crime (beginning the execution of the crime);
- b. the subjective intent required to commit the crime; and
- c. the absence of a voluntary abandonment of the offence before it is committed.³⁷

³⁵ *Id.*, Disposition, para. 7.

³⁶ *Id.*, Disposition, para. 11.

³⁷ *Ibid.*

v. With regard to modes of responsibility:

An evaluation is to be made between international criminal law and domestic Lebanese law when the Tribunal applies modes of criminal responsibility. Should no conflicts arise, Lebanese law should be applied. However, if conflicts do arise, then, taking account of the circumstances of the case, the legal regime that most favours the accused shall be applied [...].³⁸

vi. With regard to cumulative charging:

Cumulative charging should only be allowed when separate elements of the charged offences make those offences truly distinct and where the rules envisaging each offence relate to substantially different values. The Tribunal should prefer alternative charging where a conduct would not permit multiple convictions. Modes of liability for the same offence should always be charged in the alternative [...].³⁹

vii. With regard to aggravating circumstances:

Taking into account that the intended result in the crime of terrorism is to spread terror, and not necessarily to cause death or injury, deaths caused by terrorism become aggravating circumstances, pursuant to Article 6 of the Law of 11 January 1958.⁴⁰

[...]under Lebanese law the results of terrorist acts such as deaths, destruction of property and other impacts designated in Article 6 of the Law of 11 January 1958 constitute an aggravating circumstance of the terrorist act (*not* a material element) [...].⁴¹

This reasoning stems from the fact that premeditation, provided for in Article 549 of the Lebanese Criminal Code, is not an element of the crime but an aggravating circumstance of the sentence. Therefore it does not enter in the evaluation of the crime but becomes relevant at a later stage, in the determination of the sentence.⁴²

To sum up, intentional homicide based on a direct intent leading to the death of the targeted victim falls under Articles 547 and 188 of the Lebanese Criminal Code. Intentional homicide based on *dolus eventualis* leading to the death of unintended victims falls under Articles 547 and 189 of the Code. Premeditation as an aggravating circumstance is applicable to both forms of the crime (with direct intent or *dolus eventualis*) and to all perpetrators and accomplices who share the premeditation.⁴³

27. The Pre-Trial Judge refers to these definitions of the applicable law for the purposes of the review of the Indictment of 5 June 2013.

³⁸ *Id.*, Disposition, para. 13.

³⁹ *Id.*, Disposition, para. 15.

⁴⁰ *Id.*, para. 59.

⁴¹ *Id.*, para. 145.

⁴² *Id.*, para. 170.

⁴³ *Id.*, para. 175.

VI. Criteria for the review of the Indictment

28. In accordance with the terms of Article 18 of the Statute and Rule 68 of the Rules, within the context in which these provisions are relevant, with their subject and their aim, for the purposes of confirming an Indictment, the Pre-Trial Judge must ensure that:

- i. the crimes referred to in the Indictment fall within the jurisdiction of the Tribunal, as defined in Articles 1 to 3 of the Statute;
- ii. with regard to examination of the documents included with the Indictment, that Indictment relies first and foremost on evidence that is sufficient and credible to bring proceedings against the suspect; and
- iii. the Indictment is sufficiently precise and reasoned to allow the suspect to understand the allegations made against him.⁴⁴

VII. Supporting Documents for the Indictment of 5 June 2013

29. In the Submission, the Prosecution relies on 2,524 files which make up the evidentiary materials provided in support of the Indictment of 5 June 2013 (Annex F to the Submission) as well as on the evidentiary materials provided in support of the Indictment of 10 June 2011 in the case of “*The Prosecutor v. Ayyash et al.*”⁴⁵

30. In the interests of rationality, the Prosecutor did not however file these last evidentiary materials because the Pre-Trial Judge had already received them in connection with the case of “*The Prosecutor v. Ayyash et al.*”. However, as indicated previously,⁴⁶ on 22 July 2013, a certificate was filed stating that the evidentiary materials in support of the Indictment of 10 June 2011 were part of the STL-13-04 case file.⁴⁷

31. The Pre-Trial Judge considers that, taking account of the wording of the certificate, the evidentiary materials filed in support of the Indictment of 10 June 2011 are part of all the evidentiary materials in support of the Indictment of 5 June 2013 in accordance with Rule 68 (F) of the Rules and should be treated as such for the requirements of the proceedings.

⁴⁴ Decision of 28 June 2011, para. 28.

⁴⁵ Submission, paras 9-11 and Corrigendum.

⁴⁶ Supra, para. 17.

⁴⁷ Cf. footnote 22 above.

VIII. Examination of the Submission

A. Preliminary Observations

32. The Pre-Trial Judge hereby authorises the filing of the corrected versions of the Indictment of 5 June 2013.⁴⁸

33. The Pre-Trial Judge also finds that the Prosecution requests of 15 and 29 July 2013 to add and replace evidentiary materials are well-founded. Indeed, the Prosecutor has stated the precise reasons why those materials are relevant to the Indictment of 5 June 2013 and were not filed at an earlier date. Furthermore, he stated that the three items⁴⁹ replacing those that had been initially filed in support of the Submission had been amended, in particular following observations made by the Pre-Trial Judge during the review procedure of the Indictment of 5 June 2013. Consequently, the Pre-Trial Judge authorises the filing of those items in accordance with Rule 68 (1) of the Rules. The evidentiary materials filed in support of the Indictment of 5 June 2013, as well as the evidentiary materials filed in support of the Indictment of 10 June 2011 comprise, *inter alia*, reports from witnesses referred to as experts by the Prosecution, investigators notes, lists of telephone communications, witness interview reports, forensic reports, video recordings, photographs, maps and death certificates.

34. Among the evidentiary materials filed in June 2013, some of which were replaced on 29 July 2013, the Prosecution filed several reports prepared in particular by various members of its Office in relation to specific subject matters,⁵⁰ including:

- i. the witness statement from [REDACTED] of 28 May 2013 which relates to the profile of Mr Merhi,⁵¹
- ii. the report entitled “Indictment Report - Attribution of Phone Numbers to Hassan Habib Merhi” from [REDACTED] of 29 July 2013, which relates to the attribution of phones to the suspect,⁵²

⁴⁸ Any reference to the Indictment of 5 June 2013 in this document relates to the Indictment which was the subject of two corrigenda.

⁴⁹ According to the Prosecution, they are the following reports: “Indictment Report –Attribution of Phone numbers to Hassan Habib MERHI”, “Communications Evidence concerning the Assassination of Rafik Hariri: Chronology Report” and “Co-location report number 3 written by [REDACTED] regarding the single person use of mobile telephone numbers 3150071 and 375231 by suspect 3”, Application of 29 July 2013, para. 4.

⁵⁰ Contrary to what the Prosecution did in support of the Indictment of 10 June 2011 for which it filed a single report relating to the telephone communications made between the persons implicated in the attack perpetrated against Mr Hariri.

⁵¹ ERN 60280895-60280907.

- iii. the report entitled “Communications Evidence Concerning the Assassination of Rafik Hariri: Chronology Report-Hassan Habib Merhi” from [REDACTED] of 29 July 2013 (the “Chronology Report”), which relates to the participation of the suspect in the course of events leading to the attack of 14 February 2005;⁵³ and
- iv. the witness statement from [REDACTED] of 26 July 2013 relating to the co-location of the Green 3150071 and Purple 3575231 phones.⁵⁴

35. These reports are in turn based on a series of other documents which are essential to the understanding of the case:

- i. four sets of investigators notes relating respectively to the attribution of phones to Messrs Ayyash, Badreddine, Oneissi and Sabra;⁵⁵
- ii. a report entitled “Communications Evidence Concerning the Assassination of Rafik Hariri: Chronology Report” from [REDACTED], of 13 November 2012, which relates to the participation of the four accused in the course of the events leading to the attack of 14 February 2005;⁵⁶
- iii. a report entitled “Network Analysis Report: Red, Green, Blue and Yellow Phones”, analysing the phone networks prepared by [REDACTED], of 2 November 2012;⁵⁷
- iv. the report “[TRANSLATION] Presentation of the Cell Site Analysis Applied to the GSM Networks” prepared by [REDACTED], of 24 September 2012;⁵⁸ and

⁵² ERN D0327911-D0328017.

⁵³ ERN D0328018-D0328115.

⁵⁴ ERN D0327905-D0327910. That statement relies on the following materials which were added on 29 July 2013: Maps provided to [REDACTED] on 12-12-2012 for use in [REDACTED] report entitled “Single person use of 2 mobiles-Suspect 3”, ERN D0327447-D0327453; CST for Phone Number 3150071 provided to [REDACTED] on 11-12-2012 for use in [REDACTED] report entitled “Single person use of 2 mobiles-Suspect 3”, ERN D0327454-D0327545; CST for Phone Number 3575231 provided to [REDACTED] on 11-12-2012 for use in [REDACTED] report entitled “Single person use of 2 mobiles-Suspect 3”, ERN D0327546-D0327766; Ayyash co-location report - Issue 01 containing report “Demonstration of single person use of multiple mobile phones using Cell Site Analysis”, ERN D0216976-D0217258; and Report: “Demonstration of single person use of multiple mobile phones using Cell Site Analysis Suspect 2” written by [REDACTED], ERN D0221699-D0221944.

⁵⁵ Mr Ayyash: ERN D0205729-D0205934, 4 November 2012; Mr Badreddine: ERN D0187748-D0188040, 31 October 2012; Mr Oneissi: ERN 60275071-60275087, 24 October 2012; Mr Sabra: ERN 60274581-60274624, 19 October 2012.

⁵⁶ ERN D0225397-D0225786.

⁵⁷ ERN D0200399-D0200571.

⁵⁸ ERN D0136125-D0136305.

- v. an investigators note entitled “Acquisition of SIM Cards Report” relating to the acquisition of the phone cards presented in the Indictment of 5 June 2013, prepared by [REDACTED], of 4 October 2012.⁵⁹

36. The Pre-Trial Judge considers that these reports and documents put into perspective the materials collected by the Prosecution in the context of its investigations. They allow the existence of prima facie evidence in support of the Indictment of 5 June 2013 to be verified in a comprehensible and ordered fashion.

37. The Pre-Trial Judge finds that as the Indictment of 5 June 2013 is based on the same kind of circumstantial evidence as that which substantiates the Indictment of 10 June 2011, the same remarks apply that were made in the Decision of 28 June 2011.⁶⁰ Indeed, the role of the suspect was determined by the Prosecution essentially on the basis of the analysis of the telephone communications, as well as of the mobile phone usage. In that regard, the Pre-Trial Judge stated that:

It is only by having a comprehensive view of this evidence that it is possible to understand the attack of 14 February 2005, the events which preceded it and those which followed, as well as the manner in which the suspects were allegedly implicated in them. In light of his verifications, the Pre-Trial Judge deems that this evidence is sufficiently credible and relevant to review the Indictment initially. In order to lead to a conviction, it will nevertheless, if applicable, have to be shown to be established beyond reasonable doubt by the Trial Chamber.⁶¹

Finally, the Pre-Trial Judge emphasises that the alleged responsibility of the suspects, as co-perpetrators or accomplices, has been examined by taking account solely of the criteria established by the Appeals Chamber. As such, he has deemed that he should not decide on their “position in the hierarchy” as described by the Prosecutor in paragraph 5 of the Indictment.⁶²

38. Lastly, the Pre-Trial Judge notes that the amendments to the Chronology Report filed in this case are, in particular, no longer aimed at designating the unidentified users of the phones of the different networks with the pseudonyms “S5”, “S6” “S7” etc. (subject number)⁶³ and no longer attribute one or several phone numbers belonging to different networks.⁶⁴ The Pre-Trial Judge considers however that the allegations relating to those unidentified users which appear in the Indictment of 5 June 2013 are based on other evidentiary materials and, in particular, those in

⁵⁹ ERN 60271149-60271206.

⁶⁰ Decision of 28 June 2011, paras 37 and 38.

⁶¹ *Id.*, para. 37, footnote omitted.

⁶² *Id.*, para. 38.

⁶³ Indictment of 5 June 2013, para. 19.

⁶⁴ Application of 29 July 2013, Annex C, p. 2.

support of the “Report relating to telephone communications made by persons implicated in the attack against Mr Hariri”, of 2 May 2011 by [REDACTED].⁶⁵

B. The counts and the jurisdiction of the Tribunal

39. Pursuant to Articles 2 and 3 of the Statute and the relevant provisions of the Lebanese Criminal Code⁶⁶ and of the Lebanese Law of 11 January 1958 “Increasing the penalties for sedition, civil war and interfaith struggle” (the “Law of 11 January 1958”),⁶⁷ the Prosecution has accused Mr Merhi of:

- i. conspiracy aimed at committing a terrorist act, as a co-perpetrator (Count 1);
- ii. being an accomplice in the commission a terrorist act by means of an explosive device, against Rafic Hariri (Count 2);
- iii. being an accomplice, of intentional homicide of Rafic Hariri, with premeditation by using explosive materials (Count 3);
- iv. being an accomplice, of intentional homicide of 21 persons listed in Annex A to the Indictment of 5 June 2013, with premeditation by using explosive materials (Count 4);
- v. being an accomplice, of attempted intentional homicide of 226 persons listed in Annex B to the Indictment of 5 June 2013, with premeditation by using explosive materials (Count 5).

⁶⁵ The Report Relating to the Telephone Communications Between the Persons Implicated in the Attack against Mr Hariri, of 2 May 2011 by [REDACTED] – ERN 60218475-60218992 – was filed in the case of *The Prosecutor v. Ayyash et al.* and attached to the present case file by the certificate of 22 July 2013. Cf. footnote 22 above.

⁶⁶ Arts 188, 189, 200, 212, 213, 219 (4) and (5), 270, 314, 547 and 549 (1) and (7) of the Lebanese Criminal Code.

⁶⁷ Arts 6 and 7 of the Lebanese Law of 11 January 1958.

40. The facts mentioned in the Indictment of 5 June 2013 relate to the attack carried out on 14 February 2005 against Mr Hariri and other persons. Pursuant to Article 1 of the Statute, those facts fall within the jurisdiction of the Tribunal.⁶⁸

41. In the case at hand, the Indictment of 5 June 2013 charges the suspect with the crimes of conspiracy aimed at committing a terrorist act, of complicity in committing a terrorist act, of complicity in intentional homicide and complicity in attempted intentional homicide which are all referred to in Article 2 (a) of the Statute and in Article 3 (1) (a) of the Statute, in Articles 188, 189, 200, 212, 213, 219 (4) and (5), 270, 314, 547, 549 (1) and (7) of the Lebanese Criminal Code and in Articles 6 and 7 of the Law of 11 January 1958.

42. As a consequence, the Pre-Trial Judge considers that the facts, the accusations and the modes of responsibility referred to do indeed fall within the jurisdiction of the Tribunal.

C. Assessment of the Counts of the Indictment

1. Relevant facts

43. Among the factual evidence put forward by the Prosecution and which has been established prima facie, the Pre-Trial Judge hereafter notes that which he considers the most relevant for him to rule on the counts of indictment.⁶⁹

a. The attack, the claim of responsibility, and the analysis of the phone data

44. On 14 February 2005 at 12.55, Mr Hariri, former Prime Minister of Lebanon, was killed following the detonation of a large quantity of explosives – approximately equivalent to 2,500 kg of TNT – which had been hidden in a “Mitsubishi Canter” van in the centre of Beirut in Lebanon. That suicide attack also caused the death of 21 other persons and injured at least 226 and led to the partial destruction of several buildings.

45. Shortly after the attack, a video cassette accompanied by a letter claiming responsibility was received in Beirut by the Al-Jazeera press agency. That video cassette, broadcast the same day on television by that press agency, shows a person unknown to the public, named Mr Abu Adass, claiming responsibility for the attack on behalf of a fictitious alleged fundamentalist

⁶⁸ Decision of 28 June 2011, paras 32-33.

⁶⁹ These factual elements rely principally on the same evidence as those which led the Pre-Trial Judge to consider as established prima facie evidence the factual elements contained in the Indictment of 10 June 2011 in the *Ayyash et al.* case.

group called “Victory and Jihad in Greater Syria” and announcing a number of acts of the same kind to come. The investigation however found that the perpetrator of the suicide attack was not Mr Abu Adass, without however identifying who it was.

46. The report and analysis of the call data records of 14 February 2005 enabled the Prosecution to discover six mobile phones which were communicating at key times and locations in relation to the attack. These six phones, whose users were registered under false names, were used exclusively to communicate with each other during the entire period that they were activated. For ease of understanding, the Prosecution has named the secret network formed by these phones the “Red Network”.

47. Subsequently, by using the technique of phone “co-location”,⁷⁰ the Prosecution identified other mobile phones which were also used by the users of the “Red Network” phones. These phones were also registered under false names and some of them connected exclusively, or to a large extent, with each other, allowing them to be used clandestinely. The Prosecution has thus identified four other groups of phones that it has referred to as “Green”, “Blue”, “Yellow” and “Purple”.

48. In order to determine the identity of the users of the phones of all of these groups of phones, by continuing to make use of the technique of phone “co-location”, the Prosecution has identified the personal mobile phones of some of these users. These phones were used for daily business, to call persons whose identity could be more easily revealed as they were not acting clandestinely. The Prosecution has referred to these personal mobile phones as “PMPs”.

49. The identity of the users of these “PMPs” was researched [REDACTED]. Once a personal phone had been attributed to a particular person, the other phones belonging to one or several group(s) that were in “co-location” with that phone could be attributed to that same person.

50. According to its investigations, the Prosecution found, given all the evidence and reasoning, that:

⁷⁰ According to the exhibit entitled “Indictment report, Attribution of phone numbers to Hassan Habib Merhi”, ERN D0321658 filed in support of the Indictment of 5 June 2013, [REDACTED].

- i. Mr Ayyash was the user of the personal mobile phones “PMP 165”, “PMP 091”, “PMP 170”, “PMP 935” and consequently of the “Red 741”, “Green 300”, “Blue 233” and “Yellow 294” phones;
- ii. Mr Badreddine was the user of the personal mobile phones “PMP 663”, “PMP 354”, “PMP 944”, “PMP 195”, “PMP 683”, “PMP 486”, “PMP 593” (some of which were used consecutively) and consequently of the “Green 023” phone;
- iii. Mr Merhi was the user of the “Purple 231” and “Green 071” phones;
- iv. Mr Oneissi was the user of the “Purple 095” phone; and
- v. Mr Sabra was the user of the “Purple 018” phone.

b. The identity and the role of the suspect

51. According to its investigations, the Prosecution found that Mr Merhi:
- i. was a Lebanese citizen born on 12 December 1965 in Beirut (Lebanon), having resided at the following address: Section 27, eastern façade, Real Estate Number: 2501, Real Estate Zone: *Bourj-El-Barajneh*, District: Baabda, Governorate: Mount Lebanon, South Beirut and whose present address is unknown;
 - ii. participated with others, including the accused Messrs Badreddine, Ayyash, Oneissi and Sabra, in a conspiracy aimed at committing a terrorist act to assassinate Mr Hariri; and
 - iii. coordinated, with Mr Badreddine by way of the “Green” phones, the preparation of the false claim of responsibility broadcast on 14 February 2005 after the attack against Mr Hariri; he thus coordinated, using his “Purple 231” phone, the activities of Messrs Oneissi and Sabra in order to identify Mr Abu Adass, who falsely claimed, in a video recording, responsibility for the attack as well as the broadcast of that recording by Al-Jazeera.

c. Preparation of the false claim of responsibility

52. According to the Prosecutor, the users of the “Purple” phones are at first sight implicated in the false claim of responsibility for the attack on the basis in particular of the following:

- i. the “Purple” phones attributed to Messrs Oneissi and Sabra were active for 10 days in December 2004 and January 2005 in the vicinity of Mr Abu Adass’ home and the Arab University Mosque of Beirut which he apparently frequented. Mr Oneissi, using the alias “Mohammed”, approached Mr Abu Adass and then remained in contact with him before he disappeared on 16 January 2005. Mr Abu Adass then claimed responsibility for the attack in a video recording that was broadcast on television by Al-Jazeera after the attack;
- ii. by means of their “Purple” phones, Messrs Oneissi, Sabra and Merhi were in contact from 2003 until early 2005: Messrs Oneissi and Sabra were in contact 84 times between 12 January 2003 and 16 February 2005; Messrs Sabra and Merhi were in contact 212 times between 7 January 2003 and 14 February 2005; and Messrs Merhi and Oneissi were in contact with each other 195 times between 25 June 2003 and 26 January 2005;
- iii. more specifically, and according to the evidentiary materials, between 22 December 2004 and 14 February 2005, Mr Merhi and Messrs Oneissi and Sabra were in telephone contact using their “Purple” phones 45 times;
- iv. the “Green” phones attributed to Messrs Merhi, Badreddine and Ayyash were in contact exclusively with each other from 13 October 2004 to 14 February 2005;
- v. between 6 November 2004 at the latest and 7 February 2005, Mr Merhi, using his “Green 071” phone, was in contact with Mr Badreddine on his “Green 023” phone;
- vi. Mr Merhi, using his “Green 071” phone, was in contact with Mr Ayyash on his “Green 300” phone and, using his “Purple 231” phone, was in contact with Mr Ayyash’s personal mobile telephone “PMP 091”;
- vii. more specifically, during the recruitment period of Mr Abu Adass, on 22 December 2004 and 7 January 2005, while Mr Oneissi was in the vicinity of the mosque reportedly frequented by Mr Abu Adass, Messrs Merhi and Oneissi were in telephone contact using their “Purple” phones. On 1 and 4 January 2005, at the time Mr Sabra was in the vicinity of the same mosque, Messrs Merhi and Sabra were in telephone contact using their “Purple” phones. During the same period, Messrs Oneissi and Sabra were in telephone contact six times using their “Purple” phones, while one or other of the two was in the vicinity of the mosque. On 23 and 27 December 2004, as well as on 2 January 2005, Messrs Merhi and Badreddine were in telephone contact using their “Green” phones;

- viii. between 12 and 16 January 2005, the day of the alleged disappearance of Mr Abu Adass, Messrs Merhi and Badreddine were in daily telephone contact using their “Green” phones, as is established prima facie by the evidentiary materials. Between 14 and 15 January 2005, Messrs Merhi and Sabra were in telephone contact three times using their “Purple” phones and Messrs Oneissi and Sabra were in telephone contact twice using their “Purple” phones. On 16 January 2005, the day of the supposed meeting between Mr Oneissi – using the alias “Mohammed” – and Mr Abu Adass, Messrs Merhi and Badreddine were in telephone contact five times using their “Green phones”. On 17 January 2005, [REDACTED], Mr Oneissi, [REDACTED], contacted Mr Merhi using his “Purple” phone; and
- ix. Mr Hariri departed Lebanon on 4 February 2005 and returned there on 7 February 2005. Between 5 and 6 February 2005, Mr Merhi, on the “Purple 231” phone, was in telephone contact five times with Mr Ayyash on his “PMP 091”. On the morning of 7 February 2005, the day of Mr Hariri’s supposed return, Messrs Merhi and Ayyash were in contact with Mr Badreddine on their “Green” phones.

d. The broadcast of the false claim of responsibility

53. With regard to the broadcast of the false claim of responsibility by means of the delivery of a video cassette, the factors put forward by the Prosecutor are as follows:
- i. on 14 February 2005, before, during and after the four calls Mr Oneissi or Mr Sabra made to Al-Jazeera and Reuters using the same telephone card which was used in several public payphones in Beirut, Mr Sabra, using the “Purple 018” phone, contacted Mr Merhi seven times using the “Purple 231” phone;
 - ii. on 14 February 2005, Mr Oneissi was in the vicinity of the tree where the video cassette containing the claim of responsibility was placed in order to be collected [REDACTED]; and
 - iii. on 15 February 2005, the “Purple 231” phone attributed to Mr Merhi ceased being used and on 16 February 2005, the “Purple 095” phone attributed to Mr Oneissi and the “Purple 018” phone attributed to Mr Sabra likewise definitively ceased being used.

2. The Counts

54. It is more logical for the Pre-Trial Judge firstly to examine Counts 2, 3 4 and 5 and conclude with Count 1 regarding conspiracy aimed at committing a terrorist act. Indeed, in order for it to be examined, a comprehensive view of all the factors mentioned in the other counts, in particular those concerning a terrorist act, is necessary.

a. **Count 2: being an accomplice to commit a terrorist act**

55. The Pre-Trial Judge notes that Count 2 contains the constituent elements of the offence of a terrorist act as defined by the Appeals Chamber, namely: the volitional commission of an act through means that are likely to pose a public danger, with the special intent to cause a state of terror.⁷¹

56. With regard to the responsibility of the suspect in a terrorist act, the Pre-Trial Judge notes that, according to Count 2, Mr Merhi bears individual criminal responsibility as an accomplice to committing a terrorist act. According to the Appeals Chamber,⁷² an accomplice is anyone who must have acted in a form specified by Article 219 of the Lebanese Criminal Code⁷³ and be motivated by the knowledge of the intent of the primary perpetrators to commit a crime and the intention to assist these perpetrators in carrying out the crime.

57. On examining the material accompanying the Indictment of 5 June 2013 and, in particular, the relevant facts referred to in section VIII (C) of this decision, the Pre-Trial Judge finds that a sufficient prima facie case exists, in that:⁷⁴

- i. on 14 February 2005, at 12.55, an extremely powerful explosive device, concealed in a Mitsubishi Canter van, exploded on a public street, on rue Minet el Hos'n in Beirut (Lebanon) as the convoy escorting Mr Hariri, the former Prime Minister and a prominent political figure in Lebanon, was passing;
- ii. the attack resulted in the death of Mr Hariri and 21 other persons and injured 226 persons and damaged several nearby buildings;

⁷¹ Interlocutory Decision of the Appeals Chamber, Disposition, para. 3.

⁷² *Id.*, paras 218-228.

⁷³ As amended by Article 11 of Legislative Decree No. 112 of 16 September 1983.

⁷⁴ These presumptions shall, where appropriate, be confirmed and the evidence declared substantiated by the Trial Chamber.

- iii. due to its scale, this act created a state of terror which was aggravated by a public claim of responsibility and a threat that further similar attacks would follow. This claim of responsibility was also intended to create a false trail so as to shield the perpetrators from justice;
- iv. Messrs Ayyash and Badreddine participated, as co-perpetrators, in the attack: they were implicated in the operations to locate and monitor the whereabouts of Mr Hariri and they were also in contact with each other during the location and purchase of the Mitsubishi Canter van in Tripoli which was used to conceal the explosive device and carry out the attack;
- v. Messrs Oneissi and Sabra participated in the recruitment of Mr Abu Adass, who claimed responsibility for the terrorist act in a video recording which was broadcast shortly afterwards;
- vi. Mr Merhi was in direct telephone contact with Mr Badreddine using the “Green” phones at various times in the months prior to the attack and during the recruitment of Mr Abu Adass by Messrs Oneissi and Sabra. Mr Abu Adass claimed responsibility for that act in a video recording broadcast shortly after the attack and was also in contact with Mr Ayyash before the attack;
- vii. Mr Merhi oversaw the transmission by Messrs Oneissi and Sabra of the video cassette to the Al-Jazeera press agency on 14 February 2005, after the attack;
- viii. Mr Merhi is therefore implicated in the claim of responsibility for the attack of 14 February 2005, the purpose of which was to create a false trail in order to shield the perpetrators from justice and aggravate the state of terror;
- ix. in preparing the claim of responsibility for the attack before its execution, as mentioned in Count 2, Mr Merhi was aware of the intention of Messrs Ayyash and Badreddine to commit this terrorist act and he was personally willing to contribute to that act by way of these preparatory acts; and
- x. by so doing, Mr Merhi lent his support to the preparation and commission of the terrorist act mentioned in Count 2.

58. Therefore, in light of these presumptions, there is reason to prosecute Mr Mehri as being an accomplice to commit a terrorist act. Consequently, Count 2 should be confirmed against Mr Merhi.

59. The Pre-Trial Judge notes that although the evidentiary materials filed in support of the Indictment of 5 June 2013 can be used to justify *prima facie* the mode of responsibility chosen by the Prosecutor against Mr Merhi, namely being an accomplice to commit a terrorist act, they also allow a further form of participation in the terrorist act to be chosen, that of co-perpetrator, comparable to Messrs Badreddine and Ayyash. Indeed, the Prosecutor submits that Mr Merhi participated in establishing a conspiracy in order to commit a terrorist act at the same time as Messrs Badreddine and Ayyash, that the aim of that conspiracy was to commit a terrorist act by detonating a large quantity of explosives and that Mr Merhi was in contact with Messrs Badreddine and Ayyash prior to the preparation of the false claim of responsibility as part of the preparatory acts. Consequently, the distinction between the form of responsibility of Mr Merhi and that of Messrs Badreddine and Ayyash is not apparent. However, as the responsibility for prosecutions lies with the Prosecutor, the Pre-Trial Judge considers that it is not for him to oblige the Prosecutor to reclassify the facts, insofar as the position adopted by the Prosecutor is not likely to cause prejudice to the suspect.⁷⁵

b. Count 3: being an accomplice to the intentional homicide with premeditation of Rafic Hariri

60. The Pre-Trial Judge notes that Count 3 of the Indictment of 5 June 2013 does not contain the constituent elements of intentional homicide as defined by the Appeals Chamber. However, the Pre-Trial Judge considers that the concise statement of the facts in the Indictment of 5 June 2013 contains facts on which the Prosecutor founded the legal classification of intentional homicide, namely the attack of 14 February 2005 which resulted in the death of Mr Hariri, committed with intent and with means likely to cause death.⁷⁶ The Pre-Trial Judge considers that this statement of facts and their legal characterisation, together with the reference to the relevant provisions of the Statute and Lebanese law mentioned in Count 3, ensure that Mr Merhi is sufficiently informed of the charges laid against him.

⁷⁵ Pursuant to Rule 68 (I) (iii) and (iv) of the Rules, at the end of the examination of the Indictment submitted by the Prosecutor, the Pre-Trial Judge may confirm or dismiss one or more counts. Consequently, at the stage of the confirmation of the counts, the Pre-Trial Judge does not have the authority, as afforded to the judges of the International Criminal Court by way of Regulation 55 of the Regulations of the Court, to amend the legal characterisation of the facts.

⁷⁶ Indictment of 5 June 2013, para. 5.

61. With regard to the responsibility of the suspect in the commission of intentional homicide, the Pre-Trial Judge notes that the observations made in the context of the review of Count 2 may also be applied to the review of Count 3.

62. On examining the material accompanying the Indictment of 5 June 2013 and, in particular, the relevant facts referred to in section VIII (C), the Pre-Trial Judge finds that a sufficient *prima facie* case exists, in that:

- i. for the same reasons as those mentioned in relation to Count 2, Mr Merhi lent his support to the preparation and commission of the intentional homicide of Mr Hariri mentioned in Count 3; and
- ii. Mr Merhi was, at the very least, aware of the intention of Messrs Ayyash and Badreddine to commit the intentional homicide of Mr Hariri and was personally willing to contribute to that act by way of these preparatory acts.⁷⁷

63. Therefore, in light of these presumptions, there is reason to prosecute Mr Mehri as an accomplice to the intentional homicide of Mr Hariri. Consequently, Count 3 should be confirmed against Mr Merhi.

c. Count 4: being an accomplice to the intentional homicide with premeditation of 21 persons

64. The Pre-Trial Judge notes that the observations made in the context of the review of Count 3 relating to the constituent elements of intentional homicide may be applied *mutatis mutandis* to the review of Count 4.

65. With regard to the responsibility of the suspect in the intentional homicide, the Pre-Trial Judge notes that the observations made in the context of the review of Count 2 may also be applied to the review of Count 4.

66. On examining the materials accompanying the Indictment of 5 June 2013 and, in particular, the relevant facts referred to in section VIII (C), the Pre-Trial Judge finds that a sufficient *prima facie* case exists, in that:

⁷⁷ Without prejudice to the observations relating to the standing of the co-perpetrator of a terrorist act as set out in para. 57.

- i. for the same reasons as those mentioned in relation to Count 2, Mr Merhi lent his support to the preparation and commission of the intentional homicide of 21 persons in addition to Mr Hariri as mentioned in Count 4; and
- ii. Mr Merhi was aware of the intention of Messrs Ayyash and Badreddine to commit the intentional homicide of 21 other persons and was personally willing to contribute to that act by way of these preparatory acts.

67. Therefore, in light of these presumptions, there is reason to prosecute Mr Mehri as an accomplice to the intentional homicide of 21 persons listed in Annex A to the Indictment of 5 June 2013. Consequently, Count 4 should be confirmed against Mr Merhi.

d. Count 5: being an accomplice to the attempted intentional homicide with premeditation of 226 persons

68. The Pre-Trial Judge notes that the observations made in the context of the review of Count 3 relating to the constituent elements of intentional homicide may be applied *mutatis mutandis* to the review of Count 5.

69. With regard to the responsibility of the suspect in the intentional homicide, the Pre-Trial Judge notes that the observations made in the context of the review of Count 2 may also be applied to the review of Count 5.

70. On examining the materials accompanying the Indictment of 5 June 2013 and, in particular, the relevant facts referred to in section VIII (C), the Pre-Trial Judge finds that a sufficient *prima facie* case exists, in that:

- i. for the same reasons as those mentioned in relation to Count 2, Mr Merhi lent his support to the preparation and commission of the attempted intentional homicide of 226 persons mentioned in Count 5; and
- ii. Mr Merhi was aware of the intention of Messrs Ayyash and Badreddine to commit the intentional homicide of 226 other persons and was personally willing to contribute to that act by way of those preparatory acts.

71. Therefore, in light of these presumptions, there is reason to prosecute Mr Mehri as an accomplice to the attempted intentional homicide of 226 persons listed in Annex B to the Indictment of 5 June 2013. Consequently, Count 5 should be confirmed against Mr Merhi.

e. Count 1: conspiracy aimed at committing a terrorist act, as a co-perpetrator

72. The Pre-Trial Judge notes that Count 1 contains the constituent elements of the offence of conspiracy as defined by the Appeals Chamber, namely: the presence of two or more individuals; the conclusion or joining an agreement for the purpose of committing a crime against State security according to the means required by law to commit this crime; and criminal intent relating to the object of the conspiracy.⁷⁸

73. With regard to the responsibility of the suspect in the conspiracy, the Pre-Trial Judge notes that, according to Count 1, he is a “co-perpetrator with shared intent”.⁷⁹ According to the Appeals Chamber, a co-perpetrator must contribute to bringing into being the objective and subjective constituent elements of the crime of conspiracy aimed at committing a terrorist act.⁸⁰

74. On examining the materials accompanying the Indictment of 5 June 2013 and from the review of the aforementioned Counts 2 to 5, the Pre-Trial Judge finds that a sufficient *prima facie* case exists, in that:

- i. Messrs Merhi, Ayyash, Badreddine, Oneissi and Sabra, together with others unidentified, were in contact, directly or indirectly, for a significant period of time prior to the attack of 14 February 2005, in particular at key moments linked to this act, its preparation and the way in which responsibility for the attack was claimed;
- ii. due to its size, the intended victim and the resulting state of terror, this terrorist act was an attack on Lebanese State security; and
- iii. the actions of Mr Merhi and the four accused and their direct contact with each other suggest that they acted within the framework of a prior agreement aimed at committing the terrorist act of 14 February 2005.

⁷⁸ Interlocutory Decision of the Appeals Chamber, Disposition, para. 7.

⁷⁹ Indictment of 5 June 2013, para. 54 (c).

⁸⁰ Interlocutory Decision of the Appeals Chamber, paras 213-217.

75. Therefore, in light of these presumptions, there is reason to prosecute Mr Mehri as being a co-perpetrator of conspiracy aimed at committing a terrorist act. Consequently, Count 1 should be confirmed against Mr Merhi.

76. The Pre-Trial Judge notes that although the materials filed in support of the Indictment of 5 June 2013 can be used to justify prima facie the date of the conspiracy aimed at committing a terrorist act decided by the Prosecutor, namely 11 November 2004, they would likewise permit an earlier date to be chosen. Indeed, according to those materials, the surveillance of Mr Hariri took place over a period of 10 days between 20 October and 10 November 2004. Furthermore, telephone communications between Messrs Merhi, Badreddine, Ayyash, Sabra and Oneissi took place as of 1 September 2004. However, as the responsibility for prosecutions lies with the Prosecutor, the Pre-Trial Judge considers that it is not for him to oblige the Prosecutor to reclassify the facts by changing the date he has chosen to an earlier one, insofar as the position adopted by the Prosecutor is not likely to cause prejudice to the suspect.

f. Cumulative charging

77. In accordance with the Interlocutory Decision of the Appeals Chamber, there is no objection to the Prosecutor charging concurrently the crimes of conspiracy aimed at committing a terrorist act, being an accomplice in committing a terrorist act, intentional homicide and attempted intentional homicide even though, with the exception of conspiracy, these crimes are all based on the same facts.⁸¹

3. Requirements of grounds and precision and amendments to be made to the Indictment of 5 June 2013

78. The Pre-Trial Judge finds that the Indictment of 5 June 2013 meets the requirements with regard to the grounds and precision required under international jurisprudence, the Statute and the Rules. Subject to a decision rendered on preliminary motions,⁸² the Indictment of 5 June 2013 is sufficiently clear and accurate so as to ensure that the suspect understands the allegations made against him and, consequently, allow him in particular to prepare his defence and, if appropriate, challenge the legality of his detention.

⁸¹ Decision of 28 June 2011, paras 92-93.

⁸² Rule 90 of the Rules.

IX. Requirements of confidentiality

79. The Prosecutor puts forward several reasons in support of his request for non-disclosure that are principally linked to the need for all possible steps to be taken to ensure the arrest of the suspect, to ensure the smooth running of the ongoing investigations and ensure the protection of witnesses.

80. In accordance with Rule 74 of the Rules, there are grounds for the Indictment of 5 June 2013 and the accompanying material to remain confidential in order to “ensure the integrity of the judicial procedure and, in particular ensure that the search and, where appropriate, apprehension [of Mr Merhi] is carried out effectively”⁸³. The confidentiality should likewise assist in “ensuring the protection of the witnesses concerned by not revealing their identity and in safeguarding the ongoing investigations by not disclosing the techniques that have been employed and the information that has been gathered”.⁸⁴ The Indictment of 5 June 2013 may however be disclosed to the competent authorities of the Lebanese Republic and to those of other States to whom the Prosecutor might transmit the Indictment of 5 June 2013 pursuant to Rule 74 of the Rules.

81. The Prosecutor’s request to redact certain information in the Indictment of 5 June 2103 for the purpose of serving it on Mr Mehri upon his possible apprehension is also well-founded given that the information could endanger potential witnesses. As a consequence, a redacted version of the Indictment of 5 June 2013 shall be filed by the Prosecutor as soon as possible so that it might be served on Mr Mehri.

82. For the same reasons, the Pre-Trial Judge considers *proprio motu* that this decision should remain confidential until further notice and until such time that a redacted version of it has been filed for the purpose of serving it on Mr Mehri upon his possible apprehension.

83. This decision and the non-redacted Indictment of 5 June 2013 shall be served on Mr Mehri upon his possible transfer to the Headquarters of the Tribunal.

84. All the materials submitted in support of the Indictment of 5 June 2013 shall be disclosed to Mr Merhi in accordance with the relevant provisions of the Rules.

⁸³ Decision of 28 June 2011, para. 101.

⁸⁴ *Ibid.*

X. The disposition**FOR THESE REASONS,**

Pursuant to Article 18 (1) of the Statute and Rules 68 and 74 of the Rules,

THE PRE-TRIAL JUDGE,

AUTHORISES the filing of the corrigenda of 24 June and 25 July 2013 to the Indictment of 5 June 2013;

AUTHORISES the filing of the materials mentioned in the Corrigendum of 15 July 2013 and the materials mentioned in the Application of 29 July 2013;

CONFIRMS against Mr Merhi the counts mentioned in the Indictment of 5 June 2013 of:

1. conspiracy aimed at committing a terrorist act, as a co-perpetrator (Count 1);
2. as an accomplice:
 - i. committing a terrorist act (Count 2);
 - ii. intentional homicide with premeditation (of Mr Hariri) (Count 3);
 - iii. intentional homicide with premeditation (of 21 persons listed in Annex A to the Indictment of 5 June 2013) (Count 4); and
 - iv. attempted intentional homicide with premeditation (of 226 persons listed in Annex B to the Indictment of 5 June 2013) (Count 5);

ORDERS that all the evidentiary material submitted in support of the Indictment of 5 June 2013 be disclosed to Mr Merhi in accordance with the relevant provisions of the Rules;

ORDERS that this decision, together with the Indictment of 5 June 2013, remain confidential until the Indictment has effectively been served on Mr Mehri or until further notice, with the exception of the Indictment of 5 June 2013 which may be disclosed to the competent authorities of the Lebanese Republic and to those of other States to whom the Prosecutor might transmit the Indictment pursuant to Rule 74 of the Rules;

ORDERS the Prosecutor to file a redacted version of the Indictment of 5 June 2013 so that it might be served on Mr Mehri upon his possible apprehension, by 6 August 2013 at the latest; and

STATES that a redacted version of this decision shall be filed so that it might be served on Mr Mehri at the time of his possible apprehension; and

STATES that this decision and the non-redacted Indictment of 5 June 2013 shall be served on Mr Mehri at the time of his possible transfer to the Headquarters of the Tribunal.

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

Leidschendam, 11 October 2013

[stamp]

[signature]

Daniel Fransen
Pre-Trial Judge

