

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER**SPECIAL TRIBUNAL FOR LEBANON**

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

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

Registrar: Mr Daryl Mundis

Date: 20 October 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ADMITTING INTO EVIDENCE THE AUDIO RECORDINGS
AND TRANSCRIPTS OF THE PROSECUTION INTERVIEW OF
MR WISSAM AL-HASSAN (WITNESS PRH680) UNDER RULE 158 AND
THREE RELATED DOCUMENTS UNDER RULE 154**

Office of the Prosecutor:Mr Norman Farrell & Mr Alexander Hugh
Milne**Legal Representatives of****Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothee Le Fraper
du Hellen & Mr Jad Youssef Khalil**Counsel for Mr Hussein Hassan Oneissi:**Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Ms Natalie von Wistinghausen**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Geoffrey Robert
Ms Sarah Bafadhel

INTRODUCTION AND BACKGROUND

1. Brigadier-General Wissam Al-Hassan (Witness PRH680), a former Lebanese Internal Security Forces (ISF) official, was the head of security for the former Lebanese Prime Minister, Mr Rafik Hariri, at the time when Mr Hariri was killed in an attack in Beirut on 14 February 2005. Twenty-one others were also killed and 226 were injured in the attack.¹
2. Mr Al-Hassan was not working on the day of the attack against Mr Hariri. He had resigned from the ISF on 4 February 2005, but returned in late July that year. In early 2006, Mr Al-Hassan became the head of ISF's Information Branch and was assigned to lead the investigation into Mr Hariri's death. On 19 October 2012, Mr Al-Hassan himself died in a car bombing in Beirut. To date no-one has been charged with his death.²
3. Prosecution investigators interviewed Mr Al-Hassan on 16 and 17 June 2012. The interview was lengthy, conducted in English and Arabic, and transcribed simultaneously. The Prosecution seeks the admission into evidence, under Rules 149 (C) and 158³ of the Special Tribunal's Rules of Procedure and Evidence, of the audio recordings and transcripts of this interview, with some redactions.⁴ In support of its application, the Prosecution has provided Mr Al-Hassan's death certificate.⁵
4. The Defence received Mr Al-Hassan's redacted interview in August 2014 and on 4 July 2017—a less redacted version of the interview.⁶ On 18 October 2017,⁷ the Prosecution

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential) ('Amended consolidated indictment'), para. 4; F1492, Second Decision on Agreed Facts under Rule 122, 11 April 2014, disposition, recording, among others, the following facts as being proved at trial: (i) in addition to killing Mr Rafik Hariri, the explosion killed 21 other persons listed in Schedule A of the Indictment; (ii) the explosion injured 226 persons listed in Schedule B of the Indictment.

² This is publicly available information.

³ Rule 158 regulates the admissibility of evidence of 'unavailable persons', that is, persons who have 'died, who can no longer with reasonable diligence be traced, or who are for good reason otherwise unavailable to testify orally'. The admission of such evidence is, however, subject to certain conditions. See below, para. 52.

⁴ F3214, Prosecution Rule 158 Motion for Admission of Written Statement of Unavailable Person PRH680, 6 July 2017 (confidential) ('Prosecution motion'), para. 1.

⁵ ERN 60321339-60321349, dated 2 December 2016.

⁶ Prosecution motion, paras 6, 8.

⁷ F3364, Corrigendum to Further Prosecution Response to the "Order to the Prosecution to Explain the Basis for Redactions to Mr Wissam Al-Hassan's Interview Transcripts", 20 October 2017 (confidential); F3364, Corrected Version of Further Prosecution Response to the "Order to the Prosecution to Explain the Basis for Redactions to Mr Wissam Al-Hassan's Interview Transcripts", 20 October 2017 (confidential, with Confidential and *Ex Parte* Annex (corrected)); F3364, Further Prosecution Response to the "Order to the Prosecution to Explain the Basis for Redactions to Mr Wissam Al-Hassan's Interview Transcripts", 18 October 2017 (confidential, with Confidential and *Ex Parte* Annex) ('Further Prosecution response concerning redactions').

provided a less redacted version of the interview with certain pages withdrawn⁸ in substitution to the versions previously tendered.⁹

5. The Prosecution case is that five interconnected mobile telephone groups—four of which operated as networks, colour-coded as ‘red’, ‘green’, ‘blue’ and ‘yellow’, and a group of three ‘purple phones’—were involved in the 14 February 2005 attack directed against Mr Hariri. The Prosecution pleads in the amended consolidated indictment that the Green network was a closed network of three mobiles used by two of the Accused, Mr Salim Jamil Ayyash and Mr Hassan Habib Merhi, and the former Accused and named co-conspirator Mr Mustafa Amine Badreddine,¹⁰ to monitor and coordinate the preparations for and the physical perpetration of the attack, as well as to prepare a false video-recorded claim of responsibility for the attack, made soon after the explosion. The Prosecution further alleges that the Accused Mr Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra used the ‘purple phones’ to coordinate the false claim of responsibility.¹¹

6. Paragraph 49 of the amended consolidated indictment states that the four Accused are ‘supporters of Hezbollah, which is a political and military organisation in Lebanon’, as was Mr Badreddine. Hezbollah is a Lebanese Shiite Muslim political party and a military organisation. Mr Sayyed Hassan Nasrallah has been its Secretary General since 1992.¹²

⁸ Disclosure batch 3412, 18 October 2017, ERN 60263705_TS_O_EN_AR_01(RED2) for the interview of 16 June 2012 (with withdrawn pp 168-179), and ERN 60263704_TS_O_EN_AR_01(RED2) for the interview of 17 June 2012.

⁹ The transcripts of Mr Al-Hassan’s interview of 16 June 2012 tendered with the Prosecution motion are ERN 60263705 (RED)-60263705 (RED) and ERN 60263705 (RED1)-60263705 (RED1), consisting of 179 pages each (‘Interview of 16 June 2012’), and of 17 June 2012 are ERN 60263704 (RED)-60263704 (RED) and ERN 60263704 (RED1)-60263704 (RED1), consisting of 72 pages each (‘Interview of 17 June 2012’).

¹⁰ The proceedings against Mr Badreddine were terminated on 11 July 2016 pursuant to an Appeals Chamber’s order. See STL-11-01/T/AC/AR126.11, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0019, Decision on Badreddine Defence Interlocutory Appeal of the “Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings”, 11 July 2016 (by majority, Judges Baragwanath and Nsereko dissenting). See also STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2633, Order Terminating Proceedings against Mustafa Amine Badreddine without Prejudice and Ordering the Filing of an Amended Consolidated Indictment, 11 July 2016; F2612, Reasons for Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings, 7 June 2016 (by majority, Judge Braidy dissenting); transcript of 1 June 2016, pp 55-56 (Interim Decision on the Reported Death of the Accused Mustafa Badreddine, with Dissenting Opinion by Judge Braidy). Paras 3, 19, 48, 50-51 of the amended consolidated indictment refer to Mr Badreddine as a co-conspirator.

¹¹ Amended consolidated indictment, paras 14-15.

¹² Hezbollah is part of the governing alliance in Lebanon. Its military wing is also referred to as the ‘national resistance group’ or the ‘Islamic Resistance’ with a goal to defend Lebanon from Israel. See F3104, Decision Admitting 12 Documents and a Witness’ Statements Related to Hezbollah, its Officials and Telephone Numbers, 26 April 2017 (‘Decision of 26 April 2017’), para. 3, fn. 5.

MR AL-HASSAN'S EVIDENCE

7. Mr Al-Hassan's interview with the Prosecution contains information about the background to the investigation into the attack against Mr Hariri, including the cooperation between the ISF and the United Nations International Independent Investigation Commission (UNIIC).

8. Mr Al-Hassan provided portions of hearsay evidence that the Green network was a Hezbollah network. He gave the investigators information about three networks of mobile telephones—'Network 1', 'Network 2' and 'Network 3'—that he and his colleagues, and in particular the late Captain Wissam Eid, discovered and investigated. Captain Eid headed the Technical Division of ISF's Information Branch. Mr Al-Hassan also discussed four meetings he had with Mr Nasrallah in 2005 and the information he received from Mr Nasrallah linking Network 2 to Hezbollah.¹³

9. Mr Al-Hassan described the information he had about how each network was discovered and how they operated, related and corresponded with each other in time, location and hierarchy. In response to questions concerning the Green network, Mr Al-Hassan discussed Network 2 describing it as a 'senior officials' network, discovered by Captain Eid through the analysis of Network 1. Network 1, on its part, was made up of eight numbers, six of which were used on 14 February 2005, and was deactivated on the day of the attack, one hour after Mr Hariri's assassination.¹⁴

10. Captain Eid had investigated whether there were any other networks of mobiles, land-lines and or public telephones, parallel to or similar to Network 1. In September 2005, using what was referred to as spatial and time analysis, he detected Network 2. This network became gradually active as of December 2003, mostly in Beirut and its suburbs. It eventually comprised 18 mobile numbers, some of which were related to or belonged to Network 1. All 18 numbers were linked with a feature called the 'VIP option', which Mr Al-Hassan believed allowed the numbers to interconnect with each other without interference from any external party.¹⁵

¹³ Interview of 16 June 2012, *see e.g.* pp 7, 22, 25-34, 79-88, 119.

¹⁴ Interview of 16 June 2012, *see e.g.* pp 25-33, 42, 54, 108-109, 118-125.

¹⁵ Interview of 16 June 2012, pp 34-36, 39-42.

11. Mr Al-Hassan and his colleagues assumed that the users of Network 2 were senior in authority to those of Network 1 based on their observation that the users of Network 1, who purportedly executed the 14 February 2005 attack, were reporting to Network 2 throughout their mission.¹⁶

Hezbollah's PowerPoint presentation and Mr Al-Hassan's meetings with Mr Nasrallah

12. Mr Al-Hassan stated that the Hariri family had requested Hezbollah to assist in the investigation of Mr Hariri's assassination. Sometime between the end of February and mid-April 2005, after Hezbollah conducted its own investigation, the political assistant to Mr Nasrallah contacted Mr Al-Hassan on Hezbollah's behalf and scheduled an appointment with him. A Hezbollah car drove Mr Al-Hassan to a meeting room in an unknown location. Except for Mr Nasrallah's political assistant who was accompanying him, Mr Al-Hassan did not know anyone at the meeting.¹⁷

13. At that meeting, Hezbollah officials gave a PowerPoint presentation on Hezbollah's theory as to the *modus operandi* of the crime and the quantity of explosives used. This theory was built around the use of a Mitsubishi van and an explosion using a suicide bomber. Given the depth and width of the resulting crater, the Hezbollah officials assumed that the quantity of explosives was either 1200 or 1600 kilograms and that the elevation from the surface of the ground was 60 centimetres. Hezbollah considered a person named 'Abou-Adass',¹⁸ whom they did not link to any group, to be a possible suspect.¹⁹

14. Hezbollah's PowerPoint presentation lasted about 15 minutes and focused mainly on the quantity of explosives and on whether the explosion took place above or under the ground, concluding that it was probably from above the ground. They stressed that it was very easy to

¹⁶ Interview of 16 June 2012, p. 42.

¹⁷ Interview of 17 June 2012, pp 18-20, 24.

¹⁸ According to the amended consolidated indictment, Mr Ahmad Abu Adass was a 22-year-old Palestinian man, who was used by the Accused to make a video-taped false claim of responsibility for the 14 February 2005 attack. Mr Abu Adass has been missing since 16 January 2005—the day when he allegedly met the Accused Mr Oneissi, who introduced himself as 'Mohammed'. Fragments of the suicide bomber were recovered at the scene and forensic examination has established both that the remains were not those of Mr Abu Adass. *See* paras 3, 5, 23 (d), 28, 43, 44, 48, 64, 66, 68, 70 of the amended consolidated indictment.

¹⁹ Interview of 17 June 2012, pp 18-21.

monitor Mr Hariri's movements because his convoy was visible and it was very obvious which car he was in.²⁰

15. Following the discovery of Network 2 in September 2005, Mr Al-Hassan's team noticed that this network had communications with associates of Hezbollah—either Hezbollah members, Hezbollah senior officials, Members of Parliament related to Hezbollah or people otherwise in Hezbollah's sphere. Mr Al-Hassan's team could not proceed to investigate Network 2 without contacting Hezbollah. Mr Al-Hassan's contact with Mr Nasrallah was made possible through the mediation of Mr Saad Hariri.²¹ Mr Al-Hassan and Mr Nasrallah met four times at unknown locations (presumably in Beirut) between September and mid-October 2005.²²

16. Mr Al-Hassan stated that at their third meeting Mr Nasrallah told him that Network 2 was a Hezbollah network and that it was used to track Lebanese agents suspected of dealing with Israeli Mossad agents. Mr Nasrallah gave Mr Al-Hassan a piece of paper—A4 size, landscape format—containing six to seven names and telephone numbers to show that Network 2 was tracing Mossad agents.²³

17. Subsequently, Captain Eid analysed the communications made from 1 January until 1 May 2005 by three mobile numbers which were among the numbers that Mr Nasrallah had given Mr Al-Hassan, showing that Network 2 operated in parallel with Network 1 temporarily and geographically. Captain Eid drafted a report—marked as 'exhibit WAH/004' during Mr Al-Hassan's interview—describing where these numbers were active and the frequency of their communications. The report also identifies another mobile number, with which all three numbers 'co-located' at the beginning of 2005.²⁴

²⁰ Interview of 17 June 2012, pp 22-23.

²¹ Mr Saad Hariri is Mr Rafik Hariri's son and the current Prime Minister of Lebanon.

²² Interview of 16 June 2012, *see e.g.* pp 61, 80-98, 105, 110, 114-117, 120.

²³ Interview of 16 June 2012, pp 86-89.

²⁴ Interview of 16 June 2012, pp 34-35, 42, 49; Interview of 17 June 2012, pp 2-3. *See also* 'exhibit WAH/004', ERN 60263777-60263779.

Associated documents sought into admission

18. Together with Mr Al-Hassan's interview, the Prosecution requests the admission into evidence, under Rules 149 (C) and 154, of three associated documents.²⁵ These are a witness acknowledgement from the June 2012 interview, signed by Mr Al-Hassan and dated 17 June 2012;²⁶ 'exhibit WAH/004', described above; and a certificate from the Lebanese ISF, Directorate General, Information Department confirming the origin and authenticity of 'exhibit WAH/004'.²⁷

19. The Defence received 'exhibit WAH/004' by March 2014, and the ISF certificate in August 2014.²⁸ In December 2014, the Trial Chamber permitted the Prosecution to amend its witness and exhibit lists to add these documents and Mr Al-Hassan's interview.²⁹ On 4 July 2017, together with a less redacted version of the interview the Prosecution disclosed to the Defence a revised English translation of 'exhibit WAH/004'.³⁰

Evidence already admitted in support of paragraph 49 of the amended consolidated indictment

20. The Trial Chamber has already admitted Prosecution evidence related to the alleged link of the four Accused and Mr Badreddine to Hezbollah in support of the pleading in paragraph 49 of the amended consolidated indictment.³¹

21. This evidence comprises public statements of Mr Nasrallah made on 9 August 2010, 11 November 2010 and 17 August 2011.³² In addition, photographs and articles demonstrate that relatives of some of the Accused—Mr Sabra's younger brother, Mr Merhi's younger brother and Mr Oneissi's younger brother and nephew—were referred to as Hezbollah

²⁵ Pursuant to Rule 149 (C), a Chamber may admit any relevant evidence which it deems to have probative value. Rule 154 governs the admission into evidence of documents. It provides that '[s]ubject to Rules 155, 156 and 158, the Trial Chamber may admit evidence in the form of a document or other record, consistently with Rule 149 (C) and (D)'.

²⁶ ERN 60263708-60263708.

²⁷ ERN 60294239-60294252.

²⁸ Prosecution motion, para. 6.

²⁹ F1780, Decision Authorising the Prosecution to Amend its Witness and Exhibit Lists, 8 December 2014. According to para. 18, the Trial Chamber was satisfied at that point that Mr Al-Hassan's interview was relevant and *prima facie* probative to the case.

³⁰ Prosecution motion, para. 8.

³¹ Decision of 26 April 2017.

³² Exhibits P2090, P2095 and P2098.

martyrs and or Mujahedeen.³³ Other evidence assists the analysis of third-party contacts of the mobiles attributed by the Prosecution to Mr Badreddine and to two of the Accused, Mr Ayyash and Mr Merhi, including contacts with senior Hezbollah officials.³⁴

22. At a press conference on 9 August 2010, Mr Nasrallah replied affirmatively to a question asking if it were true that a group from Hezbollah's security apparatus was linked to a non-Lebanese group observing Mr Hariri, and that he had provided this information to Mr Al-Hassan on Hezbollah's behalf.³⁵

23. At a commemoration ceremony for Hezbollah martyrs on 11 November 2010, Mr Nasrallah stated in relation to the Special Tribunal that those who believe 'that we will allow the arrest or detention of any of our Mujahedeen' are mistaken and added that '[t]he hand that attempts to reach them will be cut off'.³⁶

24. Subsequently, in his speech during Iftar on 17 August 2011, delivered at the Women's Branch of the Islamic Resistance Support Association, Mr Nasrallah referred several times to the then four Accused, Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra, as 'honourable resistance men' stating that they 'should not even be referred to as accused'.³⁷

25. Four online articles from 10, 11, 14 and 15 March 2004 report the death of Mr Youssef Merhi—Mr Merhi's younger brother—and his funeral procession on 10 March 2004, which was attended by Hezbollah members of the Lebanese Parliament and other Hezbollah officials. These four articles are an article entitled 'Hezbollah bid farewell the Mujahid Martyr Merhi' reporting that Mr Youssef Merhi died as a martyr on 10 March 2004; an article entitled "'Hezbollah' pays Merhi the last honours' stating that Mr Youssef Merhi

³³ Exhibits P2092, P2094, P2097, P2100.

³⁴ F2798, Decision on the Admission of Call Sequence Tables Related to the Movements of Mr Rafik Hariri and Related Events, and Four Witness Statements, 31 October 2016, paras 12, 20; exhibits P1329, P1336, P1343 and P1353 (call sequence tables for the telephone numbers attributed to political figures associated with Hezbollah, demonstrating their contact with Mr Badreddine and or with Mr Merhi); exhibits P2093, P2099.

³⁵ Exhibit P2098. The question was: 'Is it true that you submitted data to Prime Minister Saad Hariri late in 2005 and early in 2006 that indicate that a group from the security of the resistance was monitoring an Israeli agent that observed the routes taken by martyr Prime Minister Rafic Hariri during the last months preceding his assassination? Is it correct that you submitted this data to Prime Minister Hariri through Colonel Wissam El-Hassan, and that was in response to the conclusions of the Information Branch that suggested that a group of the resistance security was linked to the group that was observing PM Hariri?'

³⁶ Exhibit P2090.

³⁷ Exhibit P2095.

was ‘killed [...] during his duty of Jihad, as stated in Hezbollah’s communiqué’; and two articles reporting on Mr Nasrallah’s speech at a memorial service for Mr Merhi.³⁸

26. The Trial Chamber has admitted an article describing Mr Sabra’s younger brother, Mr Moussa Hassan Sabra, as a ‘mujahid’ and reporting that senior Hezbollah members attended a memorial ceremony for him. Another article, also admitted into evidence, reflects that Hezbollah declared Mr Oneissi’s younger brother and nephew, Mr Ahmed Oneissi and Mr Ali Oneissi, martyrs upon their deaths as militants.³⁹

27. The Trial Chamber found that the evidence related to the deaths, funerals and memorial ceremonies of Mr Merhi’s, Mr Oneissi’s and Mr Sabra’s close relatives is relevant to and probative of the material fact pleaded in paragraph 49 of the amended consolidated indictment that the three Accused were supporters of Hezbollah. For example, the Trial Chamber found the article about the memorial for Mr Sabra’s younger brother, Moussa, relevant to demonstrate Hezbollah’s recognition of him as a Hezbollah member and hence its attitude to his family. Similarly, the Trial Chamber found that the online article and photographs published in relation to the death of Mr Oneissi’s younger brother, Ahmed, and nephew, Ali, were relevant to demonstrate the Oneissi family’s link to Hezbollah. The decision found that, taken together with Mr Nasrallah’s qualification of the then four Accused as ‘honourable resistance men’, these documents were also relevant to show the Accused’s affiliation with Hezbollah, which includes the familial association.⁴⁰

28. The fact that Mr Badreddine was a senior Hezbollah military officer appears to be uncontested. After his apparent death in unexplained circumstances in May 2016, the Trial Chamber admitted into evidence documents relevant to the pleaded material fact that he was a supporter of Hezbollah. During a large funeral procession held for him in Beirut on 13 May 2016, his coffin was draped with a Hezbollah flag and senior Hezbollah officials paid condolences to his family. At a memorial ceremony held for Mr Badreddine in Damascus on 18 May 2016, there were rows of military men carrying Hezbollah flags in a salute.⁴¹

³⁸ Exhibits P2097 and P2100.

³⁹ Exhibits P2092 and P2094.

⁴⁰ Decision of 26 April 2017, paras 38-40.

⁴¹ Exhibits P1986, P1987, P1988, P1989 and P1990. F3196, Decision Admitting 10 Documents Related to the Death of Mustafa Amine Badreddine, 23 June 2017 (‘Decision of 23 June 2017’), paras 24-25.

29. In a video of a commemoration ceremony held for Mr Badreddine on 20 May 2016 in Beirut, Mr Nasrallah referred to him as a ‘great jihadist leader’ and one of the Resistance’s best leaders. Mr Nasrallah also stated that Mr Badreddine was a leader of Hezbollah’s Military Central Command, that he assumed several responsibilities after Imad Mughniyah’s⁴² death and that he played a major role in developing the military media and the concept of psychological war.⁴³

30. Mr Badreddine’s role as a prominent Hezbollah military commander who performed significant military operational activities is also reflected in articles and photographs, using material released by Hezbollah in May 2016, some of which show Mr Badreddine and other men in military fatigues. The Trial Chamber found that this evidence was relevant to the material fact pleaded in paragraph 49 of the amended consolidated indictment that Mr Badreddine was a supporter of Hezbollah.⁴⁴

SUBMISSIONS

Prosecution motion

31. The Prosecution submits that Mr Al-Hassan’s interview satisfies the requirements of Rule 158. The tendered material provides evidence relevant to two aspects of the Prosecution case, namely the Green network and the link of the four Accused and Mr Badreddine to Hezbollah.⁴⁵

32. The tendered material supports the allegation that all four Accused are supporters of Hezbollah, as was Mr Badreddine, and that they in turn had access to a Hezbollah network of mobiles used as a means to carry out surveillance. The interview thus provides evidence that the Green network, which was instrumental in the coordination and preparation of the 14 February 2005 attack, was a Hezbollah network.⁴⁶

⁴² According to publicly available information, Imad Fayeze Mughniyah, Mr Badreddine’s brother-in-law, was a senior Hezbollah member who was a principal leader and operative for a number of years within Hezbollah’s military, intelligence, and security apparatuses. Mr Mughniyah was killed in Damascus on 12 February 2008 by a car bomb that detonated remotely as he walked past it.

⁴³ Exhibit P1989; transcript of 31 May 2016, pp 13, 48-49.

⁴⁴ Exhibits P1982, P1983, P1984 and P1986; Decision of 23 June 2017, paras 23-25.

⁴⁵ Prosecution motion, para. 2.

⁴⁶ Prosecution motion, paras 2, 10-11.

33. The evidence supports the Prosecution theory as to the *modus operandi* of the conspirators to and executors of the attack and reveals that, at the material time, Hezbollah used a cellular network to conduct surveillance. Mr Al-Hassan's interview is not tendered as evidence of attribution, as the Prosecution is presenting its own attribution analysis in support of its case against each of the Accused.⁴⁷

34. The evidence is reliable, taking into account how it was made and maintained, and features indicia of reliability that compensate for any minor departures from the Practice Direction relating to Rules 123, 155 and 157.⁴⁸ The interview is an accurate and complete record of Mr Al-Hassan's evidence and is accompanied by a signed witness acknowledgement, which was read out to him during his interview. The interview of Mr Al-Hassan was conducted in compliance with the Practice Direction.⁴⁹

35. Although the interview is redacted in part, the Prosecution submits that it has not redacted any information relevant to the witness's credibility or otherwise falling within the scope of the Prosecution obligations under Rule 113 to disclose exculpatory material.⁵⁰ The witness clearly explains when his evidence is first-hand, as well as any limitations to his knowledge. The Trial Chamber has previously held that the existence of hearsay evidence does not prevent the admission of a statement but may be taken into account when determining the weight of such evidence. Furthermore, there is no bar to the admission of the evidence under Rule 158, as its probative value is not sufficiently proximate to the acts and conduct of any of the Accused as charged in the indictment.⁵¹

36. The relevant authorities certified the authenticity and origin of 'exhibit WAH/004', which corroborates Mr Al-Hassan's interview and provides indirect evidence of Hezbollah's acknowledgement of its use of Green network mobiles.⁵²

⁴⁷ Prosecution motion, paras 26-27.

⁴⁸ Practice Direction on the Procedure for Taking Depositions under Rules 123 and 157 and for Taking Witness Statements for Admission in Court under Rule 155.

⁴⁹ Prosecution motion, paras 16-17.

⁵⁰ Prosecution motion, paras 23-24. Rule 113 reads in relevant part as follows: '(A) Subject to the provisions of Rules 116, 117 and 118, the Prosecutor shall, as soon as practicable, disclose to the Defence any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence.'

⁵¹ Prosecution motion, paras 19 (citing F2552, Decision on Prosecution Motion for the Admission of Statements by Witness PRH707 and on Ayyash Defence Motion to Strike the Prosecution Reply, 15 April 2016 ('Decision of 15 April 2016'), paras 49-50), and 25-27.

⁵² Prosecution motion, paras 14(iv), 18.

37. Mr Al-Hassan's evidence is also corroborative of other evidence admitted by the Trial Chamber. In particular, the transcript of a press conference held by Mr Nasrallah on 9 August 2010 confirms key aspects of Mr Al-Hassan's interview. Mr Nasrallah confirmed (1) that there was a suggestion that members of the Hezbollah security apparatus were linked to a group observing Mr Hariri, and (2) that he had provided information to Mr Al-Hassan on Hezbollah's behalf, specifically that Hezbollah had been tracking an Israeli agent but was unaware whether that agent had been following Mr Hariri.⁵³

Defence responses

38. Counsel for the four Accused responded to the motion, opposing the admission into evidence of all documents.⁵⁴

39. Counsel for Mr Ayyash contend that the Prosecution has failed to demonstrate the reliability of the tendered evidence, and therefore the Trial Chamber should deny the admission into evidence of the interview and the connected exhibits, which have no independent probative value. Based on the number of redactions, the interview cannot be regarded as a 'complete record' of the witness's evidence. As paragraph 49 of the amended consolidated indictment is limited to the Accused and Mr Badreddine being supporters of Hezbollah, the Trial Chamber should reject any further allegations regarding the Green network being a Hezbollah network as irrelevant and falling outside the pleaded case. The assertion that Hezbollah used a network of mobiles to carry out surveillance or that the Green network participated in such surveillance does not form part of the Prosecution case.⁵⁵

40. According to counsel for Mr Merhi, Mr Al-Hassan's interview has limited relevance. The Prosecution has not provided arguments in support of the relevance of the witness acknowledgement and the certificate. 'Exhibit WAH/004's' relevance depends entirely on that of the interview and must, therefore, only be assessed with the sections of the interview

⁵³ Prosecution motion, para. 20; exhibit P2098.

⁵⁴ F3245, Merhi Defence Response to the "Prosecution Rule 158 Motion for Admission of Written Statement of Unavailable Person PRH680", 24 July 2017 (confidential) ('Merhi Defence response'); F3246, Ayyash Defence Response to Prosecution Rule 158 Motion for Admission of Written Statement of Unavailable Person PRH680, 24 July 2017 (confidential) ('Ayyash Defence response'); F3247, Sabra Defence Response to "Prosecution Rule 158 Motion for Admission of Written Statement of Unavailable Person PRH680", 24 July 2017 (confidential) ('Sabra Defence response'); F3249, Defence for Hussein Hassan Oneissi Response to "Prosecution Rule 158 Motion for Admission of Written Statement of Unavailable Person PRH680", dated 6 July 2017, 24 July 2017 (confidential) ('Oneissi Defence response').

⁵⁵ Ayyash Defence response, paras 6, 8-9, 18-20.

identified by the Prosecution as relevant. The Prosecution has not sufficiently justified some redactions in the interview, resulting in prejudice to the Defence. Mr Al-Hassan's lack of credibility—he was absent on the day of the attack and his alibi was seriously called into question—severely vitiates the probative value of his account. His interview should not be admitted into evidence, as otherwise the prejudice to the Accused would outweigh its probative value. In support of its contentions, the Merhi Defence refers to international criminal law case law and human rights case law.⁵⁶

41. The Oneissi Defence submits that the tendered evidence has no relevance to the allegations against Mr Oneissi. Whether the Green network was a Hezbollah network is irrelevant to the allegations contained in the amended consolidated indictment, particularly with respect to the allegations against Mr Oneissi. In addition, the transcript of Mr Nasrallah's press conference does not corroborate that the Green network was operated by Hezbollah in the surveillance of Mr Hariri.⁵⁷

42. Counsel for Mr Sabra submit that Mr Al-Hassan's evidence is critical to the Prosecution case concerning the 'purple group' of mobiles and thus forms the foundation of the Prosecution case against Mr Sabra. Where the probative value of evidence is substantially outweighed by the need to ensure a fair trial under Rule 149 (D), it is a bar to admissibility and not merely an issue of weight. The Trial Chamber's overarching responsibility to protect the rights of the Accused necessitates declaring Mr Al-Hassan's evidence inadmissible.⁵⁸

43. The Sabra Defence challenges Mr Al-Hassan's credibility. It points to Mr Al-Hassan's 'conspicuous absence' from the convoy on the day of the attack following an alleged last-minute notification on the evening of 13 February 2005 of a university examination scheduled to take place the next day. The Sabra Defence highlights flaws and inconsistencies in Mr Al-Hassan's alibi for 14 February 2005 and alleges his potential involvement in Mr Hariri's assassination, as well as his efforts to mislead investigations into the attack. The Sabra Defence highlights Mr Al-Hassan's unique position to influence the UNIIIC investigation and asserts that he was in a position, and had an incentive, to mislead the investigations concerning Mr Hariri's assassination. The witness acknowledgement and the fact that Mr Al-

⁵⁶ Merhi Defence response, paras 4-5, 7-11, 14, 19-22, 24-29, 31-36.

⁵⁷ Oneissi Defence response, paras 7-13, 16.

⁵⁸ Sabra Defence response, paras 8, 10, 40-41.

Hassan's interview was audio recorded in the presence of Prosecution staff are of little value, as they do not address the seriousness of the implications of his role. The witness lacked knowledge of documents and exhibits shown to him. In the absence of associated exhibits, referenced and relied upon by Mr Al-Hassan (which the Prosecution omits to tender), the Trial Chamber is denied the opportunity to properly evaluate his interview.⁵⁹

Hearsay and uncorroborated nature of Mr Al-Hassan's evidence

44. Counsel for all four Accused contend that Mr Al-Hassan's interview contains substantial portions of hearsay evidence—largely without an explanation of their source—that cannot be clearly distinguished from the witness's first-hand evidence. This hearsay evidence of unidentified individuals is uncorroborated and manifestly unreliable. Even if Mr Nasrallah's statement during the press conference sufficed as corroborative evidence for the relevant portion of Mr Al-Hassan's interview, the rest of Mr Al-Hassan's evidence remains largely uncorroborated. This evidence is not the best available and the Prosecution should have sought better evidence to support its assertions than unfounded hearsay of a deceased person.⁶⁰

Modus operandi evidence—acts and conduct of the Accused

45. According to the Ayyash, Merhi and Oneissi Defence, evidence related to the *modus operandi* of the co-conspirators and perpetrators of the attack—that is, Hezbollah's alleged use of the Green network—is evidence of the acts and conduct of the Accused and thus should not be admitted without cross-examination. In the alternative, if the Prosecution is not tendering Mr Al-Hassan's evidence in support of this aspect of its case, it must clearly identify the sections of the interview that should not be admitted into evidence.⁶¹

Prosecution consolidated reply

46. The Prosecution does not rely on the entirety of Mr Al-Hassan's evidence. It relies only on the evidence related to the Green network and its provenance as a Hezbollah network.

⁵⁹ Sabra Defence response, paras 11-34. In para. 34 of its response, the Sabra Defence refers to exhibits WAH/001, WAH/003, WAH/006 and WAH/007. However, the Trial Chamber notes that neither the 16 June 2012 interview nor that of 17 June 2012 refers to an exhibit 'WAH/006'.

⁶⁰ Ayyash Defence response, paras 13-14, 16-17; Merhi Defence response, paras 24-30; Oneissi Defence response, paras 10, 13; Sabra Defence response, paras 22-28.

⁶¹ Ayyash Defence response, paras 26-29; Merhi Defence response, paras 15-17; Oneissi Defence response, paras 17-19.

Mr Al-Hassan's evidence demonstrates that the Green network was a Hezbollah network and, when considered with other evidence, shows that Mr Ayyash, Mr Merhi and the late Mr Badreddine, who used Green network mobiles, were supporters of Hezbollah. This evidence also supports the inference that Mr Oneissi and Mr Sabra, who were in frequent contact, and collaborated, with the alleged Green network user Mr Merhi, were also Hezbollah supporters.⁶²

47. Mr Al-Hassan's evidence is corroborated by the record of Mr Nasrallah's press conference of 9 August 2010 and by 'exhibit WAH/004'. Mr Al-Hassan's evidence does not concern the specific acts or conduct of the Accused as pleaded in the amended consolidated indictment. Rather, it goes to proof of the provenance of the Green network as a Hezbollah network. The common law 'best evidence' rule does not apply to witness testimony before the Special Tribunal and is of limited application in modern common law courts.⁶³

Confidentiality

48. Although the Prosecution initially requested that the motion and all related filings remain confidential, it subsequently submitted that it does not oppose the reclassification of its motion as public if the Trial Chamber admits the tendered items. Should the Trial Chamber deny the admission of some or all of the tendered material, the motion could be reclassified as public, subject to certain redactions to be proposed by the Prosecution.⁶⁴

49. Counsel for all four Accused submit that the Prosecution motion and their responses should be reclassified as public due to the lack of factual and legal basis for confidentiality.⁶⁵

DISCUSSION AND DECISION

50. The Trial Chamber must determine whether Mr Al-Hassan's interview and the three associated documents satisfy the admissibility requirements under Rule 149 (C) and Rule 154 or Rule 158. The Trial Chamber has previously addressed the basic requirements for

⁶² F3255, Prosecution Consolidated Reply to the Defence Responses to Prosecution Rule 158 Motion for Admission of Written Statement of Unavailable Person PRH680, 28 July 2017 (confidential) ('Prosecution consolidated reply'), paras 2, 5.

⁶³ Prosecution consolidated reply, paras 2, 6-7.

⁶⁴ Prosecution consolidated reply, para. 8; Letter to the Trial Chamber's senior legal officer, dated 25 August 2017.

⁶⁵ Ayyash Defence response, para. 33; Merhi Defence response, para. 37; Oneissi Defence response, paras 22-24; Sabra Defence response, paras 35-38.

admission of evidence under Rule 149 (C), and the requirements for admission of documents under Rule 154.⁶⁶ These are applicable here.

Specific requirements for admission of evidence under Rule 158

51. Together with the basic requirements for admission under Rule 149 (C), the admissibility of an unavailable person's statement is subject to the specific cumulative conditions of Rule 158. The Trial Chamber has determined in earlier decisions the procedural safeguards under Rule 158 for admitting statements into evidence.⁶⁷ These too apply here.

52. Rule 158 provides for the admission of the evidence of a person who has died, who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify orally. The admission of such evidence is, however, subject to certain conditions. First, the Trial Chamber must be satisfied, in accordance with Rule 158 (A) (i)-(ii), of the person's unavailability and must also find that the statement is reliable, taking into account how it was made and maintained. Lastly, Rule 158 (B) provides that the Trial Chamber, in considering the application of Rule 149 (D), which grants it the discretionary power to exclude evidence, shall take into account whether the evidence in question goes to proof of acts and conduct of the accused as charged in the indictment.⁶⁸

Mr Al-Hassan's unavailability

53. That the witness is deceased and thus 'unavailable' is not in dispute. In support of its application, the Prosecution has provided Mr Al-Hassan's death certificate. The Trial

⁶⁶ See e.g. Decision of 26 April 2017, para. 6; F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL's Prosecution, 6 May 2015, paras 66, 111; F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015, para. 33; F1350, Decision on Prosecution's Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014 ('Decision of 28 January 2014'), paras 5-7.

⁶⁷ See e.g. F3107, Corrected Version of "Decision on 'Prosecution Motion to Admit the Statement of PRH024 under Rule 158' with Partially Dissenting Opinion of Judge David Re" dated 28 April 2017, 1 May 2017, paras 16-17; F1890, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH402 and PRH636, 27 March 2015 ('Decision of 27 March 2015'), paras 17, 20.

⁶⁸ According to Rule 158, such evidence could be provided in a form of a written statement, any other reliable record of what that person has said, written or otherwise expressed, or transcript of a statement whether or not it is in the form prescribed by Rules 93, 123, 155, 156 and 157.

Rule 149 (D) provides that the 'Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. In particular, the Chamber may exclude evidence gathered in violation of the rights of the suspect or the accused as set out in the Statute and the Rules'.

Chamber is satisfied that the witness is deceased and, therefore, ‘unavailable’ within the meaning of Rule 158.⁶⁹ Accordingly, his interview fulfils the requirement of Rule 158 (A) (i).

Relevance of Mr Al-Hassan’s interview

54. The next issue is the relevance of Mr Al-Hassan’s evidence. Together with other material already admitted into evidence, including Mr Nasrallah’s 9 August 2010 press conference,⁷⁰ the Prosecution relies on Mr Al-Hassan’s evidence to corroborate its allegations concerning the Green network and those who used it, including the allegation that all four Accused and Mr Badreddine were Hezbollah supporters.

55. Mr Al-Hassan’s interview appears relevant to the allegations concerning the Green network, its purpose and use, insofar as it concerns the material fact pleaded in paragraph 49 of the amended consolidated indictment that the four Accused and Mr Badreddine were Hezbollah supporters. In particular, the purported provenance of Network 2 as a Hezbollah network⁷¹ is relevant to the allegation that the Green network users Mr Ayyash and Mr Merhi were Hezbollah supporters. This could also support an inference that Mr Oneissi and Mr Sabra, who were in frequent contact, and collaborated, with the alleged Green network user Mr Merhi, were also Hezbollah supporters. This is relevant to the pleaded material fact in paragraph 49 of the amended consolidated indictment. Accordingly, Mr Al-Hassan’s interview has some, albeit limited, corroborative relevance.

56. It is apparent that some parts of Mr Al-Hassan’s interview are not relevant to the allegations in paragraph 49 of the amended consolidated indictment. Large portions of the interview relate to the Lebanese investigation and Captain Eid’s work and assumptions made during the investigation. Normally such material—of itself, or in isolation—might not be admissible. Nevertheless, in the circumstances here, namely, a deceased witness who is referring to the evidence of another deceased person (Captain Eid), the Trial Chamber should consider the interview’s wider context. It is necessary to do this to understand how the witness provided the information that is strictly relevant to the case. Further, Mr Al-Hassan’s interview may, taken as a whole, enhance the Trial Chamber’s understanding and evaluation

⁶⁹ See e.g. F2100, Decision on Prosecution Motion to Admit the Statements of Deceased Witness PRH045, 24 July 2015 (‘Decision of 24 July 2015’), para. 14.

⁷⁰ See above, paras 21-30.

⁷¹ Interview of 16 June 2012, pp 84, 86.

of the witness's evidence, including his credibility. The International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Popović* case reached the same conclusion, finding:

In assessing admissibility, the majority of the Trial Chamber has considered the statement in totality to determine whether the reliability criteria have been met. Similarly, in subsequently assessing the weight to be accorded to the statement as a whole or in relation to any part thereof, it is equally imperative that the whole statement is before the Trial Chamber. All of the responses of the witness are relevant in assessing *inter alia*, her recollection, descriptive powers and credibility. This is the case even if different weight or no weight is ultimately accorded to any part of her statement. For this reason, the Trial Chamber, by majority, finds that it is important to admit [the statement] in its entirety in order to fully assess [it] and the weight to be given to it.⁷²

Reliability and probative value of Mr Al-Hassan's interview and of the witness acknowledgement

57. As the Trial Chamber has noted in earlier decisions, the admission of material into evidence requires only *prima facie*—rather than definite—reliability and probative value.⁷³

58. Under Rule 158 (A) (ii), when assessing the reliability of a statement, record or transcript, the Trial Chamber will consider how it was made and maintained. The Trial Chamber has previously held that statements and documents tendered under Rule 158 need not be in the form prescribed by Rules 155 and 156, which govern the admission into evidence of written statements and transcripts *in lieu* of oral testimony or examination in chief. Similarly, the Practice Direction does not apply to documents and statements tendered under Rule 158. Still, although not strictly applicable to admission of evidence of unavailable persons, the Practice Direction and Rule 155 provide useful guidance for assessing the reliability of a statement under Rule 158 (A) (ii).⁷⁴

⁷² ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T ('*Popović*'), Redacted Version of "Decision on Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*", filed confidentially on 18 December 2008, 19 February 2009, para. 50.

⁷³ F2258, Decision on Prosecution Motion for the Admission of Evidence Related to the Locations of Residences Associated with the Accused, 9 October 2015 ('Decision of 9 October 2015'), para. 10; F2062, Decision on 'Prosecution Motion for the Admission of Locations Related Evidence', 9 July 2015, para. 66; Decision of 28 January 2014, para. 7; F1308, Decision on Prosecution's Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014, para. 8.

⁷⁴ Decision of 24 July 2015, paras 3-4.

59. The manner in which Mr Al-Hassan's interview was taken provides sufficient indicia of *prima facie* reliability under Rule 158 (A) (ii). As the Trial Chamber has previously found, the fact that a statement contains the full transcript of the original audio-recorded interview adds to its reliability.⁷⁵

60. The witness acknowledgement also provides some indicia of reliability of Mr Al-Hassan's interview.⁷⁶ It is relevant to Mr Al-Hassan's evidence, as it attests to how the interview was made, a consideration to be taken into account when assessing the reliability of Mr Al-Hassan's interview under Rule 158 (A) (ii). It acknowledges that the information the witness provided in the audio recording of his interview is true and correct to the best of his knowledge and recollections. In addition, it shows that Mr Al-Hassan was warned that he was liable to prosecution for contempt or for knowingly and willfully making a false statement, knowing that it may be used in proceeding at the Special Tribunal.⁷⁷

61. Despite the limited relevance of some portions of Mr Al-Hassan's interview, his interview may corroborate other Prosecution evidence, such as Mr Nasrallah's press conference of 9 August 2010. Mr Al-Hassan's evidence may also corroborate some parts of Prosecution investigator Mr Gary Platt's evidence concerning the Green network, in particular that it emerged from a larger group of 18 mobiles and that it became operational around the end of 2003.⁷⁸

62. Further, in stating that Network 2—identified as the Green network—was a Hezbollah network, Mr Al-Hassan's account may potentially corroborate evidence on the Accused's alleged link to Hezbollah, given the allegation that Mr Oneissi and Mr Sabra were in frequent

⁷⁵ F2644, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH024, PRH069, PRH106 and PRH051 Pursuant to Rule 155, 12 July 2016 ('Decision of 12 July 2016'), para. 27; F2297, Decision on Prosecution Motion for the Admission of Witness Statements Pursuant to Rule 155 and Documents Pursuant to Rule 154, 2 November 2015, para. 20.

⁷⁶ See *similarly* F3337, Decision Granting, in part, Sabra Defence Motion for the Admission of Documents relating to Mr Abu Adass – Character, Religious Beliefs and Associates, 25 September 2017, para. 85, where the Trial Chamber found that a witness declaration acknowledging that the statement is true may provide some indicia of reliability (while at the same time noting that the mere fact that a statement was taken by the UNIIC does not, of itself, render its content *prima facie* reliable).

⁷⁷ Interview of 16 June 2012, p. 178, and of 17 June 2012, pp 71-72, containing the witness's acknowledgement that he provided his account with his full will. See F0937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, 30 May 2013, paras 28-29, considering these factors to provide indicia of reliability.

⁷⁸ Exhibit P2090; exhibit P1783, Communication Evidence Concerning the Assassination of Rafik Hariri: Chronology Report, prepared by Gary Platt, investigator, dated 20 February 2014 and updated in July 2017, paras 35, 39 (the Trial Chamber notes the typographical error in para. 35, which refers to '2013' instead of '2003' as the year in which the Green network became operative); Interview of 16 June 2012, pp 35-36.

contact with the alleged Green network user Mr Merhi.⁷⁹ This adds to the *prima facie* reliability of Mr Al-Hassan's evidence for the purposes of its admission into evidence.⁸⁰

63. In addition, during the interview, Mr Al-Hassan clearly explained the circumstances he had experienced and perceived personally, on the one hand, and the limitations to his knowledge, on the other. The Trial Chamber has carefully considered Mr Al-Hassan's lack of knowledge of the existence and contents of certain exhibits referenced by the interviewing Prosecution staff. Mr Al-Hassan explained that these exhibits either were not issued by the ISF or were produced at a time when he was not formally in charge of ISF's Information Branch.⁸¹ Accordingly and contrary to the Sabra Defence submissions, this lack of knowledge is conceivable and thus does not impact the *prima facie* reliability and probative value of Mr Al-Hassan's evidence.

64. The Trial Chamber similarly finds that the *prima facie* reliability and probative value of Mr Al-Hassan's interview is not negatively affected by the witness's inability to provide certain documentation. For instance, the witness mentioned a piece of paper in A4, landscape format, containing names and numbers of suspected Mossad agents, which he received from Mr Nasrallah at their third meeting.⁸² Mr Al-Hassan explained that he was unable to provide this document to the Prosecution because he could not find it following the assassination of his colleague, Captain Eid, who was analysing the numbers and had hidden the piece of paper listing them.⁸³ The witness stated similar reasons for his inability to provide the Prosecution with another piece of paper, containing two numbers written by Captain Eid.⁸⁴ The fact that the witness was unable to support some of his recollections with material that he referenced during the interview does not affect the *prima facie* reliability or probative value of his evidence as a whole.

65. Next, contrary to the Defence arguments, Mr Al-Hassan's alleged lack of credibility concerns the weight rather than the *prima facie* reliability or probative value of his interview. The same applies to the Merhi and Oneissi Defence contentions that due to its partial hearsay

⁷⁹ Other evidence on the link of Mr Merhi, Mr Oneissi and Mr Sabra to Hezbollah is analysed above, at paras 21, 24-27.

⁸⁰ *See to the same effect*, Decision of 27 March 2015, para. 16.

⁸¹ Interview of 17 June 2012, pp 30-33.

⁸² Interview of 16 June 2012, pp 87-88.

⁸³ Interview of 16 June 2012, pp 98-99.

⁸⁴ Interview of 16 June 2012, pp 99-101.

and uncorroborated nature, Mr Al-Hassan's evidence is not the best available and that the Prosecution should have sought better evidence than the unfounded hearsay of a deceased person. The Trial Chamber has previously held that a statement's hearsay nature affects the credibility—and, accordingly, the weight to be given to such evidence at a later stage of the proceedings—rather than its admissibility.⁸⁵ The Trial Chamber emphasises that it fully recognises that much of Mr Al-Hassan's account is hearsay and will assess it in that light.

66. In addition, the judgements in the *Popović* case at the ICTY and in the *Lucà v. Italy* case at the European Court of Human Rights (ECtHR) referred to by the Merhi Defence,⁸⁶ are to the same effect. Contrary to the Merhi Defence contentions, the relevant parts of these judgments do not concern the assessment of material for purposes of its admission into evidence. Rather, they discuss the evaluation of the totality of the evidence and the weight, if any, to be attached to untested and or uncorroborated evidence in adjudicating the individual criminal responsibility of the accused in a judgment.

67. The ICTY Appeals Chamber in *Prlić* applied a similar interpretation by reference to relevant ECtHR case law, noting that caution should be exercised 'in referring to ECtHR precedents *in relation to issues of admissibility of evidence*', explaining that the ECtHR's task is 'not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole [...] were fair'.⁸⁷ A judgment cannot be based solely or in a decisive manner on untested and or uncorroborated evidence. Such evidence, as consistently acknowledged by international criminal justice and human rights bodies, cannot form the sole basis for a conviction.⁸⁸

⁸⁵ Decision of 23 June 2017, para. 36; Decision of 15 April 2016, paras 49-50.

⁸⁶ Merhi Defence response, paras 14, 35, referring to ICTY, *Popović*, IT-05-88-A, Judgment, 30 January 2015, and ECtHR, *Lucà v. Italy*, No. 33354/96, Judgment, 27 February 2001 ('*Lucà v. Italy* Judgment').

⁸⁷ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ('*Prlić* Decision of 23 November 2007'), fn. 86 (emphasis added) referring to ECtHR, *Van Mechelen and Others v. the Netherlands*, Nos. 21363/93, 21364/93, 21427/93 and 22056/93, Judgment, 23 April 1997 ('*Van Mechelen and Others v. the Netherlands*'), para. 50, and *Doorson v. the Netherlands*, No. 20524/92, Judgment, 26 March 1996, para. 67. See also ECtHR, *A. M. v. Italy*, No. 37019/97, Judgment, 14 December 1999 ('*A. M. v. Italy* Judgment'), para. 24.

⁸⁸ ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Judgment, 6 September 2011, para. 44, noting that the case law of the ICTY is clear that non-corroborated Rule 92 *quater* evidence (that is, evidence from unavailable witnesses) cannot form the sole basis for a conviction, referring, among others, to *Popović* Trial Judgment, 10 June 2010, para. 60, *Prlić* Decision of 23 November 2007, para. 53, and to ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Judgment, 15 April 2011, para. 43, which states that the 'Trial Chamber used as a standard that it would not enter into a conviction where the evidence supporting that conviction was based solely on hearsay evidence. Similarly, with regard to written, non cross-examined evidence [...] the Trial Chamber required corroboration of

68. Next, as regards the credibility of evidence, the International Criminal Tribunal for Rwanda (ICTR) Appeals Chamber held in *Ntagerura* that this assessment ‘cannot be undertaken by a piecemeal approach’, noting that:

Individual items of evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be analysed in the light of the entire body of evidence adduced. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness, that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible. Or, on the other hand, a seemingly convincing testimony may be called into question by other evidence which shows that evidence to lack credibility.⁸⁹

69. Further, as found by the ICTY Trial Chamber in the *Limaj* case, ‘the ultimate weight to be attached to each relevant piece of evidence [...] is not to be determined in isolation’.⁹⁰ Similarly, according to the Appeals Chamber of the International Criminal Court (ICC) in the *Ngudjolo* case, ‘the evidence of a witness in relation to whose credibility the Trial Chamber has some reservations may be relied upon to the extent that it is corroborated by other reliable evidence’.⁹¹ Thus, consistent with international precedent and with its earlier findings,⁹² the Trial Chamber will consider the credibility and the partial hearsay nature of Mr Al-Hassan’s interview when determining the weight to be given to each item of evidence in view of the totality of the evidence in the case.

other evidence before entering into a conviction.’ See also ECtHR, *Lucà v. Italy* Judgment, para. 40; ECtHR, *A. M. v. Italy* Judgment, para. 25 citing, among others, *Van Mechelen and Others v. the Netherlands*, para. 55, ECtHR, *Saidi v. France*, No. 14647/89, Judgment, 20 September 1993, paras 43-44, ECtHR, *Unterpertinger v. Austria*, No. 9120/80, Judgment, 24 November 1986, paras 31-33.

⁸⁹ ICTR, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgment, 7 July 2006 (*Ntagerura* Appeals Judgment), para. 174. See also ICTR, *Prosecutor v. Musema*, ICTR-96-13-T, Judgment and Sentence, 27 January 2000, para. 57 noting that ‘the determination of admissibility does not go to the issue of *credibility*, but merely *reliability*. Accordingly, documentary evidence may be assessed, on the balance of probabilities, to be reliable, and as a result admitted. Later, that same evidence may be found, after examination by the Chamber, not to be credible’ (emphasis in the original).

⁹⁰ ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Judgment, 30 November 2005, para. 20.

⁹¹ ICC, *Prosecutor v. Ngudjolo Chui*, ICC-01/04-02/12 A, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, 27 February 2015 (by majority, Judges Trendafilova and Tarfusser dissenting) (*Ngudjolo* Appeals Judgment), para. 168, referring, among others, to *Ntagerura* Appeals Judgment, para. 174, and noting that the Trial Chamber may ‘rely on certain aspects of a witness’s evidence and consider other aspects unreliable’; *Ngudjolo* Appeals Judgment, Joint dissenting opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser, para. 40, referring to the Judgment and observing that it would be ‘wrong to reject a piece of evidence in its entirety because it is credible and/or reliable in some parts, but not in others.’

⁹² See e.g. Decision of 23 June 2017, para. 36.

70. The Trial Chamber is therefore satisfied that Mr Al-Hassan's interview meets the threshold test of *prima facie* reliability for it to have some probative value.

71. Similarly, the Trial Chamber finds that Mr Al-Hassan's witness acknowledgement is sufficiently reliable. This document is dated and was signed by Mr Al-Hassan and the Prosecution staff present at the interview. In addition, the witness acknowledgement is probative of Mr Al-Hassan's interview in that it attests to how it was made, a consideration to be taken into account when assessing the interview's reliability under Rule 158 (A) (ii). Accordingly, the witness acknowledgement meets the requirements for admission under Rule 154.

Relevance, reliability and probative value of 'exhibit WAH/004' and the ISF certificate

72. Mr Al-Hassan provided 'exhibit WAH/004' on the second day of his interview, in response to a request from the Prosecution. The Trial Chamber finds that this document, like Mr Al-Hassan's interview, relates to allegations concerning the Green network and to the purported link of the four Accused to Hezbollah. It therefore has some relevance to the Prosecution case.

73. The certificate received from the ISF concerns the origin and authenticity of 'exhibit WAH/004' and is, as such, also relevant to some extent.

74. Next, 'exhibit WAH/004' corroborates and is thus probative of the contents of Mr Al-Hassan's interview. This document, containing an analysis of the communications of three mobile numbers drafted by Captain Eid, the then Head of the Technical Division, complements Mr Al-Hassan's interview. Mr Al-Hassan, who headed ISF's Information Branch from January 2006 until his death in October 2012, acknowledged the report's authenticity and provenance. The witness initialled each page of 'exhibit WAH/004' during his interview.⁹³

75. The ISF also confirmed the origin and authenticity of 'exhibit WAH/004' in the certificate. This certificate, which is an official document issued by a reliable source, verifies and confirms the witness's account concerning the authenticity and provenance of the report.

⁹³ Interview of 17 June 2012, p. 2.

76. All these facts, considered together, confer upon ‘exhibit WAH/004’ and the related ISF certificate indicia of *prima facie* reliability and probative value sufficient for their admission into evidence under Rule 154.⁹⁴

Whether the probative value of Mr Al-Hassan’s evidence is substantially outweighed by the need to ensure a fair trial under Rule 149 (D)

77. Having determined that Mr Al-Hassan’s interview is relevant, *prima facie* reliable and that it has some probative value, the Trial Chamber must assess, in accordance with Rule 158 (B), if its probative value is not substantially outweighed by the need to ensure a fair trial under Rule 149 (D). In case of a positive determination, Rule 149 (D) grants the Trial Chamber the discretionary power to exclude the evidence.

78. In applying its discretion under Rule 149 (D), the Trial Chamber must perform a careful balancing exercise between the statement’s probative value and its potential prejudice, if any, to the Accused’s right to a fair trial.⁹⁵ First, in considering the application of Rule 149 (D) to Rule 158, the Trial Chamber must take into account whether the evidence goes to proof of acts and conduct of the Accused as charged in the amended consolidated indictment.

79. The Trial Chamber has previously held that to determine whether a statement goes to proof of the acts and conduct of the Accused as charged in the indictment, each separate piece of evidence must be assessed on its own merits and in light of the circumstances.⁹⁶

80. The phrase ‘acts and conduct of the accused’ signifies the core object of proof in the case comprised by the elements of the crimes charged. Hence, the wording ‘acts and conduct of the accused as charged in the indictment’ denotes the matters directly concerning the accused’s individual criminal responsibility. In the case law of the ICTY and the Special Court for Sierra Leone (SCSL), the phrase ‘acts and conduct’ is a plain expression which should be given ‘its ordinary meaning: deeds and behaviour of the accused’ and should not be expanded to include all information that goes to a critical issue in the case.⁹⁷

⁹⁴ See also e.g. Decision of 9 October 2015, paras 19, 43; Decision of 24 July 2015, para. 14.

⁹⁵ See to the same effect, Prlić Decision of 23 November 2007, para. 62.

⁹⁶ Decision of 9 October 2015, para. 64.

⁹⁷ See e.g. Popović, Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony pursuant to Rule 92 bis, 12 September 2006, para. 10, referring to ICTY *Prosecutor v. Milošević*, IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted under Rule

81. The Trial Chamber considers that Mr Al-Hassan's evidence relevant to paragraph 49 of the amended consolidated indictment does not go to proof of acts or conduct of any of the Accused as charged in the amended consolidated indictment. Although the link of the four Accused to Hezbollah is a material fact pleaded by the Prosecution, it does not represent an element of the crimes charged and thus goes beyond the acts and conduct of the Accused as charged.⁹⁸

82. The Defence submissions that *modus operandi* evidence necessarily goes to proof of the acts and conduct of the Accused are misplaced. The term '*modus operandi*' may denote pattern of conduct or, alternatively, may signify the manner of commission of the crimes charged. In the sense of pattern of conduct, the Trial Chamber has previously found pattern of conduct evidence to entail specific and deliberate acts of an accused that can demonstrate a systematic course of conduct.⁹⁹ Here, Mr Al-Hassan's evidence does not relate to a systematic course of conduct of any of the Accused.

83. If *modus operandi* is interpreted as the manner of commission of the crimes charged, it would, as a matter of principle, be comprised by the accused's acts and conduct only if it would constitute an element of the crimes charged. Here, the alleged link of the Accused to Hezbollah does not, of itself, constitute an element of any of the crimes charged in the amended consolidated indictment.¹⁰⁰

84. But even if a statement goes to proof of acts or conduct of the Accused as charged in the amended consolidated indictment, the Trial Chamber may nevertheless admit it into

92bis, 21 March 2002, para. 22; SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Defence Application for the Admission of Witness Statement of DIS-129 under Rule 92bis or, in the alternative, under Rule 92ter, 12 March 2008, p. 3. See also Decision of 12 July 2016, para. 33.

⁹⁸ See similarly, Decision of 24 July 2015, para. 15.

⁹⁹ Decision of 23 June 2017, para. 27, with reference to the relevant ICTY and ICTR case law: ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgment, 23 October 2001, para. 321; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Judgment, 28 November 2007, para. 315, fn. 759 and *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, paras 11-14.

¹⁰⁰ Conspiracy aimed at committing a terrorist act, committing a terrorist act by means of an explosive device, intentional homicide and attempted intentional homicide with premeditation by using explosive materials, complicity to commit: a terrorist act by means of an explosive device, an intentional homicide with premeditation by using explosive materials and an attempted intentional homicide with premeditation by using explosive materials. See also F3317, Prosecution Submissions pursuant to the Trial Chamber's Order of 27 July 2017, 8 September 2017, annex A (Elements of Crimes Charged in the Amended Consolidated Indictment).

evidence.¹⁰¹ Under Rule 158 (B), the Trial Chamber must consider whether the evidence goes to proof of acts and conduct of the Accused when applying Rule 149 (D), but it does not bar the Trial Chamber from ultimately finding that the probative value of such evidence is not substantially outweighed by the need to ensure a fair trial.

85. The Trial Chamber must consider the lack of cross-examination in assessing whether the Accused's right to a fair trial substantially outweighs the probative value of Mr Al-Hassan's interview.¹⁰² That Defence counsel cannot cross-examine Mr Al-Hassan does not automatically warrant exclusion under Rule 149 (D), as is evident from the regime for admission of evidence under Rule 158 and its equivalent provisions, namely Rule 92 *quarter* of the ICTY's, ICTR's and SCSL's Rules of Procedure and Evidence, and Rule 68 (2) (c) of the ICC's Rules of Procedure and Evidence. This is consistent with international precedent¹⁰³ and with the Trial Chamber's earlier findings noting that probative value is distinct from the weight that the Trial Chamber may ultimately attach to a piece of evidence.¹⁰⁴

86. The Trial Chamber will carefully consider the lack of cross-examination when assessing the weight it can give to Mr Al-Hassan's interview. It will also consider that Mr Al-Hassan's (hearsay) sources of information are another deceased person (Captain Eid) and Mr Nasrallah, who will not be testifying in the trial. Taken together, these factors will inevitably decrease the probative value of the interview and hence the weight the Trial Chamber can give to it.

87. The Trial Chamber has considered that some portions of Mr Al-Hassan's interview are of limited relevance and that it does not go to proof of acts or conduct of the Accused as charged. In addition, Mr Al-Hassan's interview is not the sole support for any Prosecution allegation. Rather, it may corroborate in part other Prosecution evidence, analysed at paragraphs 21 to 30 above, tendered in support of the material fact pleaded in paragraph 49 of

¹⁰¹ See similarly, F3017, Decision Admitting Witness PRH437's Statements under Rule 158 and Granting Protective Measures ('Decision of 28 February 2017'), para. 17; Decision of 24 July 2015, para. 15.

¹⁰² Decision of 28 February 2017, para. 17.

¹⁰³ As noted by the ICTY, 'as a matter of principle nothing bars *the admission* of evidence that is not tested or might not be tested through cross-examination' (emphasis added), (*Prlić* Decision of 23 November 2007, para. 55). It distinguished a decision on admissibility of evidence from 'a determination as to the weight to be given to any piece of evidence', including to 'evidence not subjected to the testing of cross-examination'. At that stage the Trial Chamber will bear in mind the absence of the Defence opportunity to cross-examine (*Popović*, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quarter*, 21 April 2008, para. 66; *Prlić* Decision of 23 November 2007, para. 53).

¹⁰⁴ Decision of 9 October 2015, para. 10.

the amended consolidated indictment regarding the Accused's link to Hezbollah and the alleged provenance of the Green network as a Hezbollah network.

88. In exercising its discretionary power under Rules 149 (D) and 158 (B), the Trial Chamber finds that all of these factors, on balance and taken together, weigh in favour of admitting Mr Al-Hassan's interview transcripts and audio recordings into evidence. This will not adversely affect the Accused's right to a fair trial, as any potential prejudice in this respect does not substantially outweigh the probative value of the evidence. Accordingly, Mr Al-Hassan's interview may be admitted into evidence under Rule 158.

89. The same applies to Mr Al-Hassan's signed witness acknowledgement, 'exhibit WAH/004', and the ISF certificate confirming the origin and authenticity of 'exhibit WAH/004'. Their probative value is not outweighed by the need to ensure a fair trial. Hence, they may also be admitted into evidence under Rule 154.

REDACTIONS TO MR AL-HASSAN'S INTERVIEW

90. The Prosecution is tendering redacted versions of Mr Al-Hassan's interview for admission into evidence. The brief procedural history is that in 2014 the Prosecution requested authorisation from the Trial Chamber to redact portions of the audio recordings and transcripts of the interview under Rule 116,¹⁰⁵ annexing the unredacted interview transcripts for the Trial Chamber's review. The Trial Chamber then authorised some proposed redactions but denied others.¹⁰⁶

91. The Prosecution, however, has now tendered versions of Mr Al-Hassan's interview containing redactions well beyond those authorised by the Trial Chamber. On 3 October 2017 the Trial Chamber ordered the Prosecution to explain the legal basis for these additional redactions, to which the Prosecution responded that they were made under Rule 118.¹⁰⁷ On

¹⁰⁵ Rule 116 specifies the grounds for non-disclosure of information that would ordinarily be subject to disclosure. The Prosecution may apply for non-disclosure, if the disclosure of such information '(i) may prejudice ongoing or future investigations, (ii) may cause grave risk to the security of a witness or his family, or (iii) for any other reasons may be contrary to the public interest or the rights of third parties'.

¹⁰⁶ F1416, Decision on Prosecution Request for Protective Measures (Redaction of Four Documents) of 27 January 2014, 20 February 2014; F1346, Prosecution Request for Protective Measures, 27 January 2014 (Confidential and *Ex Parte*).

¹⁰⁷ Rule 118 reads in relevant part as follows: 'Where the Prosecutor is in possession of information which was provided on a confidential basis and which affects the security interests of a State or international entity or an agent thereof, he shall not disclose that information or its origin without the consent of the person or entity providing the information'.

18 October 2017, the Prosecution provided the Trial Chamber with less redacted versions of the interview for tender.¹⁰⁸

92. In this decision the Trial Chamber declares Mr Al-Hassan's interview admissible into evidence; the issue remaining for determination is the extent, if any, of the redactions beyond those initially authorised. The Trial Chamber will therefore have to address the redactions issue in another decision.

93. The Trial Chamber is aware that the Defence has not seen the unredacted interview transcripts and has objected to their admission in a redacted form. However, the Trial Chamber is satisfied that nothing of any real substance has been redacted from Mr Al-Hassan's interview; the redactions consistent with the Trial Chamber's decision under Rule 116 merely remove the names of Lebanese officials from the interview.

94. The other redactions, the Trial Chamber is satisfied, could not affect in any meaningful way the Defence submissions on the admission into evidence of the interview. No information falling within Rule 113 (exculpatory material), for example, or material to the preparation of the defence for trial under Rule 110, has been redacted.¹⁰⁹ The consequence of this is that there will be no prejudice to the fair trial rights of the Accused if the Trial Chamber admits the latest redacted version of Mr Al-Hassan's interview into evidence. But this awaits a further decision.

CONFIDENTIALITY

95. As noted above, despite its initial request that the motion and all related filings remain confidential, the Prosecution subsequently submitted that if the Trial Chamber admits into evidence Mr Al-Hassan's interview transcripts and audio recordings, and the associated documents, it does not oppose the reclassification of its motion as public.¹¹⁰

¹⁰⁸ Further Prosecution response concerning redactions, paras 1-2; F3351, Prosecution Response to the "Order to the Prosecution to Explain the Basis for Redactions to Mr Wissam Al-Hassan's Interview Transcripts" (with Annex A, Further Confidential and *Ex Parte* Submissions), 5 October 2017; F3348, Order to the Prosecution to Explain the Basis for Redactions to Mr Wissam Al-Hassan's Interview Transcripts, 3 October 2017 (confidential).

¹⁰⁹ The Prosecution submitted to the Trial Chamber the unredacted transcripts of Mr Al-Hassan's interview with proposed redactions in Annex E (confidential and *ex parte*) to F1346, Prosecution Request for Protective Measures, 27 January 2014 (confidential and *ex parte*).

¹¹⁰ *See above*, para. 48; Prosecution consolidated reply, para. 8; Letter to the Trial Chamber's senior legal officer, dated 25 August 2017.

96. The Trial Chamber reiterates the public nature of the trial and thus orders the Parties either to file public redacted versions of their submissions or have them reclassified as public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES admissible, under Rule 158, the audio recordings and transcripts of the Prosecution interview of Mr Wissam Al-Hassan (Witness PRH680) of 16 and 17 June 2012;

DECLARES admissible, under Rule 154, Mr Wissam Al-Hassan's signed witness acknowledgement of 17 June 2012, 'exhibit WAH/004', and the certificate received from the Lebanese Internal Security Forces confirming the origin and authenticity of 'exhibit WAH/004';

DECIDES that, at a suitable stage of the proceedings, it will formally admit these documents into evidence; and

ORDERS the Prosecution and counsel for Mr Salim Jamil Ayyash, Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra to file public redacted versions of their filings or to have their filings reclassified as public.

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

Leidschendam,
The Netherlands
20 October 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

