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

BEFORE THE APPEALS CHAMBER

Case No.:	**STL-11-01/I**
Before:	**Judge Antonio Cassese, Presiding, and Judge Rapporteur** **Judge Ralph Riachy** **Judge Sir David Baragwanath** **Judge Afif Chamsedinne** **Judge Kjell Erik Björnberg**
Registrar:	**Mr Herman von Hebel**
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INTERLOCUTORY DECISION ON THE APPLICABLE LAW: TERRORISM, CONSPIRACY, HOMICIDE, PERPETRATION, CUMULATIVE CHARGING
with corrected front page

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المحكمة الخاصة بلبنان
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HEADNOTE[1]

I. The Questions of Law Submitted by the Pre-Trial Judge

Pursuant to Rule 68(G) of the Special Tribunal for Lebanon's Rules of Evidence and Procedure, the Pre-Trial Judge has submitted to the Appeals Chamber 15 questions of law that require resolution before the Pre-Trial Judge can determine whether to confirm the indictment currently before him. Those questions can be grouped into five categories:

1. *Whether the Tribunal should apply international law in defining the crime of terrorism; if so, how the international law of terrorism should be reconciled with any differences in the Lebanese domestic crime of terrorism; and in either case, what are the objective and subjective elements of the crime of terrorism to be applied by the Tribunal.*
2. *Whether the Tribunal should interpret the elements of the crimes of intentional homicide and attempted homicide under both Lebanese domestic and international law; if so, whether there are any differences between the international and Lebanese definitions of intentional homicide and attempted homicide and how those differences should be reconciled; and what are the elements of intentional homicide and attempted homicide to be applied by the Tribunal.*
3. *Whether the Tribunal should interpret the elements of conspiracy* (complot) *under both Lebanese domestic and international law; if so, whether there are any differences between the international and Lebanese definitions of conspiracy and how those differences should be reconciled; what are the elements of the crime of conspiracy to be applied by the Tribunal; and to the extent that the notion of conspiracy overlaps with that of joint criminal enterprise (a mode of liability), how to distinguish between them.*
4. *Regarding modes of liability for crimes prosecuted before the Tribunal (in particular perpetration and co-perpetration), whether the Tribunal should apply Lebanese domestic or international law or both; how and on what basis to resolve any contradictions between Lebanese and international legal notions of such modes of liability; and whether accused before the Tribunal can be convicted on the basis of advertent recklessness or constructive intent* (dolus eventualis) *for terrorism (which requires a special intent* (dolus specialis) *to spread terror among the population) or for intentional homicide (when the accused did not intend particular victims as the result of an act of terrorism).*
5. *Whether the Tribunal should apply Lebanese or international law to the regulation of cumulative charging and plurality of offences; how any differences between Lebanese and international law on this point should be reconciled and on what basis; and whether different criminal offences regarding the same conduct should be charged cumulatively or alternatively and under what conditions.*

[1] This Headnote does not constitute part of the decision of the Appeals Chamber. It has been prepared for the convenience of the reader, who may find it useful to have an overview of the decision. Only the text of the decision itself is authoritative.

II. The Decision of the Appeals Chamber

A. Interpretation of the STL Statute

In interpreting the Statute, the task of the Tribunal is to establish the proper meaning of the text so as to give effect to the intent of its drafters as fully and fairly as possible; in particular the Tribunal must give consistency to seemingly inconsistent legal provisions. This task shall be discharged based on the general principle of construction enshrined in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (and the corresponding customary rule of international law) whereby a treaty must be construed "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose." With specific regard to the Tribunal's Statute, this principle requires an interpretation that better enables the Tribunal to achieve its goal to administer justice in a fair and efficient manner. If however this yardstick does not prove helpful, one should choose that interpretation which is more favourable to the rights of the suspect or the accused, utilising the general principle of criminal law of favor rei *(in favour of the accused) as a standard of construction.*

Unlike other international criminal tribunals, which apply international law (or, in some limited instances, both international law and national law) to the crimes within their jurisdiction, under the Tribunal's Statute the Judges are called upon primarily to apply Lebanese law to the facts coming within the purview of the Tribunal's jurisdiction. Thus, the Tribunal is mandated to apply domestic law in the exercise of its primary *jurisdiction, and not, as is common for most international tribunals, only when exercising its* incidental *jurisdiction. In consonance with international case law, generally speaking, the Tribunal will apply Lebanese law as interpreted and applied by Lebanese courts, unless such interpretation or application appears to be unreasonable, might result in manifest injustice, or appears not to be consonant with international principles and rules binding upon Lebanon. Also, when Lebanese courts take different or conflicting views of the relevant legislation, the Tribunal may place on that legislation the interpretation which it deems to be more appropriate and attuned to international legal standards.*

B. The Notion of Terrorism To Be Applied by the Tribunal

The Tribunal shall apply the Lebanese domestic crime of terrorism, interpreted in consonance with international conventional and customary law that is binding on Lebanon.

Under Lebanese law the objective elements of terrorism are as follows: (i) an act whether constituting an offence under other provisions of the Criminal Code or not; and (ii) the use of a means "liable to create a public danger". These means are indicated in an illustrative enumeration: explosive devices, inflammable materials, poisonous or incendiary products, or infectious or microbial agents. According to Lebanese case law, these means do not include such non-enumerated implements as a gun, a machine-gun, a revolver, a letter bomb or a knife. The subjective element of terrorism is the special intent to cause a state of terror.

Although Article 2 of the Statute enjoins the Tribunal to apply Lebanese law, the Tribunal may nevertheless take into account international law for the purpose of interpreting Lebanese law. In this

respect, two sets of rules may be taken into account: the Arab Convention against Terrorism, which has been ratified by Lebanon, and customary international law on terrorism in time of peace.

The Arab Convention enjoins the States Parties to cooperate in the prevention and suppression of terrorism and defines terrorism for that purpose, while leaving each contracting party freedom to simultaneously pursue the suppression of terrorism on the basis of its own national legislation.

A comparison between Lebanese law and the Convention shows that the two notions of terrorism have in common two elements: (i) they both embrace acts; and (ii) they require the intent of spreading terror or fear. However, the Convention's definition is broader than that of Lebanese law in that it does not require the underlying act to be carried out by specific means, instrumentalities or devices. In other respects the Arab Convention's notion of terrorism is narrower: it requires the underlying act to be violent, and it excludes acts performed in the course of a war of national liberation (as long as such war is not conducted against an Arab country).

On the basis of treaties, UN resolutions and the legislative and judicial practice of States, there is convincing evidence that a customary rule of international law has evolved on terrorism in time of peace, *requiring the following elements: (i) the intent (*dolus*) of the underlying crime and (ii) the special intent (*dolus specialis*) to spread fear or coerce authority; (iii) the commission of a criminal act, and (iv) that the terrorist act be transnational. The very few States still insisting on an exception to the definition of terrorism can, at most, be considered persistent objectors. A comparison between the crime of terrorism as defined under the Lebanese Criminal Code and that envisaged in customary international law shows that the latter notion is* broader *with regard to the means of carrying out the terrorist act, which are not limited under international law, and* narrower *in that (i) it only deals with terrorist acts in time of peace, (ii) it requires both an underlying criminal act and an intent to commit that act and (iii) it involves a transnational element.*

While fully respecting the Lebanese jurisprudence relating to cases of terrorism brought before Lebanese courts, the Tribunal cannot but take into account the unique gravity and transnational dimension of the crimes at issue and the Security Council's consideration of them as particularly grave international acts of terrorism justifying the establishment of an international court. As a result, for the purpose of adjudicating these facts, the Tribunal is justified in applying, at least in one respect, a construction of the Lebanese Criminal Code's definition of terrorism more extensive that than suggested by Lebanese case law. While Lebanese courts have held that a terrorist attack must be carried out through one of the means enumerated in the Criminal Code, the Code itself suggests that its list of implements is illustrative, not exhaustive, and might therefore include also such implements as handguns, machine-guns and so on, depending on the circumstances of each case. The only firm requirement is that the means used to carry out the terrorist attack also be liable to create a common danger, either by exposing bystanders or onlookers to harm or by instigating further violence in the form of retaliation or political instability. This interpretation of Lebanese law better addresses contemporary forms of terrorism and also aligns Lebanese law more closely with the relevant international law that is binding on Lebanon.

*This interpretation does not run counter to the principle of legality (*nullum crimen sine lege*) because (i) this interpretation is consistent with the offence as explicitly defined under Lebanese law; (ii) it was accessible to the accused, especially given the publication of the Arab Convention and other international treaties ratified by Lebanon in the Official Gazette (none of which limits the*

means or implements by which terrorist acts may be performed); (iii) hence, it was reasonably foreseeable by the accused.

In sum, and in light of the principles enunciated above, the notion of terrorism to be applied by the Tribunal consists of the following elements: (i) the volitional commission of an act; (ii) through means that are liable to create a public danger; and (iii) the intent of the perpetrator to cause a state of terror. Considering that the elements of the notion of terrorism do not require an underlying crime, the perpetrator of an act of terrorism that results in deaths would be liable for terrorism, with the deaths being an aggravating circumstance; additionally, the perpetrator may also, and independently, *be liable for the underlying crime if he had the requisite criminal intent for that crime.*

C. Other Crimes Falling under the Jurisdiction of the STL

The Tribunal shall apply the Lebanese law on intentional homicide, attempted homicide and conspiracy As these are primarily domestic crimes without equivalents under international criminal law (conspiracy in international law being only a mode of liability in the case of genocide), the Appeals Chamber does not evaluate these crimes in light of international criminal law.

Under Lebanese law the elements of intentional homicide are as follows: (i) an act, or culpable omission, aimed at impairing the life of a person; (ii) resulting in the death of a person; (iii) a casual connection between the act and the result of death; (iv) knowledge (including that the act is aimed at a living person and conducted through means that may cause death); and (v) intent, whether direct or dolus eventualis. *Premeditation is an aggravating circumstance, not an element of the crime, and can apply to an intentional homicide committed with* dolus eventualis.

Under Lebanese law the elements of attempted homicide are as follows: (i) preliminary action aimed at committing the crime (beginning the execution of the crime); (ii) the subjective intent required to commit the crime; and (iii) absence of a voluntary abandonment of the offence before it is committed.

Under Lebanese law the elements of conspiracy are as follows: (i) two or more individuals; (ii) who conclude or join an agreement; (iii) aimed at committing crimes against State security (for the purposes of this Tribunal, the aim of the conspiracy must be a terrorist act); (iv) 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); and (v) the existence of criminal intent.

D. Modes of Criminal Responsibility

Article 2 of the Statute requires the Tribunal to apply Lebanese law regarding "criminal participation" (as a mode of responsibility) and "conspiracy", "illicit association" and "failure to report crimes and offences" (as crimes per se*). Article 3 specifies various modes of criminal liability utilised in international criminal law: commission, complicity, organising or directing others to commit a crime, contribution to crimes by a multitude of persons or an organized group, superior responsibility, and criminal liability for the execution of superior orders.*

Either Lebanese or international criminal law (as contained in Article 3 of the Statute) could apply to modes of liability. The Pre-Trial Judge and the Trial Chamber must (i) evaluate on a case-by-case basis whether there is any actual conflict between the application of Lebanese law and that of international criminal law; (ii) if there is no conflict, then Lebanese law should apply; and (iii) if there is a conflict, then the body of law that would lead to a result more favourable to the accused should apply.

1. **Perpetration and Co-Perpetration**

Under both international criminal law and Lebanese law, the perpetrator physically carries out the prohibited conduct, with the requisite mental element. When a crime is committed by a plurality of persons, all persons performing the same act and sharing the same mens rea *are termed co-perpetrators. To the extent that Lebanese law recognises a broader definition of co-perpetration, that concept is treated here as "participation in a group with common purpose."*

2. **Complicity (Aiding and Abetting)**

To a large extent the Lebanese notion of complicity and the international notion of aiding and abetting overlap, with two important exceptions. First, Lebanese law explicitly lists the objective means by which an accomplice can provide support, while international law only requires "substantial assistance" without any restriction on what form that assistance can take. Second, under Lebanese law accomplice liability requires the accused know *of the crime to be committed, join with the perpetrator in an* agreement *to commit the crime and share the* intent *to further that particular crime; instead, international law only requires the intent to further the general illegality of the principal's conduct. Generally speaking, the Lebanese concept of complicity should be applied as it is more protective of the rights of the accused, including the principle of legality (*nullum crimen sine lege*).*

3. **Participation in a Group with Common Purpose**

The main question that arises here is whether and to what extent the various modes of responsibility contemplated in Lebanese law (co-perpetration, complicity, instigation) overlap or can be harmonised with the notion of joint criminal enterprise (JCE) provided for in customary international law (reference should be made to JCE I and III, namely the "basic" and the "extended" notion of such enterprise)

*The two bodies of law coincide in requiring a subjective element: both rely on intent or advertent recklessness (*dolus eventualis*). Thus, Lebanese law and international criminal law overlap in punishing the execution of a criminal agreement, where all the participants share the same criminal intent although each of them may play a different role in the execution of the crime.*

The two bodies of law also overlap in punishing those participants in a criminal enterprise who, although they had not agreed upon the perpetration of an "extra" crime, could be expected to know and did know of the reasonable possibility that such crime may be committed and willingly took the risk of its occurrence (so-called JCE III). However, under international criminal law, this notion cannot apply to "extra" crimes requiring special intent (as is the case with terrorism).

The Pre-Trial Judge and the Trial Chamber will have to evaluate on a case-by-case basis whether there is any actual conflict between the application of Lebanese and that of international criminal notions of joint criminality. If there is no conflict, then Lebanese law should apply. Where there is a conflict, the body of law that would lead to a result more favourable to the accused should apply. In particular, as Lebanese law would allow conviction of an individual for a terrorist act effectuated by another person, even if the individual only had dolus eventualis *as to that terrorist act, the international criminal concept of JCE should be applied to this particular circumstance because it would not allow the conviction of an individual under JCE III for terrorist acts.*

E. Multiple Offences and Multiple Charging

These matters are largely regulated along the same lines by Lebanese law and international criminal law. Both provide for multiple offences and also allow multiple charging and thus there is no cause—at least as can be foreseen before the presentation of any particular facts—to envisage, let alone reconcile any conflict between the two bodies of law.

There is no clear general rule under either Lebanese or international criminal law as to whether cumulative or alternative charging are to be preferred. Notwithstanding, the Pre-Trial Judge, in confirming the indictment, should be particularly careful to allow cumulative charging only when separate elements of the charged offences make these offences truly distinct In particular, when one offence encompasses another, the Judge should always choose the former and reject pleading of the latter. Likewise, if the offences are provided for under a general provision and a special provision, the Judge should always favour the special provision. Additionally, modes of liability for the same *offence should always be charged in the alternative.*

The Pre-Trial Judge should also be guided by the goal of providing the greatest clarity possible to the defence. Thus, additional charges should be discouraged unless the offences are aimed at protecting substantially different values. This general approach should enable more efficient proceedings while avoiding unnecessary burdens on the defence, thus furthering the overall purpose of the Tribunal to achieve justice in a fair and efficient manner.

With regards to the hypothetical posed by the Pre-Trial Judge, we make the following observations: under Lebanese law, the crimes of terrorist conspiracy, terrorism and intentional homicide can be charged cumulatively even if based on the same underlying conduct because they do not entail incompatible legal characterisations, and because the purpose behind criminalising such conducts is the protection of substantially different values. Therefore, it would in most circumstances be more appropriate to charge those crimes cumulatively rather than alternatively.

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INTRODUCTION

1. The Pre-Trial Judge of the Special Tribunal for Lebanon ("Tribunal") is currently seized with an indictment filed by the Tribunal's Prosecutor on 17 January 2011. On 21 January 2011, the Pre-Trial Judge submitted to the Appeals Chamber 15 questions of law raised by this indictment, pursuant to Article 68(G) of the Tribunal's Rules of Procedure and Evidence ("Rules").[2] The Pre-Trial Judge has asked the Appeals Chamber to resolve these questions *ab initio* (from the outset) to ensure that this and any future indictments are confirmed—if they are confirmed—on sound and well-founded grounds.[3] On the basis of the President's Scheduling Order of the same day,[4] the Office of the Prosecutor ("Prosecution") and the Head of the Defence Office ("Defence Office") filed written submissions on these questions on 31 January 2011[5] and 4 February 2011[6] and presented oral arguments at a public hearing on 7 February 2011.

2. On 7 February 2011, the Appeals Chamber further announced its intention to allow intergovernmental organisations, national governments, non-governmental organisations and academic institutions to file *amici curiae* briefs by 11 February on specific issues related to the 15 questions.[7] The parties did not object to this in principle, simply announcing that they might wish to respond to such briefs, should they be presented.[8] On 11 February, the War Crimes Research Office at American University Washington College of Law (USA) filed a brief on "The Practice of Cumulative Charging before International Criminal Bodies" ("War Crimes Research Office Brief"). On the same day, the Institute for Criminal Law and Justice of Georg-August Göttingen University (Germany) filed an "*Amicus Curiae* brief on the question of the applicable terrorism offence in the

[2] 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, STL-11-01/I, 21 January 2011 ("Pre-Trial Order pursuant to Rule 68(G)"). Rule 68(G) provides: "The Pre-Trial Judge may submit to the Appeals Chamber any preliminary question, on the interpretation of the Agreement, Statute and Rules regarding the applicable law that he deems necessary in order to examine and rule on the indictment."

[3] Pre-Trial Order pursuant to Rule 68(G), para. 2.

[4] "Scheduling Order", STL-11-01/I, 21 January 2011.

[5] "Prosecutor's Brief Filed Pursuant to the President's Order of 21 January 2011 Responding to the Questions Submitted by the Pre-Trial Judge (Rule 176 *bis*)", STL-11-01/I, 31 January 2011 ("Prosecution Submission"); "Defence Office's Submissions Pursuant to Rule 176*bis*(B)", STL-11-01/I, 31 January 2011 ("Defence Office Submission").

[6] "Prosecutor's Skeleton Brief in Response to 'Defence Office Submissions Pursuant to Rule 176*bis*(B)' and Corrigendum to Prosecutor's Brief STL-11-01/I/AC-R176*bis* of 21 [*sic*] January 2011", STL-11-01/I, 4 February 2011; « Résumé des arguments du bureau de la defense », STL-11-01/I, 4 February 2011.

[7] Hearing of 7 February 2011, T. 6. All references to a transcript page in this decision are to the unrevised English version.

[8] Hearing of 7 February 2011, T. 159.

proceedings before the Special Tribunal for Lebanon, with a particular focus on a *"special" special intent* and/or a *special motive* as additional subjective requirements" ("Institute for Criminal Law and Justice Brief"). On 14 February 2011, the Registry received another *amicus curiae* brief on "The Notion of Terrorist Acts", submitted by Professor Ben Saul of the Sydney Centre of International Law at the University of Sydney. Since this *amicus* brief was submitted outside time, the Appeals Chamber was unable to take it into account.

3. There is a threshold question whether the Appeals Chamber should exercise jurisdiction to answer the questions posed. Although the course proposed is supported by both the Office of the Prosecutor and counsel for the Defence Office, the potential accused (if the indictment which we have not seen is confirmed) have not been heard.

4. For reasons that follow, the Appeals Chamber has decided to answer these 15 questions of law and does so in this decision.

5. These questions can be grouped into three general categories: the substantive criminal law of terrorism, homicide, and conspiracy; modes of criminal responsibility; and the concurrence of offences. In Section I of this opinion, we will address questions 1-12, regarding the elements of the crimes of terrorism, intentional homicide, attempted homicide, and conspiracy to be applied by the Tribunal. In Section II, we will address question 13, regarding the modes of responsibility to be applied by the Tribunal, in particular perpetration, co-perpetration, complicity (aiding and abetting), joint criminal enterprise, and liability based on *dolus eventualis* (a notion roughly equivalent to constructive intent, also at times defined as advertent recklessness). Finally, in Section III, we will address questions 14-15, regarding how the Tribunal should handle conduct that may be categorised under multiple criminal headings, including whether such multiple offences should be charged cumulatively or alternatively.

6. First, however, we pause to consider three overarching matters that will inform the remainder of this opinion: (i) the provenance and purpose of the Rule 68(G) power and its exercise in this case; (ii) the scope of the Tribunal's jurisdiction and its exercise in this case; and (iii) the general principles of interpretation that the Appeals Chamber will apply in addressing the questions of the Pre-Trial Judge.

I. The Provenance and Purpose of the Rule 68(G) Power and Its Exercise in This Case

7. The Tribunal's Judges adopted Rules 68(G) and 176*bis*(A)[9] to enable the Appeals Chamber to clarify in advance the law to be applied by the Pre-Trial Judge and the Trial Chamber, thereby expediting the justice process in a manner supported by both the Prosecutor and the Head of the Defence Office. In establishing these Rules, the Judges were guided by Articles 21 and 28 of the Tribunal's Statute, which require the Tribunal to avoid unreasonable delay in its proceedings and to adopt rules of procedure and evidence "with a view to ensuring a fair and expeditious trial."[10]

8. Thus the present function of the Appeals Chamber is not to apply the law to some specific set of facts. Rather, it is requested only to set out the law applicable to any future case on the specific issues raised, without encroaching on the right of future defendants to seek reconsideration of these matters in light of the particular facts of a case. It is important to emphasise that neither the Appeals Chamber nor the Defence Office has seen the indictment (which is currently under seal), much less the evidence submitted by the Prosecutor to the Pre-Trial Judge to support the indictment's confirmation. In other words, the Appeals Chamber is invited to make legal findings *in abstracto* (in the abstract), without any reference to facts. This procedure, sometimes encountered in civil proceedings of some countries, is less common in the context of criminal proceedings.

9. There are significant reasons for the normal practice of refraining from giving judgment, even on interpretation of a statute, in the absence of a specific factual context. The experience of the law is that general observations frequently require modification in the light of particular facts, which can provide a sharper focus and trigger a more nuanced response. But the decision whether to adopt Rule 176*bis*(C) required election between two alternatives: (i) to accept the risk that the Pre-Trial Judge or

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[9] "The Appeals Chamber shall issue an interlocutory decision on any question raised by the Pre-Trial Judge under Rule 68(G), without prejudging the rights of any accused."

[10] Article 21 ("Powers of the Chambers") provides in part: "The Special Tribunal shall confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively. It shall take strict measures to prevent any action that may cause unreasonable delay.[...]"
Article 28 ("Rules of Procedure and Evidence") further states:

> 1. *The judges of the Special Tribunal shall* [ ] *adopt Rules of Procedure and Evidence* for the conduct of the pre-trial, trial and appellate proceedings, the admission of evidence, the participation of victims, the protection of victims and witnesses and other appropriate matters and may amend them, as appropriate.
>
> 2. In so doing, the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, *with a view to ensuring a fair and expeditious trial.*

(Emphasis added.)

the Trial Chamber might adopt an interpretation of the law with which this Appeals Chamber ultimately disagrees, unnecessarily delaying the resolution of cases and thereby causing an injustice to the parties and to the people of Lebanon; or (ii) to authorise the Appeals Chamber to pronounce on the applicable law in the abstract, with a view to expediting proceedings in the interests both of potential defendants and the good administration of justice.

10. In this case we are conscious of the advantage we would enjoy as an appellate court of having as our starting point a reasoned decision of the lower court reached in the light of arguments based on specific facts, which we do not possess. We are however satisfied that that advantage is outweighed by three considerations. We have mentioned the first: the need for expedition. The second is that the questions asked by the Pre-Trial Judge have been the subject of careful written submissions and oral arguments of counsel at a reasonable level of specificity. The third is that no prejudice will arise against any future accused. If an accused were to challenge any of our conclusions, in the light of specific evidence, the fact that he was not heard at this stage will be a major factor in deciding whether to revisit any of the issues decided herein, pursuant to Rule 176*bis*(C).[11]

11. The function of the Appeals Chamber is to decide the issues raised by the Pre-Trial Judge in the light of the arguments of counsel. We endorse what a great international authority, Hersch Lauterpacht, wrote in 1933: "[T]he function of the judge to pronounce in each case *quid est juris* [what is the law?] is pre-eminently a practical one. He is neither compelled nor permitted to resign himself to the *ignorabimus* [it shall be ignored] which besets the perennial quest of the philosopher and the investigator in the domain of natural science."[12] It is the responsibility of the Appeals Chamber to accomplish this task by stating the applicable law in the clearest and most coherent way possible.

II. The Jurisdiction Conferred

12. The crimes which are the subject of any indictment must, in terms of the Statute of the Tribunal, be confined to certain particularly serious offences against the criminal law of Lebanon.

[11] "The accused has the right to request the reconsideration of the interlocutory decision under paragraph A, pursuant to Rule 140 without the need for leave from the presiding Judge. The request for reconsideration shall be submitted to the Appeals Chamber no later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 110(A)(i)."

[12] H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), at 64.

One of the purposes of this judgment is to identify with some precision both what the law of Lebanon requires and to what extent, if at all, its application is modified by the Statute. Among the questions we must discuss is the extent to which the relevant criminal law of Lebanon is to be construed in the light of international developments.

13. It would be wrong to assume that this Tribunal's jurisdiction is closely comparable to that of other criminal tribunals with an international composition. Compared to them, one of the several novelties of the Tribunal relates to the scope of offences over which it has jurisdiction. The statutes of other international criminal courts and tribunals do not confine their subject-matter except by reference to one or more categories of crimes: it is for the prosecutor of each court or tribunal to select cases whose facts he regards as falling under one or more of those categories and to identify the persons suspected of criminal conduct within those categories. In contrast, this Tribunal's Statute submits to the Tribunal's jurisdiction a set of specific allegations: the killing of the former Prime Minister Hariri and 22 other persons, which occurred in Beirut on 14 February 2005, as well as additional attacks connected with that killing (if the Tribunal finds that the connection meets the standards enumerated in Article 1[13]). The Statute then requires the Tribunal to determine whether those allegations are made out and can be characterised, under Lebanese law, as (i) "acts of terrorism", (ii) "crimes and offences against life and personal integrity", (iii) the crime of "illicit association", (iv) a crime of conspiracy (*complot*), or as (v) the crime of "failure to report crimes and offences."[14] Thus, the Tribunal's Statute reverses the approach to jurisdiction taken in other statutes of international criminal courts and tribunals: instead of starting with the categories of criminalities to be prosecuted and punished (war crimes, crimes against humanity, genocide, and so on), it starts with the allegations of facts to be investigated and then enjoins the Tribunal to prosecute those responsible under one or more specific heads of criminality, set out in the Statute. The Tribunal's Prosecutor cannot therefore "choose" the facts to prosecute on his own or turn to other facts. Once through independent investigation he has identified the persons believed responsible for specified attacks, his task is to bring before the Tribunal's Judges charges authorised by the Statute which he

[13] "If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks."

[14] Article 2(a) STLSt.

believes can be established. The Tribunal's only province at that point is to legally characterise those facts.

14. Even though the Preamble of the Statute defines the assassination of Rafik Hariri and others as a "terrorist crime", and Article 1, at least in the French version, defines the other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005 as "*attentats terroristes*", the Tribunal cannot assume to be proved what is an essential element of any charge that alleges terrorism. It will be for the Tribunal's Judges, and for them alone, to determine whether allegations of a kind identified by the Statute are proved on the basis of the evidence. The Tribunal is not bound by the definitions or classifications set out in the Statute, which reflect the political perspectives of the Statute's framers. The finding of relevant facts and the determination of their legal significance can only be the result of the judicial process of the Tribunal.

15. Also novel is the Tribunal's mandate to apply solely the substantive criminal law of a particular country.[15] Except where overridden by other provisions of the Tribunal's Statute, the substantive criminal law which the Tribunal must apply is the domestic criminal law of Lebanon.[16] It is necessary first to determine what are the terms of that Lebanese law. Once we have done that, we will have to consider whether, and if so, to what extent and with what effect, the Lebanese law may be held to have been overridden. As to who are complicit in an offence or liable for conduct related to it, the Statute sets out specific provisions which are based not on the domestic law of Lebanon but on principles of international criminal law.[17] The Tribunal, being international in character, is fully

[15] While other internationalised tribunals, such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, have been charged in part with prosecuting crimes defined under domestic law, this Tribunal is the first to be charged with applying predominantly domestic law, at least in terms of substantive criminal law.

[16] Article 2 of the Statute, entitled "Applicable criminal law", provides that:

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

(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy, and

(b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".

[17] Article 3 of the Statute, entitled "Individual criminal responsibility", provides that:

1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:

(a) Committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or

(b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of

empowered to apply any provision of its Statute which refers to international criminal law. In this connection, it is worth noting that the Secretary-General has emphasised the international nature of the Tribunal:

> [T]he constitutive instruments of the special tribunal in both form and substance evidence its international character. The legal basis for the establishment of the special tribunal is an international agreement between the United Nations and a Member State; its composition is mixed with a substantial international component; its standards of justice, including principles of due process of law, are those applicable in all international or United Nations-based criminal jurisdictions; its rules of procedure and evidence are to be inspired, in part, by reference materials reflecting the highest standards of international criminal procedure; and its success may rely considerably on the cooperation of third States.[18]

16. Thus we have a tribunal that must apply the substantive criminal law of a particular country, yet it is nonetheless an international tribunal in provenance, composition, and regulation,[19] it must abide by "the highest international standards of criminal justice",[20] and its statute incorporates certain aspects of international criminal law. It is this tension, best exemplified by the contrast between Articles 2 and 3 of the Statute, that animates many of the questions posed by the Pre-Trial Judge: when and whether international law, based on the international nature and mandate of this Tribunal, should inform the Tribunal's application of Lebanese criminal law.

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furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.

2. With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

3. The fact that the person acted pursuant to an order of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Tribunal determines that justice so requires.

See paragraph 206 below regarding how Article 3 incorporates norms of international criminal law.

[18] *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, S/2006/893 (2006), at para. 7. The Secretary-General also noted, however, that "[w]hile in all of these respects the special tribunal has international characteristics, its subject matter jurisdiction or the applicable law remain national in character". *Id.*

For example, both the Prosecutor and the Defence Office argued in part on the basis of international law, and this Chamber relied in part on that international law, when considering questions of jurisdiction and standing. See STL, *In re Application of El Sayed*, "Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing", CH/AC/2010/02, 10 November 2010.

[19] See Order of the Pre-Trial Judge pursuant to Rule 68(G), para. 7(b).

[20] S/RES/1757 (2007), preamble, at para. 2.

III. General Principles on the Interpretation of the Lebanese Criminal Law and the STL Statute

A. Principles on the Interpretation of the Provisions of the Statute

17. According to the Prosecutor, the Tribunal must essentially apply Lebanese law to the crimes set out in Article 2 of the Statute.[21] Any time the Tribunal finds that there is an inconsistency or a gap in that law, the Prosecutor asserts, the Tribunal must rely on general rules and principles of Lebanese criminal law and Lebanese case law. Only if the relevant Lebanese jurisprudence is uncertain or divided or based on a manifestly incorrect interpretation of Lebanese law may the Tribunal turn to international treaty law and customary international law to construe domestic Lebanese law.[22] Under the Prosecutor's approach, the Tribunal may do so only if there are gaps in Lebanese law on the elements of the crimes and then only subject to the following strict and cumulative conditions:

> (a) [a]n examination of the Statute, relevant provisions of the LCC [Lebanese Criminal Code], Lebanese legal principles and jurisprudence, shows that the Tribunal's legislation is not definitive on a specific issue related to the definition of any of these crimes; and (b) [t]he application of relevant international rules and principles (including customary international law) would offer further elucidation of such issue; and (c) [t]he relevant international rules and principles (including customary international law) are not inconsistent with the spirit, object and purpose of the Statute.[23]

The Prosecutor, however, hastens to add that "[w]ith respect to terrorist acts [...] no lacuna in the applicable Lebanese law arises".[24]

18. According to the Defence Office, the Tribunal should apply the following principles of interpretation: "[S]trict interpretation of criminal law including the prohibition of interpretation of a clear text [...], the prohibition against extension of the text beyond the intention of the legislator, and prohibition of interpretation by analogy."[25] In addition, when interpreting the relevant resolution of the Security Council, the Defence Office submits that the Tribunal should adhere to the principle of construction that "limitations of sovereignty may not be lightly assumed" and to the principle of

[21] Hearing of 7 February 2011, T. 11.
[22] Prosecution Submission, paras 5-12.
[23] Prosecution Submission, para. 13.
[24] Prosecution Submission, para. 15.
[25] Defence Office Submission, para. 30. See also Hearing of 7 February 2011, T. 48.

interpretation *in dubio mitius* (in case of doubt, one should prefer the interpretation more favourable to a sovereign state), "which call for deference to the sovereignty of a state when interpreting a text that is binding on it".[26] More generally the Defence Office argues that the Tribunal should base itself exclusively on Lebanese law both with regard to the crimes falling under its jurisdiction and with regard to the modes of responsibility envisaged in Article 3 of the Statute: "[T]he Tribunal is not permitted and has not been jurisdictionally enabled to import into the interpretative process methods or means of interpretation that are not recognised as applicable to the interpretation of Lebanese criminal law in the Lebanese legal order."[27] Under the Defence Office's approach, the modes of liability provided for in Article 3 of the Statute and seemingly based on international law must be applied only to the extent they coincide with Lebanese law: "[A] combined reading of these provisions [of Articles 2 and 3 of the Statute] makes clear that Lebanese criminal law is the body of law ultimately relevant to determining the applicability and definition of both crimes and forms of liability applicable before this Tribunal."[28] On this point the Defence Office concludes that "[a]ssessed against that standard, neither of the 'modes of liability' provided in Articles 3(2) and 3(1)(b) of the statute are applicable to proceedings before the Tribunal".[29] In short, according to the Defence Office, the only body of law that the Tribunal may apply is Lebanese law: as repeatedly stated by the Defence Office in its oral submissions,[30] resort to international law may be made only to the extent that such law expands the rights of the suspects or accused. Otherwise, according to the Defence Office, international law must not be applied by the Tribunal when dealing with the legal issues currently before the Appeals Chamber.

19. Interpretation is an operation that always proves necessary when applying a legal rule. One must always start with a statute's language. But that must be read within the statute's legal and factual contexts. Indeed, the old maxim *in claris non fit interpretatio* (when a text is clear there is no need for interpretation) is in truth fallacious, as has been rightly emphasised by distinguished scholars.[31] It overlooks the spectrum of meanings that words, and especially a collection of words,

[26] Defence Office Submission, paras 40-41.
[27] Defence Office Submission, para. 59.
[28] Defence Office Submission, para. 155.
[29] Defence Office Submission, para. 165.
[30] Hearing of 7 February 2011, T. 42-43 and 49-50.
[31] R. Dworkin rightly notes that the "description 'unclear' is the *result* rather than the *occasion* of [...] [a] method of interpreting statutory texts". *Law's Empire* (Oxford: Hart Publishing, 1998), at 352; see also *id* at 350-354. P.M. Dupuy

may have and misses the truth that context can determine meaning. That is particularly so when what is at stake is the construction not of one single provision but of many legal rules contained in a national statute or in a piece of international legislation. The process is not to construe the text initially to determine whether there is a gap and, if there is, to construe it a second time to deal with the problem created by the gap.[32] Rather, the court performs a simple exercise of construction, referring to whatever is the relevant context.

20. The *internal* context—that of the statute—is of obvious importance:

> [W]ords derive colour from those which surround them.[...] Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which you have assigned to them as separate words.[33]

But so too is the *external* context. It has been stated that:

> Judges [...] sometimes use the word 'context' in a narrow sense. At other times they use it with a meaning so wide that embraces virtually all the interpretative criteria. The widest meaning is best.[34]

We agree, but would delete "virtually". Context must embrace all legitimate aids to interpretation. Important among them are the international obligations undertaken by Lebanon with which, in the absence of very clear language, it is presumed any legislation complies.

21. Also relevant are the conditions of the day, a topic to which we return at paragraph 135. The tenet of construction that a statute is presumed to be "always speaking" recognises the reality that society alters over time and interpretation of a law may evolve to keep pace.[35]

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points out that: « l'appréciation de la clarté de l'acte constitue elle-même le résultat d'une interprétation par le juge». *Droit International Public*, 9th edn. (Paris: Dalloz, 2008), at 448.

[32] Compare the narrow approach of English law (P. Sales and J. Clement, "International Law in Domestic Courts: The Developing Framework", 124 *Law Quarterly Review* (2008) 388, at 402) with that taken in New Zealand (*Ye v Minister of Immigration*, [2010] 1 NZLR 104 at [24-25]).

[33] U.K., Chancery Division, *Bourne (Inspector of Taxes) v Norwich Crematorium Ltd* [1967] 1 WLR 691 at 696, [1967] 2 All ER 576 at 578, Stamp J. See also J. F. Burrows and R. I. Carter, *Statute Law in New Zealand*, 4th edn. (Wellington: LexisNexis, 2009), at 232.

[34] F. Bennion, *Bennion on Statutory Interpretation*, 5th edn. (London: LexisNexis, 2008), at 589

[35] See U.K., House of Lords, *R v Ireland* [1998] AC 147, 158 (Lord Steyn), applied in U.K., Supreme Court, *Yemschaw v London Borough of Hounslow* [2011] UKSC 3, 26 (referencing the principle "that statutes will generally be found to be [...] 'always speaking' [...]").

22. Who are the lawmakers whose presumed intent we must harmonise and effectuate? Here there are three. One is the Parliament of Lebanon in respect to the substantive criminal law referenced in Article 2 of the Tribunal's Statute. The United Nations and the Government of Lebanon are the makers of the second law: that of the Statute, which as indicated in particular by Article 3 as well as by the general context of the Tribunal incorporates some norms of international criminal law.[36] The Judges of the Tribunal, exercising powers under Article 29 of the Statute, and the authors of the Lebanon Code of Criminal Procedure, to which reference may be made under Rule 3(A) of the Tribunal's Rules of Procedure and Evidence, are the makers of the third law: the adjectival rules of procedure and evidence.

23. Lawmakers, both national and international, may seek to protect and turn into legally binding standards interests and concerns that are conflicting, or which are not necessarily shared by all legislators. As a result, statutes and international treaties (as well as other binding international instruments) not infrequently contain varying or diverging formulations of interests and concerns without amalgamating them and reducing them into a logically well-structured and coherent body of rules. Some concerns or demands may be reflected in one provision, while others, not necessarily reconcilable, may be articulated in other provisions. In some instances they may even be embedded in the same provision. Where provisions are inconsistent, the dominant provision must be identified. In all these cases as well as in those areas that H.L.A. Hart termed 'penumbral situations',[37] it falls to the interpreter as far as practicable to give consistency, homogeneity and due weighting to the different elements of a diverging or heterogeneous set of provisions. Judges are not permitted to resort to a *non liquet* (that is, to declare that it is impossible for them to reach a decision because the point at issue "is not clear" in default of any rule applicable to the case).[38]

24. This operation must of course be undertaken by way of construction and without the judges arrogating to themselves the role of lawmakers beyond that inherent in interpretation, that is, without permitting the will of the interpreter to override that of the standard-setting body.

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[36] See paragraph 206 below regarding Article 3's incorporation of standards of international criminal law.

[37] H.L.A. Hart, *Essay in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), at 64–65, 71–72 (referencing those cases that fall outside the core of clearly defined legal principles).

[38] See for example Article 4 of the Lebanese Code of Civil Procedure: "A judge shall be liable for a denial of justice if he [...] refrains from ruling on the pretext of obscurity or lacunae in the law [...]. If the law is obscure, the judge shall interpret it in a manner consistent with its purpose and with other texts. In the absence of a law, the judge shall apply the general principles of law, customs, and the principles of justice."

25. The starting point is the criminal law of Lebanon. That is made clear by Article 2 of the Statute. It is also to be presumed in terms of the principle of legality, according to which any conduct alleged to be criminal is to be measured against the law in effect at the time it was committed.[39]

26. For the purpose of interpretation, we consider it appropriate, save to the extent that the Lebanese law adopted by Article 2 may clearly otherwise provide, to apply to the Statute of the Tribunal international law on the interpretation of treaty provisions. That is so whether the Statute is held to be part of an international agreement between Lebanon and the United Nations or is regarded instead as part of a binding resolution adopted by the Security Council under Chapter VII of the UN Charter, an issue we need not decide upon at this juncture. Indeed, in the latter case, the customary rules on interpretation would undoubtedly apply, in accordance with the consistent practice of other international criminal tribunals, to which there has been no objection by States or other international subjects.[40] It is true that the rules of interpretation that evolved in international custom and were codified or developed in the 1969 Vienna Convention on the Law of Treaties referred only to treaties between States, because at that stage the development of new forms of binding international instruments (such as agreements between States and rebels, or binding resolutions of the UN Security Council regulating matters normatively) had not yet taken a solid foothold in the world community. Those rules of interpretation must, however, be held to be applicable to any internationally binding instrument, whatever its normative source. This is because such rules translate into the international realm general principles of judicial interpretation that are at the basis of any serious attempt to interpret and apply legal norms consistently.[41]

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[39] See paras 131-142 below for further discussion of this principle.

[40] ICTR, *Nsengiyumva*, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, 3 June 1999 ("*Nsengiyumva* Concurrence"), para. 14: "In interpreting the Statute and the Rules which implement the Statute, the Trial Chambers of both the [ICTR] and the [ICTY], as well as the Appeals Chamber have consistently resorted to the Vienna Convention , for the interpretation of the Statute." See also ICTR, *Kanyabashi*, Joint and Separate Opinion of Judge Wang and Judge Nieto-Navia, 3 June 1999 ("*Kanyabashi* Concurrence"), para. 11; ICTY, *Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para 3; ICTY, *Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 19 August 1995, para. 18.

[41] See *Nsengiyumva* Concurrence, para. 14: "Because the Vienna Convention codifies logical and practical norms which are consistent with domestic law, it is applicable under customary international law to international instruments which are not treaties."; *Kanyabashi* Concurrence, para. 11: "The rules of the Vienna Convention, and Article 31 in particular, reflect customary rules of interpretation which originate from principles found in systems of municipal law 'expressive of common sense and of normal grammatical usage '" (quoting R. Jennings and A. Watts (eds), *Oppenheim's International Law*, vol. 1, 9th edn. (London: Longman, 1996), at 1270); see also ICTY, *Delalić*, Appeal Judgment, 20 February 2001, para. 67 (noting the Vienna Convention "reflect[s] customary rules" of interpretation and citing *Case Concerning the Territorial Dispute (Libyan Aram Jamahiriya/Chad)*, Judgment, I.C.J. Reports (1994), at 21, para. 41, for the customary status of Article 31 of the Vienna Convention).

27. However, we will also take account of the apposite remarks made by the International Court of Justice in its Advisory Opinion on *Kosovo*. There the Court emphasised that, although the rules of the Vienna Convention can be used to interpret acts of the Security Council, one should be mindful of the specific features of Security Council acts:

> While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States [...], irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.[42]

Accordingly, in so far as the provisions of this Tribunal's Statute have entered into force on the basis of Security Council Resolution 1757 (2007), the Appeals Chamber will also take into account such statements made by members of the Security Council in relation to the adoption of the relevant resolutions, the *Report of the UN Secretary-General on the Establishment of the Tribunal* of 15 November 2006 (S/2006/893), and the object and purpose of those resolutions (in keeping with the *Kosovo* Opinion of the ICJ),[43] as well as the practice of the Security Council.

28. Subject to the caveat suggested by the *Kosovo* Advisory Opinion, under international law seeming inconsistencies in a text must be resolved by reference to the general principle of construction enshrined in Article 31(1) of the Vienna Convention (and the corresponding customary rule of international law): rules must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The latter portion of this clause embodies the principle of teleological interpretation, which

[42] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, para. 94, *available at* http://www.icj-cij.org/docket/files/141/15987.pdf.

[43] See *id* at para. 96, where the Court pinpointed three distinct features of Security Council Resolution 1244 (1999) as "relevant for discerning its object and purpose".

emphasises the need to construe the provisions of a treaty in such a manner as to render them effective and operational with a view to attaining the purpose for which they were agreed upon.

29. Let it be emphasised that, in the present context, contrary to what has been argued by the Defence Office,[44] the principle of teleological interpretation, based on the search for the purpose and the object of a rule with a view to bringing to fruition as much as possible the potential of the rule, has overridden the principle *in dubio mitius* (in case of doubt, the more favourable construction should be chosen), a principle that—when applied to the interpretation of treaties and other international rules addressing themselves to States—calls for deference to state sovereignty. The principle *in dubio mitius* is emblematic of the old international community, which consisted only of sovereign states, where individuals did not play any role and there did not yet exist intergovernmental organisations such as the United Nations tasked to safeguard such universal values as peace, human rights, self-determination of peoples and justice. It is indeed no coincidence that, although this canon of interpretation was repeatedly relied upon by the Permanent Court of International Justice in its heyday, it is no longer or only scantily invoked by modern international courts. Today the interests of the world community tend to prevail over those of individual sovereign states; universal values take pride of place restraining reciprocity and bilateralism in international dealings; and the doctrine of human rights has acquired paramountcy throughout the world community.

30. An element of teleological interpretation is the principle of effectiveness, also expressed in the maxim *ut res magis valeat quam pereat* (in order that a rule be effective rather than ineffectual): as enunciated by the UN International Law Commission, this principle requires that "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purpose of the treaty demand that the former interpretation should be adopted".[45] One must assume that the lawmaker intended to pursue an objective through the set of norms he created; hence, whenever a literal interpretation of the text would set a norm at odds with other provisions, an effort must be made to harmonise the various provisions in light of the goal pursued by the legislature.

[44] Defence Office Submission, paras 40-41. See also Hearing of 7 February 2011, T. 45.

[45] *Report of the International Law Commission to the General Assembly*, A/6309/Rev.1, *reprinted in* [1966] 2 *Y B Int'l L Comm'n* 169, at 219.

31. An example of this notion, in the case of conflicting languages, is Article 33(4) of the Vienna Convention, dealing with the case of "a treaty authenticated in two or more languages, when a comparison of the authentic text discloses a difference of meaning" that cannot be resolved by other means of interpretation. In such a case, that Article requires that "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". This provision, which to a large extent codifies existing law,[46] particularises the general principle of effectiveness with regard to conflicts between texts drafted in different languages. Indeed, instead of leaving a treaty clause inoperative on account of discrepancies of expression in texts employing two or more authoritative languages, the court will adopt such content as is common to both (as expression of the shared will of the parties) provided it is consonant with the object and purpose of the treaty.[47]

32. With regard to the Tribunal's Statute, the principles of teleological interpretation just referred to require an interpretation that best enables the Tribunal to achieve its goal to administer justice in a fair and efficient manner.[48] If however this yardstick does not prove helpful, one should choose that

[46] In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice held: "Where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it [the Court] is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties." *Mavrommatis Palestine Concessions*, 1924 PCIJ Series A, No. 2, at 19.

[47] In terms of practical operation, this interpretive approach is also found in the domestic laws of states. For example, in the United Kingdom (and other common law countries), absent an unambiguous contrary expression of the lawmakers' will, the judges will construe statutes in accordance with the settled presumptions of the law. See R. Cross, J. Bell and G. Engle, *Cross Statutory Interpretation,* 3rd edn. (Oxford: Oxford University Press, 1995), at 165-166:

> Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules[..] Long-standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament [...] These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction, and they may be described as 'presumptions of general application'[...] These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text [...]'

See also U.K., House of Lords, *R v Secretary of State for the Home Department,* ex parte *Pierson* [1998] AC 539 at 573-575; U.K., House of Lords, *R v Secretary of State for the Home Department,* ex parte *Simms* [2000] 2 AC 115 at 130; U.K., House of Lords, *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 534

[48] See in particular S/RES/1757 (2007), preamble: "*Mindful* of the demand of the Lebanese people that all those responsible for the terrorist bombing that killed former Lebanese Prime Minister Rafiq Hariri and others be identified and brought to justice"; S/RES/1664 (2006), at para. 1, requesting the Secretary General "negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice"; Article 21(1) STLSt: "The Special Tribunal [...] shall take strict measures to prevent any action that may cause unreasonable delay."; Article 28(2) STLSt, directing the judges in adopting Rules of Procedure and Evidence to "be guided [...] by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial"; *Report of the Secretary-General on the Establishment of*

interpretation which is more favourable to the rights of the suspect or the accused, in keeping with the general principle of criminal law of *favor rei* (to be understood as "in favour of the accused"). This principle, a corollary of the overarching principle of fair trial and in particular of the presumption of innocence, has been upheld by international criminal tribunals[49] and is codified in Article 22(2) of the ICC Statute ("[i]n case of ambiguity, the definition [of a crime] shall be interpreted in favour of the person being investigated, prosecuted or convicted"). The same principle, in its more trial-orientated facet, when it is referred to as the *in dubio pro reo* standard (in case of doubt one should hold for the accused) or *in dubio mitius* (as a principle applying to conviction and sentencing of individuals: in case of doubt one should apply the more lenient penalty), normally guides the trial judge when appraising the evidence and assessing the culpability of the accused or determining the penalty to be inflicted.[50] As we shall see, in the field of criminal law one has also to take into account a particular facet of the principle of legality (*nullum crimen sine lege*), namely the ban on retroactive application of criminal law.[51] These principles, *favor rei* and *nullum crimen sine lege*, are general principles of law applicable in both the domestic and the international legal contexts. The Appeals Chamber is therefore authorised to resort to these principles as a standard of

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a Special Tribunal for Lebanon, S/2006/893 (2006), at para. 17, noting balance struck "between fairness, objectivity and impartiality of the trial process, and its efficiency and cost-effectiveness".

The Appeals Chamber further notes, pursuant to the ICJ *Kosovo* Opinion mentioned above, not just various statements of UN Security Council Members casting their votes in favour of Resolution 1757 (see, for instance, Peru: "Peru decided to support this resolution because of its commitment to the fight against impunity and its firm position on combating terrorism and because it is of the view that this resolution is the only way to overcome the legislative impasse regarding the establishment of the Special Tribunal for Lebanon, given the need to ensure that justice prevails, which is essential in promoting peace and security"; and Slovakia: "impunity should not be allowed and tolerated. The perpetrators of any crime have to be brought to justice. The rule of law must be respected everywhere and by everybody. The establishment of the Tribunal is necessary for a thorough investigation of the cases of politically motivated violence — in fact, terrorism — and for bringing perpetrators of these outrageous crimes to justice"), but also the statements of the Members abstaining (see Qatar: "advocating the need to establish justice and oppose impunity, in line with the objective set out in the United Nations Charter of creating conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained"; South Africa: "South Africa [..] expects [the STL] to operate with impartiality and in accordance with Lebanese law and the highest international standards of criminal justice"; China: "[The Tribunal should] help to establish the truth as soon as possible, hold the perpetrators accountable and ensure justice for the victims"; Russia: "We fully share with the sponsors of the draft resolution their primary objective of preventing impunity and political violence in Lebanon"). For the record of the debate, see S/PV.5685 (30 May 2007).

[49] See ICTR, *Akayesu*, Trial Judgment, 2 September 1998, paras 500-501; ICTY, *Krstić*, Trial Judgment, 2 August 2001, para. 502; ICTY, *Galić*, Appeals Judgment, 30 November 2006, paras 76-78; ICTY, *Limaj et al*, Appeals Judgment, 27 September 2007, paras 21-22; ICC, *Situation in the Democratic Republic of Congo*, Decision on the OPCD's Request for Leave to Appeal the 3 July 2008 Decision on Applications for Participation, 4 September 2008, para. 23; ICC, *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 31.

[50] Military Tribunal IV, *United States of America v Friedrich Flick et al* ("The Flick Case"), Case No. 5, 19 April 1947 – 22 December 1947, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. VI, p. 1189.

[51] See below, Section I(I)(B)(3)(b).

construction when the Statute or the Lebanese Criminal Code is unclear and when other rules of interpretation have not yielded satisfactory results.

B. Principles on the Interpretation of Lebanese Law

33. Applying these principles to the Statute of the Tribunal, it is indisputable that under Article 2 of the Statute, the Tribunal is to apply Lebanese law as the *substantive law* governing the crimes prosecuted before it.[52] In this regard, our Tribunal is different from most international tribunals. These tribunals apply international law when exercising their primary jurisdiction (namely their jurisdiction over the inter-state disputes or the crimes which they are called upon to adjudicate) but may need to have recourse to national law incidentally (*incidenter tantum*),[53] in order to decide whether the precondition for the applicability of an international rule has been satisfied (*e.g.*, to establish whether an individual has the nationality of the State which has engaged in his judicial protection).[54] In contrast, under our Statute we are called upon primarily to apply *national* law to the facts coming within our jurisdiction. In other words, we are mandated to apply national law—in particular, Lebanon's—*principaliter* (that is, in the exercise of our primary jurisdiction over particular allegations).

34. The need to apply Lebanese law when pronouncing on crimes falling under our jurisdiction raises the question of how to interpret that law.

35. In consonance with the case law of international tribunals, such as the Permanent Court of International Justice (which admittedly relates to interstate disputes and not to criminal

[52] See Prosecution Submission, para 3; Defence Office Submission, para. 33; Hearing of 7 February 2011, T. 11-31 (Prosecution) and 44 (Defence Office)

[53] Cf. STL, *In re Application of El Sayed*, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010, paras 45-46 (discussing the distinction between primary and incidental jurisdiction).

[54] As the Permanent Court of International Justice stated in *Exchange of Greek and Turkish Populations*, "the national status of a person belonging to a State can only be based on the law of that State, and [...] therefore any convention dealing with this status must implicitly refer to the national legislation". 1925 PCIJ Series B, No. 10, at 19; see also *id* at 22. There are many precedents where international courts have applied national laws to this effect. See for instance *Nottebohm Case (second phase)*, Judgment, I.C.J. Reports (1955) 4, at 20-21; *Esteves Case* (Spanish-Venezuelan Comm'n), R.I.A.A., Vol. X, 739 (1903), at 740; *Tellech (United States) v Austria and Hungary*, R.I.A.A., Vol. VI, 248 (1928), at 249; *Parker (United States) v United Mexican States*, R.I.A.A., Vol. IV, 35 (1926), at 38; *Mackenzie (United States) v Germany*, R.I.A.A., Vol. VII, 288 (1925), at 289; *Flegenheimer Claim*, 25 I.L.R. 92 (It.-U.S. Concil. Comm'n 1958).

proceedings),[55] and as urged by both the Prosecutor and the Defence Office,[56] generally speaking the Tribunal will apply Lebanese law as interpreted and applied by Lebanese courts.[57] In doing so, we have the distinct advantage not only of the assistance of members of the bar of Lebanon, but also of the experience of two of our members, including the Vice President.

36. To apply Lebanese law requires more than a narrow examination of specific past decisions. It requires us to stand back and identify the principles that express the state of the art in Lebanese jurisprudence.

37. We have rejected the Prosecution's submission that one may not look beyond the text of a statute unless there is a gap. We reiterate that to find there is a gap presupposes a construction to that effect; in fact construction is the end result after all legitimate considerations have been employed. The question is what those legitimate considerations are.

38. One begins with the words, but in context not in isolation. Whereas the context for an ultimate verdict will be both legal and factual, we are confined on interpretation to the former. One must look to the interpretation which best fits the task the words are to perform.

39. As an international court, we may depart from the application and interpretation of national law by national courts under certain conditions: when such interpretation or application appears to be

[55] Back in 1895, a Great Britain-Republic of South Africa Tribunal in *Affaire des protégés britanniques au Transvaal* held that a national law "was subject to the sole and exclusive interpretation in the ordinary course by the tribunals of the country", thus implying that an international tribunal was obliged to comply with such interpretation. La Fontaine (ed.), *Pasicrisie international Histoire documentaire des arbitrages internationaux 1794-1900* (Berne 1902), at 460. The same principle had already been set out in *Dominguez (United States) v Spain* (1879), *reprinted in* J.B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, Vol. III (Washington: GPO, 1898), at 2596-2597.

The principle was specified in greater detail by the Permanent Court of International Justice in 1929 in the *Serbian Loans* case. The Court stated that "The Court, having in these circumstances to decide as to the meaning and scope of a municipal law, makes the following observations· For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal *and which, in its results, seems to the Court reasonable,* would not be in conformity with the task for which the Court has been established [...]." 1929 PCIJ Series A, No. 20, at 46-47 (emphasis added). The PCIJ reverted to the same question in *Brazilian Loans*, 1929 PCIJ Series A, No. 21, at 124.

[56] See Prosecution Submission, paras 7-8; Defence Office Submission, para. 58.

[57] In assessing domestic law, international tribunals should "consider the very terms of the law, in their proper context, and complemented, whenever necessary, with additional sources, which may include proof of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars." WTO, Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, Case No. WT/DS392/R (29 September 2010), at para. 7.104. In this context, a certain level of deference to the application and interpretation of domestic law by national judicial authorities is warranted. See generally ICSID, *Siag and Vecchi v Egypt*, Case No. ARB/05/15, 1 June 2009, at para 463; *Etezadi v Iran*, 30 Iran-U.S. C.T.R. 22 (23 March 1994), at 42

unreasonable,[58] or may result in a *manifest injustice*,[59] or is *not consonant with international principles and rules* binding upon Lebanon.[60] That is indeed what other international tribunals have effectively held.

40. In this regard, we reject in three respects the Defence Office's emphasis that the Tribunal may apply only Lebanese law as blind to the international nature of this Tribunal. First, as stated above, international law binding upon Lebanon is part of the legal context in which its legislation is construed. Secondly, we agree with the Prosecution that the application of national law by an international court is subject to some limitations by international law.[61] An obvious example of

[58] See in particular *Serbian Loans*, 1929 PCIJ Series A, No. 20, at 46-47. The Prosecution cites the International Court of Justice's recent decision in the *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Judgment, 30 November 2010, para. 70, *available at* http://www.icj-cij.org/docket/files/103/16244.pdf. See Prosecution Submission, para. 7, fn.4. That citation is not to the point, however. In that case the Court, after restating the previous well-known holdings of the Permanent Court of International Justice on the application of national law, went on to say that nevertheless the Court might depart from the national interpretation of a law when a State appearing before the Court relied on a manifestly incorrect interpretation of its domestic law. In other words, the Court did not deal with the permissibility of departing from the national interpretation of a domestic law propounded by *domestic courts*, but rather with a departure from a wrong interpretation suggested by a State appearing before the Court.

[59] See *Solomon (United States) v Panama*, R.I.A.A., Vol. VI, 370 (1933), at 371-373; *Putnam (United States) v United Mexican States*, R.I.A.A., Vol. IV, 151 (1927), at 153: "Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunals of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law."

In *Sewell (United States) v United Mexican States*, the General US-Mexico Claims Commission found that Mexico had committed a denial of justice in that the penalty inflicted on the murderers of US nationals was not, under Mexican law, commensurate with the offence. R.I.A.A., Vol. IV, 626 (1930), at 630-632. In *Davies et al (United States) v United Mexican States*, the same Commission held that there is a denial of justice when "there existing a failure or omission punishable by law, the authorities of a country refuse to comply with their own legal provisions as interpreted by the courts." R.I.A.A., Vol. IV, 650 (1930), at 652. Lord Asquith of Bishopstone – Umpire, in *Petroleum Development Ltd v Sheikh of Abu Dhabi*, 18 I.L.R. 144 (1951), said that international tribunals shall disregard the content or effects of national laws if national law administers discretionary or arbitrary justice. *Id* at 149.

[60] See, for instance, ICTY, *Krnojelac*, Trial Judgment, 15 March 2002, para. 114 (stating that, if national law is relied upon as justification, the relevant provisions must not violate international law and that, in particular, the national law itself must not be arbitrary and the enforcement of this law in a given case must not take place arbitrarily); ICTR, *Ntagerura et al*, Trial Judgment, 25 February 2004, para. 702 (holding that, when a national law is relied upon to justify imprisonment, the national law must not violate international law). More generally, see ICTY, *Kupreškić*, Trial Judgment, 14 January 2000, paras 539 and 542, according to which international criminal courts must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgments. In other fields, the Italian-United States Conciliation Commission held in 1958 in the *Flegenheimer Claim* that international tribunals should disregard the content or effects of national laws where they sanction fraud, serious errors or run counter to the general principles of the laws of nations or applicable treaties. 25 I.L.R. 92 (It.-U S Concil. Comm'n 1958), at 112. Similarly, the ICSID Tribunal in *Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia*, Case No. ARB/83/2, Award, 31 March 1986, *reprinted in* 26 I.L.M. 647 (1987), at 658, stated that "'[t]he law of the contracting state is recognized as paramount within its territory, but is nevertheless subjected to control by international law".

At least to a limited degree, the Defence Offfice acknowledges that domestic law should be interpreted in a manner that does not violate international law. See Defence Office Submission, para. 70(i).

[61] See the sources cited in footnote 4 of the Prosecution Submission.

substantive law is the entitlement of diplomats under public international law to immunity from suit. That rule is imposed upon all States and for an international tribunal overrides any inconsistent domestic law. Thirdly, when Lebanese courts take different or conflicting views of the relevant legislation, the Tribunal may place on that legislation the interpretation which it deems to be more appropriate and consistent with international legal standards.[62]

41. In the following analysis, we find no need to depart from Lebanese law for any of these reasons. However, we must still interpret provisions of the Lebanese Criminal Code as they would be interpreted by Lebanese courts, and thus for this purpose we take into account international law that is binding on Lebanon. This is in accord with a general principle of interpretation common to most States of the world: the principle that one should construe the national legislation of a State in such a manner as to align it as much as possible to international legal standards binding upon the State.[63]

[62] See *Brazilian Loans*, 1929 PCIJ Series A, No. 21, at 124: "Of course, the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law."

[63] The reason for this rule is that, in the words of Lord Denning, "Parliament does not intend to act in breach of international law, including therein specific treaty obligations". U.K., Court of Appeal, *Salomon v Commissioners of Customs and Excise*, [1967] 2 Q.B. 139, at 143, *reprinted in* 41 I.L.R. 1 at 7. See also U.K., Court of Appeal, *Post Office v Estuary Radio Ltd*, [1968] 2 Q.B. 752 at 756 (Lord Diplock), *reprinted in* 43 I.L.R. 114, at 121; U.K., House of Lords, *Garland v British Rail Engineering Ltd*, [1983] 2 A.C. 751, at 771 (Lord Diplock). According to J.L. Brierly, *The Law of Nations*, 6th edn. (H. Waldock, ed.) (Oxford: Clarendon Press, 1963), at 89, "there is [...] a presumption that neither Parliament nor Congress will intend to violate international law, and a statute will not be interpreted as doing so if that conclusion can be avoided".

Or, as Oppenheim put it, "[a]s international law is based on the common consent of the different states, it is improbable that a state would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible always be interpreted so as to avoid such conflict." R. Jennings and A. Watts (eds), *Oppenheims' International Law*, Vol. I, 9th edn. (Oxford: Oxford University Press, 2008), at 81-82.

SECTION I: CRIMES FALLING UNDER THE TRIBUNAL'S JURISDICTION

I. Terrorism

42. We turn first to this Tribunal's principal *raison d'être*: the crime of terrorism. The Pre-Trial Judge has asked:

i) Taking into account the fact that Article 2 of the Statute refers exclusively to the relevant provisions of the Lebanese Criminal Code in order to define the notion of terrorist acts, should the Tribunal also take into account the relevant applicable international law?

ii) Should the question raised in paragraph i) receive a positive response, how, and according to which principles, may the definition of the notion of terrorist acts set out in Article 2 of the Statute be reconciled with international law? In this case, what are the constituent elements, intentional and material, of this offence?

iii) Should the question raised in paragraph i) receive a negative response, what are the constituent elements, material and intentional, of the terrorist acts that must be taken into consideration by the Tribunal, in the light of Lebanese law and case law pertaining thereto?

iv) If the perpetrator of terrorist acts aimed at creating a state of terror by the use of explosives intended to commit those acts to kill a particular person, how is his criminal responsibility to be defined in the event of death of or injury caused to persons who may be considered not to have been personally or directly targeted by such acts?

43. The first three questions are best addressed together. Article 2 of the Tribunal's Statute is explicit: in prosecuting the allegations falling under the Tribunal's jurisdiction by virtue of Article 1, the Tribunal shall apply the provisions on terrorism (and other crimes) set forth in the Lebanese Criminal Code as well as in Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".[64] Article 2 does not make general reference to the Lebanese law as a whole, which would allow us to construe it as also embracing a reference to any other rule on terrorism existing in Lebanese law, including rules of international origin, even beyond the narrow confines of the Criminal Code. Although the Article adds that the specified set of rules shall be applied "subject to the provisions of this Statute", the Statute does not contain any other provision defining terrorism or directly impinging upon the notion of terrorism;

[64] An English version of the Lebanese Criminal Code is to be found on the Tribunal's website. While the original Criminal Code applicable to Lebanon was issued in French (1 March 1943, before Lebanon's independence on 22 November 1943), the Arabic version is of course now the authoritative one.

this qualifying clause must thus be held to refer primarily to the modes of responsibility set out in Article 3 ("Individual criminal responsibility"), as well as, more generally, to the spirit and purpose of the Statute (to administer justice in a fair and efficient manner[65]). The conclusion is therefore inescapable that Article 2 imposes application of the specified provisions of Lebanese law.[66] It would seem that the drafters of the Tribunal's Statute resolved that no international substantive rule on terrorism, either conventional or customary, shall be applied as such by the Tribunal when called upon to adjudicate the crimes within its jurisdiction. The Prosecution and the Defence Office agree entirely with this conclusion.[67]

44. The clear language of Article 2, which is unaffected by other contextual factors, therefore leads us to conclude that the Tribunal must apply the provisions of the Lebanese Criminal Code, and not those of international treaties ratified by Lebanon or customary international law to define the crime of terrorism.

45. We note, however, that international conventional and customary law can provide guidance to the Tribunal's interpretation of the Lebanese Criminal Code. It is not a question of untethering the Tribunal's law from the Lebanese provisions referred to in Article 2. It is rather that as domestic law those Lebanese provisions may be *construed* in the light and on the basis of the relevant international rules. Thus when applying the law of terrorism, the Tribunal may "take into account the relevant applicable international law", but only as an aid to interpreting the relevant provisions of the Lebanese Criminal Code.

46. To answer questions (i)-(iii) in greater detail, we first consider the elements of the crime of terrorism under the Lebanese Criminal Code. We then consider the crime of terrorism under treaty conventions binding on Lebanon and under customary international law, and note there are some differences between the domestic and various of the international definitions of terrorism. We

[65] See above note 48 (collecting evidence of the general purpose of the Statute).

[66] Article 2 of the Statute only mentions the objective element of the crime, omitting the subjective or intentional one. However, this is only a material error which the Judge should remedy in accordance with the principles guiding interpretation, such as the obligation to insure coherence between the provisions of a rule. It is therefore clear from the wording of Article 2 of the Statute, as well as from the Secretary-General's Report (see *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, S/2006/893 (2006), at para. 22) that the initial will of the drafters of the Statute was to apply substantive Lebanese law. Thus, Article 2, while clearly stating that the Tribunal is to apply the objective elements of the crime as provided for under Lebanese law, it implicitly refers to the subjective elements as well; any other interpretation would lead to a lack of coherence in the interpretation process.

[67] Prosecution Submission, paras 2-3; Defence Office Submission, para. 75.

evaluate how conventional and customary international law are generally incorporated into Lebanese law; from this, we conclude that the international conventional and customary definitions of terrorism do have legal import under Lebanese law, even if they are not specifically embodied in the Lebanese Criminal Code. In particular, as we shall see, Lebanese courts look to international law binding on Lebanon when interpreting Lebanese laws. In interpreting the Lebanese Criminal Code in light of international law binding on Lebanon, we then conclude that one element of the Lebanese domestic crime of terrorism—namely, the objective element of the means used to perpetrate the terrorist act—should be interpreted by this Tribunal in a way that reflects the legal developments in the sixty-eight years since the Lebanese Criminal Code was adopted. As a result of this interpretation, before this Tribunal the means used to perpetrate a terrorist act might include those so far recognised by Lebanese courts. This conclusion does not violate the principle of legality, in particular the non-retroactivity of criminal prohibitions, because it is consistent with the statutory definition of terrorism under Lebanese law and is in accord with international law that was accessible to the accused at the time of the alleged offending; thus it is a reasonably foreseeable application of existing law. For all other elements of the crime, the Tribunal will apply Lebanese law as it has been interpreted and applied by the Lebanese courts.

A. The Notion of Terrorism under the Lebanese Criminal Code

47. Article 314 of the Lebanese Criminal Code states:

> Terrorist acts are all acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents.[68]

48. In addition, the Law of 11 January 1958 provides as follows:

> Article 6: Any act of terrorism shall be punishable by hard labour for life. Where the act results in the death of one or more individuals, the total or partial destruction of a building having one or more individuals inside it, the total or partial destruction of a public building,

[68] Article 315 of the Lebanese Criminal Code, criminalising conspiracy to commit terrorist acts, was superseded by the Law of 11 January 1958, which provides a supplementary criminalisation of conspiracy, and in addition increases the penalties applicable to terrorist crimes. Article 316 of the Lebanese Criminal Code criminalises organisations (and their founders and members) set up with a view to changing the economic, social or other fundamental institutions of society, through the perpetration of terrorist acts pursuant to Article 314. The funding of terrorism or terrorist activities or terrorist organisations was recently criminalised by Article 316*bis* added to the Criminal Code by Act No. 553 of 20 November 2003.

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

Article 7: Every person who enters into a conspiracy with a view to the commission of any of the offences contemplated in the preceding articles shall be liable to the death penalty

49. It is clear from these provisions, as all parties agree, that the elements of terrorism under Lebanese law are as follows: (i) an *act*, whether constituting an offence under other provisions of the Criminal Code or not, which is (ii) intended "to cause a state of terror"; and (iii) the use of a means "liable to create a public danger (*un danger commun*)".[69]

50. These relevant means are indicated in an illustrative enumeration preceded by the expression "such as" (in French: *tels que*): explosive devices, inflammable materials, poisonous or incendiary products, or infectious or microbial agents. In listing these concrete examples (although not as an exhaustive enumeration), the Lebanese legislature appears to have adopted a physical connotation to the term "means", as further demonstrated by the use of the Arabic word "*wassila*".

51. Some Lebanese courts have propounded a strict interpretation of Article 314. According to the Lebanese Military Court of cassation in *Case no. 125/1964*, decision of 17 September 1964, it is not the conduct, but the *means or instrument or device used* that must be such as to create a public danger. If the means used is apt to create a public danger, then the act can be defined as terrorism. Thus, for instance, in the *Karami* case,[70] the Court of Justice held that the use of explosive devices in a flying helicopter created a public danger and was therefore to be considered as a terrorist act.

52. Lebanese courts appear to have further concluded that the definition of (terrorist) "means" is limited to those means which *as such* are likely to create a public danger, namely a danger to the general population. It would follow that the definition does not embrace any non-enumerated means referred to in Article 314 ("means such as...") unless these means are similar to those enumerated in their effect of creating a public danger *per se*. The means or implements which under this approach are not envisaged in Article 314 include a gun, a semi-automatic or automatic machine gun, a revolver, or a knife and perhaps even a letter-bomb. This construction was applied by the Court of

[69] See Prosecution Submission, para. 27; Defence Office Submission, para 77; Hearing of 7 February 2011, T. 14-17 and 58-59 (Defence Office's opposition to the application of *international* law to the issue in question).

[70] Court of Justice, *Rachid Karami case*, decision n° 2/1999, 25 June 1999, available on the STL website. (Although the English translation of the Lebanese Criminal Code on the STL's website refers to the Court of Justice as the "Judicial Council", for consistency with the French ("*Cour de justice*") and Arabic ("*Al-majless al-adli*") versions of the Code, we will refer to the "Court of Justice" throughout this opinion.)

Justice in the *Assassination of Sheikh Nizar Al-Halabi* case[71], in which an act that would be considered terrorism under most national legislation and international treaties was instead categorised as simple murder. In this case, Sheikh Nizar al-Halabi was killed (on 31 August 1995) by means of Kalashnikov assault rifles by masked men in broad daylight and in a crowded street, as he was leaving his home to go to his offices in Beirut. The Sheikh was murdered because he was the leader of the Al-Ahbash movement, regarded by the killers, who belonged to another Islamic movement (Wahabi), as deviating from the precepts of Islam and perverting the verse of the Quran.[72] Nevertheless, according to the Court the murder in question did *not* amount to a terrorist act because the materials or devices used were not those required by Article 314. The Court stated:

> Article 314 of the Criminal Code defines terrorist acts as all acts aimed at creating a state of panic and committed by such means as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents that are liable to cause a public threat. While it is true that the actions of the defendants Hamid, Aboud, Al-Kasm, Nabah and Abd al-Mo'ti pertaining to the homicide of Sheikh Nizar al-Halabi were liable to cause a state of panic in view of the Sheikh's religious and social standing and the fact that the offence was committed in broad daylight in a street full of residents, shopkeepers and pedestrians, the offence was not committed by any of the means listed in Article 314. [Hence] the said defendants must be acquitted of the offence defined in Article 6 of the Act of 11 January 1958 [namely terrorist acts] inasmuch as its elements have not been fulfilled.[73]

53. In the *Homicide of Engineer Dany Chamoun and others* case[74], the same Court also held that the murder of Mr Chamoun, his wife and his two sons was not a terrorist act, but "simply" murder, because of the means used:

> While it may be true that the crime that is being prosecuted was intended and succeeded in creating panic, *it was not perpetrated by any of the means referred to* in the Article [314 of the Criminal Code], *and the means used* (handguns and submachine guns), the place in which they were used, a private and closed apartment, and the persons targeted *were not designed to bring about a public emergency.*[75]

[71] Court of Justice, *Assassination of Sheikh Nizar Al-Halabi*, decision n° 1/1997, 17 January 1997, available on the STL website.

[72] *Id.* at 26-27 of the English translation available on the STL website.

[73] *Id.* at 55-56 of the English translation available on the STL website.

[74] Court of Justice, *Homicide of Engineer Dany Chamoun and others*, decision n° 5/1995, 24 June 1995, available on the STL website.

[75] *Id* at 70 of the English translation available on the STL website (emphasis added).

Thus, according to Lebanese courts the means that may cause a "public danger" include only those means which may harm innocent victims who are not specifically targeted but are injured by mere chance, for they happen to be on the place where the terrorist means is used.

54. From these interpretations of Article 314, it would follow among other things that—under Lebanese legislation as applied by Lebanese courts—attacks on a Head of State or Prime Ministers, or on persons enjoying diplomatic immunity, including ambassadors and diplomats serving in or accredited to the State, as well as on their spouses and families, would not be considered "terrorist acts" if such attacks were carried out by means (for instance, rifles or handguns) which are not likely *per se* to cause a danger to the general population or, more precisely, to third parties falling victim to the terrorist act without being intended in any way to be involved in the actions leading to it (such as passers-by, onlookers, and so on).

55. It can be argued that this narrow interpretation of the "means" element of Article 314 balances and constrains the otherwise broad definition of terrorism under Lebanese law. Suffice it to mention the *Fathieh* case, where the Lebanese Court of cassation, in a decision of 16 November 1953, held that a young man who harassed and scared the father of his potential bride for the purpose of coercing him to allow his daughter to marry him had engaged in a "terrorist act" (according to the Court, "the fact of throwing on two occasions explosives onto the house of X. [...] is a terrorist act envisaged and punished by Articles 314 and 315 of the Criminal Code, even though the motive of the act is to influence the father of Fathieh so that he accepts Y. as his son-in-law, or for any other cause, and this is so because Article 314 provides that [...]").[76] Here the purpose of the "terrorist act" was plainly to seek a personal advantage, namely to marry the young woman the "terrorist" yearned for.

56. Likewise, as Lebanese courts have applied Article 314, a terrorist act is punishable even if it does not achieve its intended physical goal (for instance, a person plants a bomb under the car of a political leader but the bomb explodes prematurely, before any person gets into or even approaches the car). Lebanese legislation is grounded in the notion that terrorist conduct is so reprehensible that it must be punished regardless of whether or not the intended consequences of the criminal conduct

[76] Court of cassation, decision n° 334, 16 November 1953, in S. Alia (ed.), *Mawsouat al-ijtihadat al-jaza'iya li kararat wa ahkam mahkamat al tamyiz fi ishrin aman mounzou iadat insha'iha 1950-1970* [Encyclopedia of the criminal judgments and decisions of the court of cassation in the twenty years since its re-creation 1950-1970], 2nd ed., (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi', 1993), at 114. Since the *Fathieh* case was issued, Article 315 of the Lebanese Criminal Code has been superseded by Article 7 of the Law of 11 January 1958.

actually materialise—it is in other terms a *crime of danger* (as opposed to a "crime of harm").[77] The act in question is punishable not because and insofar as it creates actual damage, but because it puts in jeopardy the protected value. Terrorist acts are thus punished by Lebanese law on account of their social relevance, even when they exhibit the features and the nature of an *inchoate* crime.

57. As for the *subjective elements* of the crime or mens rea, the Prosecution and the Defence Office are likewise in agreement, as are we, that, since the Lebanese Criminal Code (unlike other national legislation or international treaties[78]) does not require the act in question to amount to an offence punished by other statutory provisions, the mens rea of the underlying offence is not a requisite element of the crime of terrorism. What is required is a deliberate act (throwing a bomb, spreading toxic substances, and so on) intended to cause a state of terror. Thus, if the terrorist act consists of killing one or more persons, Lebanese law does not require the mens rea of murder for the act to amount to terrorism, as long as the act which resulted in death was intentional. However, the perpetrator may be responsible both for terrorism and murder—two distinct crimes—if it is proved that he had the intent both to cause terror and to bring about the death of the victim. The essential subjective element required under Article 314 for the crime of terrorism is the special intent (*dolus specialis*) of spreading terror or panic among the population.[79]

58. We will state our understanding of the elements of the Lebanese crime of terrorism, in particular the meaning of "means liable to cause a public danger", at paragraph 147 below.

59. In the meantime, however, our discussion brings us to a preliminary answer to question (iv): "if the perpetrator of terrorist acts aimed at creating a state of terror by the use of explosives intended to commit those acts to kill a particular person, how is his criminal responsibility to be defined in the event of death of or injury caused to persons who may be considered not to have been personally or

[77] According to E.S. Binavince ("Crimes of Danger", 15 *Wayne L Rev* (1969) 683, at 683), "European criminal law literature makes a distinction between 'crimes of danger' (*Gefahrdungsdelikte*) and 'crimes of harm' (*Verletzungsdelikte*). The distinction lies in the nature of the undesirable consequences of these crimes[...]" According to J. Hurtado Pozo, *Droit Pénal – Partie générale*, (Genève: Shulthess 2008), at 161: « [s]ur la base des effets de l'acte incriminé, les infractions peuvent être classées en deux groupes distincts : les infractions de lésion (*Verletzungsdelikte*) et les infractions de mise en danger (*Gefahrdungsdelikte*). Si les premières supposent un dommage causé à l'objet de l'infraction [...] les secondes, comme leur dénomination l'indique, impliquent que l'auteur crée un risque pour l'objet de l'infraction ou, du moins, contribue à le mettre en danger ».

[78] See below paras 93-96 and accompanying footnotes (collecting national legislation regarding terrorism).

[79] See Prosecution Submission, para. 28; Defence Office Submission, para. 81; Hearing of 7 February 2011, T. 14. This special intent might be characterised as "general" special intent. See the discussion in Institute for Criminal Law and Justice Brief, para. 2.

directly targeted by such acts?" 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 January1958.[80] That is, the incidental result has no bearing on the legal characterisation of the act as "terrorism". The perpetrator would be liable for terrorism, as he would have had the requisite special intent to create a state of terror, and the additional deaths would be an aggravating factor in his sentencing.[81] (Injury, however, is not included in Article 6 of the Law of 11 January 1958 as an aggravating factor for acts of terrorism). He would *also* be liable for intentional homicide (the specific elements of which are discussed further below[82]) based on a direct intent, if he intended to kill the victim who died, and/or based on *dolus eventualis*, if he had foreseen the possibility of the additional deaths and accepted the risk of their occurrence. Likewise, for injuries resulting from the act of terrorism, the accused may also be liable for attempted homicide, either on the basis of direct intent or *dolus eventualis*. We will discuss the application of *dolus eventualis* under Lebanese criminal law, in particular as applied to intentional homicide and attempted homicide, in much greater detail below.[83]

60. As to how the requisite special intent to spread terror may be proved, the Court of Justice held in *Attempted Assassination of Minister Michel Murr* in 1997 that the existence of the special intent could be inferred because the murder attempt had been conducted by means of explosive devices causing a public danger.[84] On the other hand, the special intent to spread terror will not suffice, by itself, to make an offence terrorist in nature, if the means used are not those required by Article 314. Thus, in the aforementioned *Assassination of Sheikh Nizar Al-Halabi* case, the Court of Justice held that the convicted had intended to bring about a state of panic and terror, yet their crimes could not amount to a terrorist act because the means used did not meet the requirements of Article

[80] Article 6 of the Law of 11 January 1958 does not create a new offence but only aggravates the sentence of the individual convicted for a terrorist act when it results in the death of human beings and the destruction of property.

[81] Court of Justice, *Attempted Assassination of Minister Michel Murr*, decision n° 2/97, 9 May 1997, available on the STL website. The Court of Justice referred explicitly to the rule in Article 6.

[82] See paras 153-166.

[83] See paras 165, 169 and 231-234.

[84] The Court said that "the attempted assassination of Minister Michel Murr on 20 March 1991 and the second car-bomb operation on 29 March 1991 involved the use of explosives, created panic among the population, killed and injured a number of persons, and destroyed residential and commercial buildings, they constituted terrorist acts within the meaning of article 314 of the Criminal Code, entailing the penalty prescribed in article 6 of the Law of 11 January 1958." (at 53 of the English translation, available on the STL website). But see Judgment No. 85/98, 16 April 1998, cited by the Prosecution (para. 29, footnote. 28), that the use of explosives did not *per se* demonstrate an intent to cause a state of terror.

314. As the Prosecution has summarised, Lebanese courts have considered the following factors as relevant to establishing this special intent to spread terror: "the social or religious status of the principal target; the commission of the attack in daylight in a street full of people; the collateral killing of bystanders; the use of explosives; and the destruction of residential and commercial buildings".[85] In general, this determination will have to be made on a case-by-case basis.[86]

B. The Notion of Terrorism in International Rules Binding Upon Lebanon

61. The Appeals Chamber will now consider the definition of terrorism under treaties and customary international law binding on Lebanon. We have noted that both the Prosecutor and the Defence Office hold the view that international law, either conventional in nature or (assuming it exists, which both deny) customary is not material to the interpretation or application of the Lebanese law on terrorism. According to the Prosecutor, in principle reliance on international law may be had when national legislation contains gaps; however, in the case at issue no such gaps exist.[87] The Defence Office takes a more radical view. In its opinion international law must not be taken into account, for Lebanese law is sufficiently clear and would better guarantee the rights of potential defendants.[88] Nevertheless, the Defence Office argues, international rules could exceptionally be taken into consideration to the extent, and to such extent only, that they grant or ensure broader rights to the defendants.[89]

62. We conclude instead that although the Tribunal may not apply those international sources of law directly because of the clear instructions of Article 2 of the Tribunal's Statute, it may refer to them to assist in *interpreting* and *applying* Lebanese law.

[85] Prosecution Submission, para. 30 (footnotes omitted).

[86] Thus we decline to adopt the Prosecutor's limiting proposal to equate the spread of fear with the intent for the act "to have a substantial impact upon the population or a significant group thereof" as unnecessary. Prosecution Submission, para. 29; Hearing of 7 February 2011, T. 15.

[87] Prosecution Submission, paras 4-5.

[88] Defence Office Submission, paras 58, 70, 88-89.

[89] Defence Office Submission, paras 68 and 74.

1. Treaty Law

a) The Arab Convention for the Suppression of Terrorism

63. The only international treaty *ratified by Lebanon* that provides a general definition of terrorism is the Arab Convention for the Suppression of Terrorism of 22 April 1998 ("Arab Convention").[90] The Arab Convention provides for cooperation among Arab countries in their fight against terrorism. It is a multilateral treaty on judicial cooperation among the contracting parties. It shows some unique features which need to be stressed.

64. The Arab Convention is different from other conventions on judicial cooperation such as the 1948 Convention on Genocide or the 1984 Convention against Torture, which impose on the Contracting Parties an obligation to adopt in their domestic legal systems the definition of the crime laid down in the Convention. In contrast, the Arab Convention defines terrorism for the purposes of judicial cooperation, while carefully stressing that it does not intend to replace the contracting parties' national laws of terrorism.[91] The Arab Convention rather enjoins States to cooperate in their fight against the forms of terrorism defined by the Convention, leaving each contracting party freedom to simultaneously pursue the suppression of terrorism on the basis of its own national legislation. Perusal of the relevant provisions of the Convention will show how the Convention operates.

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[90] League of Arab States, Arab Convention for the Suppression of Terrorism ("Arab Convention"), 22 April 1998 (entered into force on 7 May 1999) (*available in English at* https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf). Eighteen "Arab States" have so far ratified the Arab Convention: Palestine, Bahrain, United Arab Emirates, Egypt, Saudi Arabia, Algeria, Jordan, Tunisia, Sudan, Libya, Yemen, Oman, Lebanon, Syria, Morocco, Djibouti, Qatar, Iraq. (Source: Arab League Secretariat).

[91] Article 1 (3) defines "terrorist offence" as "Any offence or attempted offence committed in furtherance of a terrorist objective in any of the Contracting States, or against their nationals, property or interests, that is punishable by their *domestic law*. The offences stipulated in the following conventions, *except where conventions have not been ratified by Contracting States or where offences have been excluded by their legislation*, shall also be regarded as terrorist offences". Article 3 II (1) provides that Contracting States shall "1. [...] arrest the perpetrators of terrorist offences and to *prosecute them in accordance with national law* or extradite them in accordance with the provisions of this Convention or of any bilateral treaty between the requesting State and the requested State." Article 4 provides that "Contracting States shall cooperate for the prevention and suppression of terrorist offences, *in accordance with the domestic laws and regulations of each State*, as set forth hereunder." Article 14 provides that "Where one of the Contracting States has jurisdiction to prosecute a person suspected of a terrorist offence, it may request the State in which the suspect is present to take proceedings against him for that offence, subject to the agreement of that State and provided that the offence is punishable in the prosecuting State by deprivation of liberty for a period of at least one year or more. The requesting state shall, in this event, provide the requested state with all the investigation documents and evidence relating to the offence. (b) The investigation or prosecution shall be conducted on the basis of the charge or charges made by the requesting state against the suspect, *in accordance with the provisions and procedures of the law of the prosecuting state*." (Emphasis added.)

65. In Article 1(2) the Arab Convention defines terrorist acts as follows:

> Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardise a national resource.

66. Article 1(3) adds that States parties shall also consider as terrorism any act provided for in a host of listed international conventions,[92] to the extent that the States in question have ratified such conventions. Furthermore, Article 2(a) excludes from the category of terrorist acts some acts performed in the course of conflicts for national liberation, unless the armed conflict is designed to jeopardise the territorial integrity of an Arab country. It provides that:

> [a]ll cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab State.

67. In addition, Article 2(b) provides that some offences shall be considered as terrorist acts and not as political acts (clearly, with a view to allowing the extradition of alleged terrorists, given that normally treaties on judicial cooperation ban the extradition of persons accused of political offences):

1. Attacks on the kings, Heads of State or rulers of the contracting States or on their spouses and families;
2. Attacks on crown princes, vice-presidents, prime ministers or ministers in any of the Contracting States;
3. Attacks on persons enjoying diplomatic immunity, including ambassadors and diplomats serving in or accredited to the Contracting States;
4. Premeditated murder or theft accompanied by the use of force directed against individuals, the authorities or means of transport and communications;
5. Acts of sabotage and destruction of public property and property assigned to a public service, even if owned by another Contracting State;

[92] The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 704 U.N.T.S. 219; The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 860 U.N.T.S. 106; The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 U.N.T.S. 178, and the Protocol thereto of 10 May 1984; The New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, 1035 U.N.T.S. 168; The International Convention against the Taking of Hostages, 17 December 1979, 1316 U.N.T.S. 206; the provisions of the United Nations Convention on the Law of the Sea of 1982, relating to piracy on the high seas.

6. The manufacture, illicit trade in or possession of weapons, munitions or explosives, or other items that may be used to commit terrorist offences.

68. It is clear from these provisions that the two notions of terrorism, one contained in the Lebanese Criminal Code, the other enshrined in the Arab Convention, have in common some elements, in particular that they both require a special intent which may be to spread terror or fear (although the Convention also envisages other possible purposes, namely "seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardise a national resources").

69. In some respects, the Convention's definition is broader than that of Lebanese law. The Arab Convention requires that the act be intended to sow panic and fear (or to damage the environment, or property or natural resources), without mention of particular means as Article 314 does. It follows that, *inter alia*, under the Arab Convention, any attack on a Head of State, Prime Minister, or persons enjoying diplomatic immunity (including ambassadors and diplomats serving in or accredited to the State, as well as on their spouses and families), can be defined as "terrorism" whatever the means by which the attack is carried out, provided that the intent be that required by the Convention.

70. In other respects the Arab Convention's notion of terrorism is narrower: it requires the terrorist act to be actually (rather that only potentially) violent in nature.[93] Further it excludes acts performed in the course of a *war of national liberation* (as long as such war is not conducted against an Arab country). The provisions of Article 314 of the Lebanese Criminal Code do not distinguish between times of peace and *times of war or armed conflict*. On the face of these articles, anybody engaging in acts of terrorism, as defined by Article 314, may be found guilty and punished, whatever his status (civilian or military), and regardless of whether, in the event of an armed conflict, he is engaged in a war of national liberation or in any other armed conflict involving so-called "freedom fighters".[94]

[93] This requirement of violence might reflect the Arab Convention's early provenance in the long line of regional and universal anti-terrorism treaties. More recently, States and conventions have moved away from a requirement of violence in order to include within the crime of terrorism, for example, attacks on societal infrastructure (particularly technological attacks) that could create widespread disorder and insecurity.

[94] The only reference to humanitarian law norms potentially applicable to terrorism and other crimes under the Tribunal's jurisdiction is contained in Article 197 of the Lebanese Criminal Code, which reads: "Complex offences or offences closely connected with political offences are deemed to be political offences, unless they constitute the most serious felonies in terms of morals and ordinary law, such as homicide, grievous bodily harm, attacks on property by arson, explosives or flooding, and aggravated theft, particularly when involving the use of weapons and violence, as well as

b) Implementation of Treaties under Lebanese Law

71. States are duty bound by international law to adopt the necessary implementing legislation once they become parties to international treaties (that is, when such legislation is needed to give effect to international rules at the domestic level).[95] Paying only lip service to international treaties is contrary to the principle of good faith, a cardinal legal principle governing international relations incorporated in the Vienna Convention on the Law of Treaties[96] and frequently proclaimed by international courts.[97] If the State's Constitution, consistent national case-law or other relevant sources explicitly require that the provisions of the treaty, in order to become operational at the domestic level, must be implemented through national law other than the law authorising ratification of or accession to the treaty, then the State is internationally bound to pass that law. In certain States, including Lebanon, the mere publication of the treaty in the *Official Gazette* renders the treaty provisions applicable within the Lebanese legal system. While other Arab countries lay down this principle in their constitutions,[98] in Lebanon the principle, although not explicit, has been recognised by the Lebanese Governmental authorities in their initial report to the UN Human Rights Committee:

> All treaties duly ratified by Lebanon acquire mandatory force of law within the country simply [...] upon the deposit of the instruments of ratification or accession [...] *No further procedure is required for their incorporation into internal legislation. The provisions of those treaties which are sufficiently specific and concrete will therefore be immediately applied.*

attempts to commit those felonies. At times of civil war or insurrection, complex or closely related offences shall not be deemed to be political unless they constitute non-prohibited *customs of war* and they do not constitute acts of barbarity or vandalism." (Emphasis added).

[95] Pursuant to this duty, in a *note verbale* to the UN Security Council's Counter-Terrorism Committee, Lebanon stated that it "is committed to implementing the conventions and protocols to which it has acceded or to which it is in the process of acceding in the knowledge that international cooperation can assist in the proper implementation of these conventions." *Report to the Counter-Terrorism Committee* (Lebanon), 13 December 2001, S/2001/1201, at 7.

[96] See Article 26, stating inter alia that "every treaty [...] must be performed [by States] in good faith".

[97] See for instance *Nuclear Tests (Australia v France)*, Judgment, I.C.J. Reports (1974) 253, at 268, para. 46: "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."

[98] This for instance applies to Bahrain In its initial Report to the UN Committee Against Torture, this country stated that "The Convention against Torture has acquired the force of law, since, according to article 37 of the Constitution, a convention acquires the force of law after its conclusion, ratification and publication in the *Official Gazette*. Thus, any failure to comply therewith constitutes a breach of the law and entails criminal responsibility if a criminal offence has been committed. It also entails legal liability for any damage caused." CAT/C/47/Add 4., 27 October 2004, para. 50; see also *id*, para. 54.

Provisions which call for legislative or statutory measures are binding on the State of Lebanon, which must then introduce such measures.[99]

72. Lebanese case law corroborates this view of the law. Thus, for instance, the Single Judge of Beirut, Civil Section, in the decision no. 818 of 2 June 1950 stated that:

> [T]he purpose of the publication of a law is to disseminate it and to make the public aware of it. This purpose has been achieved through the publication of the law on ratification of the Convention [the French-Lebanese Convention of 24 January 1948 on monetary matters] in issue 29 September 1948 of the *Journal Officiel* and there is no more any interest in publishing the entire text of the Convention in the issue in question because the Convention has already been published in the *Journal Officiel* relating to parliamentary sessions; the Convention has entered into force after ratification in keeping with the law, after publication; its provisions prevail over those of the domestic law which may be inconsistent with them, on the strength of the principle: the external law trumps the domestic law.[100]

73. The Court of Appeals of Beirut, Civil Section, in its decision no. 684 of 10 July 1952 said that:

> Considering that an international agreement it is not but a law that one must apply in the territory of the Contracting States immediately and directly to individuals, and this notwithstanding the existence of another domestic law which expressly conflicts with it, this Tribunal is of the view that it belongs to ordinary courts, which are designed to protect the rights and freedoms of individuals, to interpret the text of the international convention while handling a case relating to these rights when the dispute hinges on the scope of such rights; in contrast it does not belong to domestic ordinary courts to pronounce upon the international relations stemming from the aforementioned Convention [the French-Lebanese Convention of 24 January 1948 on monetary matters] and to place its interpretation on the text of this

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[99] HRI/CORE/1/Add.27 ("Core Document Forming the First Part of the Reports of the States Parties: Lebanon"), 12 October 1993 (emphasis added). See also *Report to the Counter-Terrorism Committee* (Lebanon), 31 March 2003, S/2003/451, at 9, in which Lebanon explained:

> When Lebanon becomes a party to international conventions and the protocols thereto pursuant to the authorization issued by the Chamber of Deputies, these provisions become an integral part of Lebanese legislation, without there being any need to amend it. Where its international commitments are incompatible with its internal legislation, the former takes precedence over the latter.

See also G.J Assaf, "The Application of International Human Rights Instruments by the Judiciary in Lebanon", in E. Cotran et al. (eds), *The Role of the Judiciary in the Protection of Human Rights* (London: Kluwer, 1995), at 85-86 (footnotes omitted):

> [T]he publication of an international treaty, whatever the means of publication, is enough to incorporate it in the national body of legislation and therefore to make it enforceable in the national legal system, as long as the ratification law is published in the *Journal Officiel*. When the treaty norms are so incorporated, the courts may apply them to effectively realize the rights of the individuals as per Art. 2 par (2) of the Code of Civil Procedure. [...] Lebanese civil courts have rules that the provisions of international treaties have precedence over the provisions of internal legislation pertaining to the same subject, that is, even if there isn't any contradiction *per se* between the said provisions.

[100] Single Judge of Beirut, Civil Section, decision n°. 818, 2 June 1950 in *Al-nashra al-kada'iya* [Revue Judiciaire], 1950, at 650-654.

> Convention to the extent that such interpretation revolves around state sovereignty and governmental acts.[101]

74. We thus disagree with the Defence Office that under Lebanese law generally speaking a treaty must be not only ratified but also implemented through additional domestic legislation before it can take effect.[102] Rather, once an international treaty has been duly ratified by the Head of State after authorisation or approval by the legislature, the provisions of the treaty that are *self-executing* (namely capable of being implemented without any domestic legislative addition) automatically become binding upon all individuals and officials of the State. That a treaty, once ratified, can directly create rights and obligations for individuals and state officials, without any need for implementing legislation, if such was the manifest intention of the contracting parties and the text of the treaty reflects that intention, was stated back in 1928 by the Permanent Court of International Justice in the celebrated Advisory Opinion in *Jurisdiction of the Court of Danzig*.[103] Recent case law, notably in countries of Romano-Germanic tradition, bears out this proposition.[104] This holds true in particular in countries such as Lebanon that attach to treaties duly ratified a rank higher than that of the domestic law,[105] thereby signifying that they intend to set greater store by treaties than by

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[101] Court of Appeals of Beirut, Civil Section, decision n°. 684, 10 July 1952, in *Al-nashra al-kada'iya* [Revue Judiciaire] 1955, at 537-539.

[102] See Defence Office Submission, para. 65.

[103] The Court said that "[A]ccording to a well-established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts." The Court went on to say that "[t]he wording and general tenor of the *Beamtenabkommen* show that its provisions are directly applicable as between the officials and the Administration." *Jurisdiction of the Courts of Danzig*, 1928 PCIJ Series B, No. 15, at 17-18.

[104] See for instance the decision of the French *Conseil d'État* in the *Madame Elser* case, where the Council held that Article 15 of the 1984 Convention Against Torture (requiring contracting States to ensure that confessions made under torture not be utilised in court) was directly applicable in the French legal system Text in *Revue générale de droit international public*, 2002, at 462-463.

[105] See Article 2 of the new Lebanese Code of Civil Procedure of 1983, which provides: "In the event of conflict between the provisions of international treaties and those of ordinary law, the former shall take precedence over the latter. Courts shall not declare null the legislative authority's activities on the grounds of inconsistency of ordinary laws with the Constitution or international treaties." (STL translation) This provision, while located in the Code of Civil Procedure, applies as a general principle of law to all Lebanese legislation.

The same view has been maintained by Lebanese courts in a number of cases. The Court of cassation, in a decision of 9 December 1973, held that:

> [...] the doctrine of general international law establishes that if the provisions of an international convention are inconsistent with the provisions of a domestic law, the provisions of the Convention are the only ones that must be applied, regardless of the entry into force of the domestic law (before or after ratification of the Convention), because the Convention is an agreement between two States that is not affected by the domestic legislation of the States, whether such domestic legislation is passed before or after the Convention, except if a domestic text expressly provides for the "nullity" of the Convention.

legislation enacted by the national legislature, in the event of conflict. In recognition of this effect, Lebanon stated in a *note verbale* addressed to the Security Council's Counter-Terrorism Committee that "the international protocols and conventions to which Lebanon has acceded have come to have the force of law in the country and take precedence over the provisions of national law." Thus, as "the National Assembly authorised the Government to ratify the Arab Convention on the Suppression of Terrorism," "the provisions of this convention have come to take precedence over the application of the provisions of national law."[106]

75. It is notable that in the *Rachid* case the Single criminal Judge in Beirut, in a decision of 10 September 2009, applied the 1984 Convention against Torture to the case of an Iraqi refugee who had entered Lebanon illegally. The Court held that the Convention Against Torture is an integral part of the Lebanese legal system since the passing of the Law of 24 May 2000, authorising ratification of the Convention. As the Prosecution had submitted that the entry of the Iraqi was contrary to Article 32 of the Law of 10 July 1962 on entering, residing in and exiting Lebanon,[107] the Court noted that this Article provides for three distinct penalties, one of which is expulsion of the foreigner. However, according to the Court, expulsion could not be imposed because, although no explicit legislation had been adopted to modify the Law of 1962, it was contrary to the 1984 Convention to expel a person to a country where he or she risked being tortured. Accordingly, the Court inflicted the other two penalties.[108] Although this position held by the single Judge in Beirut is inconsistent with a decision from the Court of Appeal of Mount Lebanon,[109] both of those cases relate to circumstances in which

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Court of cassation, 1st Civil Chamber, decision n° 59, 9 December 1973, in *Al-Adel* [Journal of the Beirut Bar], 1974, at 277-79. Likewise, the Beirut Court of Appeal stated that "with regard to the hierarchy of norms, international Conventions prevail over domestic laws, in case of conflict." Beirut Court of Appeal, 1st Civil Chamber, decision n° 121, 26 April 1988, *Al-nashra al-kada'iya* [Revue Judiciaire], 1988, at 692-95. See also the Council of State (*Conseil d'État*) in *Kettaneh v State*, decision n° 315, 28 May 1973, in RJAL, 1973 (confirming the superiority of treaties to Lebanese law).

[106] *Report to the Counter-Terrorism Committee* (Lebanon), 13 December 2001, S/2001/1201, at 7. See also *Report to the Counter-Terrorism Committee* (Lebanon), 26 October 2004, S/2004/877, at 13, in which Lebanon informed the Chairman of the Security Council's Counter-Terrorism Committee that Lebanon considers itself "bound" by the Arab Convention.

[107] This law was later amended by Law n° 173 of 14 February 2000.

[108] Single criminal Judge in Beirut, *Prosecution v Louay Majid Rachid*, decision of 10 September 2009, unpublished, original on file with the Tribunal.

[109] Civil Court of Appeal, Mount Lebanon, 13th Chamber, decision n° 398, 18 May 2010 (unpublished, on file with the Tribunal). The court held that judicial tribunals may not refer to the conventions that may be applied *ex officio* in Lebanon such as the Covenant of 1966, the international jurisprudence, the general principles of international law and customary international law, when these instruments contradict domestic legislation. The court first compared the French constitution, which gives primacy to treaties over domestic legislation, to the Lebanese constitution, which does not contain a similar provision. From this the court reasoned that the conventions and treaties to which Lebanon has adhered

domestic legislation directly conflicts with a treaty. That is not the case here, because the Arab Convention relates to the separate topic of State cooperation and does not directly conflict with Article 314. The general idea behind the *Rachid* case, that Lebanese law should be interpreted in the light of binding international treaties, still holds true for the situation before us.

76. The sole exception allowed to the automatic incorporation into Lebanese law of treaties duly ratified after approval of Parliament is *when a treaty provision is "non-self-executing"*, in that it requires the specific designation, by Parliament, of a domestic organ for the implementation of some of its provisions, or the passing by Parliament of legal provisions implementing the rules of the treaty. As a general rule, international norms criminalising conduct are non-self-executing, for their implementation requires national legislation defining the crime and the relevant penalty. In this regard, we do agree with the Defence Office.[110] The principle of legality (*nullum crimen sine lege*), whereby individuals may not be punished if their conduct had not been previously criminalised by law, has been so extensively proclaimed in international human rights treaties with regard to domestic legal systems[111] and so frequently upheld by international criminal courts with regard to international prosecution of crimes,[112] that it is warranted to hold that by now it has the status of a peremptory norm (*jus cogens*), imposing its observance both within domestic legal orders and at the

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have, in the domestic system, the same position as its accession law, and therefore do not have primacy over the legislative law. According to that court, Article 2 of the Code of Civil Procedure has been implicitly repealed by Article 18 of the law on the establishment of the Constitutional council, which prohibits civil tribunals from determining whether a law is constitutional or consonant with an international treaty; therefore, civil tribunals may not expand their jurisdiction by interpreting domestic laws by analogy so as to render the law in keeping with the constitution or an international treaty.

[110] See Defence Office Submission, para. 65.

[111] See the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, art. 15; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 222, art. 7; Organization of American States, American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123, art. 9; Organisation of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, *reprinted in* 21 I.L.M. 58 (1982), art. 7(2); League of Arab States, Arab Charter on Human Rights, 22 May 2004, art. 6.

[112] The *nullum crimen* principle has been laid down in the international criminal tribunals' Statutes (*Report of the UN Secretary-General Pursuant to Paragraph 2 of Security Council Res 808*, S/25704 (1993), para. 34; Article 22 ICCSt; *Report of the UN Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, para. 12) and in the relevant case law (ICTY, *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 139, 141, 143; ICTY, *Jelisić*, Trial Judgment, 14 December 1999, para. 61; ICTY, *Delalić et al*, Appeals Judgment, 20 February 2001, para. 170; ICTY, *Erdemović*, Appeals Judgment, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 11; ICTY, *Krstić*, Trial Judgment, 2 August 2001, para. 580; ICTY, *Vasiljević* Trial Judgment, 29 November 2002 ("*Vasiljević* TJ"), paras 193, 196, 201; ICTY, *Hadzihasanović et al*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras 32-36; ICTY, *Galić*, Trial Judgment, 5 December 2003, paras 90, 93, 98, 132; ICTR, *Akayesu*, Trial Judgment, 2 September 2008, para. 605).

international level. It follows that, if a treaty provides for the punishment of conduct that previously did not amount to a crime, the relevant provision of the treaty must be held to be non-self-executing, because—absent domestic law criminalising the conduct and setting out the relevant penalty—its implementation would not ensure that all guarantees of precision and foreseeability are afforded to any person accused of crimes deriving from the international treaty.[113] Thus under Lebanese law, if the legislature does not criminalise particular conduct and specify the penalty as provided for in a ratified international treaty, judges may not apply those provisions of international origin, on account of the *nullum crimen sine lege* principle, enshrined in Article 1 of the Lebanese Criminal Code,[114] although Lebanon would find itself in breach of an international treaty, thereby incurring international State responsibility.

77. The Defence Office rightly refers to the case of the *Minor house servant*, decided on 9 November 1999 by the Criminal Chamber of the Court of cassation.[115] In that case, the Court held that a father who had allowed his daughter (who was under ten years of age) to work as a house servant could not be punished because the 1989 UN Convention on the Rights of the Child, ratified by Lebanon on 14 May 1991, had not been implemented through a law criminalising the relevant conduct. A specific additional statute was thought necessary to make the conduct in question a crime and to set the appropriate sentence—failing this, no tribunal could convict on the sole basis of a law authorising ratification.

78. Unlike the Arab Convention, however, the UN Convention on the Rights of the Child did not contain a provision defining the crime: it merely required Contracting States to pass legislation on the matter, with a view to criminalising the employment of a child below a certain age (to be specified by each Contracting State with regard to such State) and providing for the penalty attached to the crime.[116] The Lebanese authorities having failed to enact that legislation, domestic courts were

[113] See, e g., Australia, Federal Court, *Buzzacott v Hill*, [1999] FCA 1192 (S23 of 1999); Senegal, Court of cassation, *Hissène Habré*, 20 March 2001, available online at http://www.icrc.org/ihl-nat nsf, and reprinted in part at 125 I.L.R. 569.

[114] Article 1 reads: "No penalty may be imposed and no preventive or corrective measure may be taken in respect of an offence that was not defined by statute at the time of its commission. An accused person shall not be charged for acts constituting an offence or for acts of principal or accessory participation, committed before the offence in question has been defined by statute."

[115] See Defence Office Submission, para. 65 and footnote 70. Court of cassation, 6th Chamber, decision n° 142, 9 November 1999, *Sader fil-tamyiz* [Sader in the cassation], 2001.

[116] Article 32 of this Convention stipulates that:

not in a position to enter convictions on the matter. The Arab Convention, on the other hand, *does* include a clear definition intended to complement Lebanon's national legislation and to take precedence in instances of judicial cooperation with other Arab States that have ratified the Convention. It does not create a new crime in Lebanon but expands in some foreseeable ways the definition of an existing crime, although solely with regard to and in the area of judicial cooperation with other Arab countries.

79. Thus the question arises: does this distinction matter, that a treaty (the Arab Convention) defines differently conduct (terrorism) *already criminalised* within Lebanon? In other words, can the Arab Convention's definition of terrorism be used by the Tribunal when ascertaining the notion of terrorism for the purpose of its cases, since the Arab Convention does not purport to define a new crime in Lebanese law, but merely to *add* to the already existing definition in Article 314?

80. We first note that the Convention itself clearly indicates that it does not intend to substitute its own definition of terrorism for those contained in the national law of each contracting party. The Convention simply creates a system of suppression that *runs parallel* to that of national legislation: in the area of judicial cooperation among Arab countries, the prevention and suppression of terrorism shall be conducted along the lines indicated by the Convention and based on the definition of "terrorism" and "terrorist offences" set out or referred to in the Convention. Each contracting State remains free to prosecute and punish terrorism in its own legal system based on its own definition of terrorism. Thus, while killing with a dagger a foreign dignitary, for instance, has not been generally regarded by Lebanese courts as "terrorism" even if the act was intended to spread terror, Lebanon agreed to treat such act as terrorism for the purpose of judicial cooperation with other parties to the Arab Convention. In this sense, we agree with the Defence Office that the purpose of the Arab

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Convention's definition of terrorism is to enable prosecution, not to change domestic criminal codes.[117]

81. The Appeals Chamber thus finds that the Tribunal cannot apply the Convention directly, as an independent source of law. The Statute is clear that the Tribunal is to apply the definition of terrorism found in the Lebanese Criminal Code, and the definition used in the Arab Convention does not automatically replace that enshrined in Article 314. Deference to the will of the Lebanese legislature, which has never chosen to modify the definition used in the Lebanese Criminal Code, and to the letter of the Statute mandates this outcome. In addition and *ad abundantiam*,[118] as the Defence Office noted,[119] since the initial reference to the Arab Convention was deleted in the course of the drafting process of the Statute,[120] the argument can also be made that the preparatory work confirms this literal interpretation.

82. Nevertheless, while not overriding inconsistent provisions of the Lebanese Criminal Code, the definition of the Arab Convention undoubtedly forms part of the domestic legal system of Lebanon. The Defence Office urges us not to use the Arab Convention as an aid to interpretation,[121] but we believe its definition can nonetheless be used to help identify a persuasive interpretation of the Lebanese Criminal Code as part of the overall context relevant to its interpretation. As the Defence Office acknowledges, Lebanese courts do look to ratified treaties to interpret Lebanese law.[122] Further, we disagree that the Arab Convention's definition lacks clarity,[123] or that such an absolute distinction can be drawn between the realm of judicial cooperation and that of criminal prohibitions[124]: while the Arab Convention does not directly change the Lebanese Criminal Code, Lebanon has agreed to allow other countries to prosecute people found within its borders for crimes within the Arab Convention's definition. Further, as noted above, it is a well-known principle of

[117] See Defence Office Submission, paras 114, 118-119.

[118] Under Article 32 of the Vienna Convention on the Law of Treaties resort to preparatory works is only a "supplementary" or subsidiary means of interpretation, applicable when there is a doubt about the meaning of a provision.

[119] Defence Office Submission, para. 116.

[120] N. N. Jurdi, "The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon", 5 *J Int'l Crim Justice* (2007) 1125, at 1128.

[121] Defence Office Submission, para. 121.

[122] Defence Office Submission, paras 66-67.

[123] Defence Office Submission, para. 120.

[124] Defence Office Submission, para. 114.

international law that, as much as possible, a national law shall be so construed as to make it consistent with a State's international obligations.[125]

2. Customary Law

a) Customary International Law on Terrorism

83. The Defence Office and the Prosecutor both forcefully assert that there is currently no settled definition of terrorism under customary international law.[126] However, although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of the marked difference of views on some issues,[127] closer scrutiny demonstrates that in fact such a definition has gradually emerged.

84. The Institute for Criminal Law and Justice Brief, prepared by Prof Dr Ambos, has helpfully reviewed universal and regional instruments.

85. As we shall see, a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio*, to the effect that a customary rule of international law regarding the international crime of terrorism, at least *in time of peace*, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or

[125] See sources cited in footnote 63, above; see also *French State v Établissements Monmousseau*, 15 I L.R 596 (Fr Ct. App. Orleans 1948), at 597; *Yugoslav Refugee (Germany) Case*, 23 I.L R. 386 (F.R G. Fed. Admin. Sup. Ct. 1956), at 387-388; *Interpretation of Customs Valuation Statute (Austria) Case*, 40 I.L.R. 1 (Aust Admin. Ct. 1962), at 2-3. For some older British cases taking the same view, see C.K Allen, *Law in the Making*, 6th edn. (Oxford: Clarendon Press, 1958), at 445-446.

[126] Defence Office Submission, para. 90; Prosecution Submission, para. 17; Hearing of 7 February 2011, T. 11-13 and 55.

[127] For example, see Y. Dinstein, "Terrorism as an International Crime", 19 *Israel Y B on Human Rights* (1989), at 55; A. Schmid, "Terrorism: The Definitional Problem", 36 *Case W Res J Int'l L* 375 (2004); B. Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2008), at 270; R. Barnidge, "Terrorism: Arriving at an Understanding of a Term", in *Terrorisme et droit international* (Leiden: Nijhoff 2008), 157-193; M. Williamson, *Terrorism, War and International Law The Legality of the Use of Force Against Afghanistan in 2001* (Surrey: Ashgate Publishing 2009), at 49. See further: U.S., Federal Court of Appeal, *United States v Yousef*, 337 F.3d 56, 106-108 (2d Cir. 2003); India, Supreme Court, *Singh v State of Bihar* (2004) 3 SCR 692; France, Court of cassation, *Gaddafi Case*, [cass. crim.], 13 March 2001, *reprinted in English in* 125 I.L.R. 490. See also Institute for Criminal Law and Justice Brief, para 7. For the reasons, authorities and national and international instruments set out in this decision, we cannot subscribe to this view.

directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.[128]

86. As a preliminary matter, there is no doubt that there is a commonly shared agreement on the need to "fight international terrorism in *all its forms* and *irrespective of its motivation, perpetrators and victims, on the basis of international law*".[129] Furthermore, that there exists a crime of terrorism under customary international law has already been recognised by some national courts, including the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*;[130] the Italian Supreme Court of cassation in *Bouyahia Maher Ben Abdelaziz et al.*, which stated that "a rule of customary international law [is] embodied in various resolutions by the UNGA and the UNSC, as well as in the 1997 Convention for the Suppression of *Terrorist* Bombings";[131] and the First "Judge of Amparo" on Criminal Matters in the Federal District of Mexico, who noted that "the multiple conventions to which reference has been made, provide that the crimes of genocide, torture and *terrorism* are internationally wrongful in nature and impose on member States of the world

[128] Coincidentally, although the Prosecution asserts there is no customary international law of terrorism, it identifies the first two of these elements as components of a potential customary norm. See Prosecution Submission, para. 25.

[129] *Report to the Counter-Terrorism Committee* (Iran), 27 December 2011, S/2001/1332, at 1 (emphasis added). Similar comments by States are widespread; for example, see statements collected in footnotes 156 ff., below.

[130] The Court said:

> We are not persuaded [...] that the term 'terrorism' is so unsettled that it cannot set the proper boundaries of legal adjudication. The recently negotiated International Convention for the Suppression on the Financing of Terrorism, G.A Res. 54/109, December 9 1999, approaches the definitional problem in two ways. First, it employs a functional definition in Article 2(a), defining 'terrorism' as '[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex' [...] Second, the Convention supplements this offence-based list with a stipulative definition of terrorism. Article 2 (1) (b) defines 'terrorism' as 'Any [...] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.' [...] This definition catches the essence of what we understand by 'terrorism'.

Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] S.C.R. 3, at paras 96 and 98. It should be noted that, at the time, Canada had not yet ratified the Convention for the Suppression on the Financing of Terrorism. The Convention was ratified by Canada on 19 February 2002, while the decision in *Suresh* was delivered on 11 January 2002. Likewise, in *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, 229 D.L.R. (4th) 235, it was noted that, in light of mounting international conventions, UN resolutions, and international case law, the international consensus at least as to certain forms of terrorism may have emerged as early as 1997. *Id* at paras 178-180, Décary JA (concurring).

[131] Cass. crim., sez. I, 17 January 2007, n. 1072, at para. 2.1 (unofficial STL translation). Under Italian domestic law, the purpose of terrorism is understood to be the creation of terror in the public through indiscriminate criminal conduct against the general public or against certain individuals because of the function they represent. See for instance Supreme Court of cassation, sez. I, 5 November 1987, n. 11382; see also Article 270-*bis* of the Italian Penal Code (amended 15 December 2001) (setting penalties for participating in terrorist associations).

community the obligation to prevent, prosecute and punish those culpable of their commission".[132] Reference to customary law regulating terrorism was also made by Judge Antonio Boggiano in his Concurring Opinion in the *Enrique Lautaro Arancibia Clavel* Case decided on 24 August 2004 by the Argentinean Supreme Court (*Corte Suprema de Justicia de la Nación*),[133] as well as by a U.S. federal court in *Almog v. Arab Bank.*[134]

87. However significant these judicial pronouncements may be as an expression of the legal view of the courts of different States, to establish beyond any shadow of doubt whether a customary rule of international law has crystallised one must also delve into other elements. In particular, one must look to the behaviour of States, as it takes shape through agreement upon international treaties that have an import going beyond their conventional scope or the adoption of resolutions by important intergovernmental bodies such as the United Nations, as well as the enactment by States of specific domestic laws and decisions by national courts. This examination will be undertaken in the following paragraphs.

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[132] Mexico, Supreme Court, *Cavallo* Case, No. 140/2002, 10 June 2003 (at p. 392 of the version on file with the STL) (unofficial STL translation) (emphasis added). The Mexican Supreme Court quoted the lower court at length in affirming the result but for different reasons.

[133] Argentina, Supreme Court, *Enrique Lautaro Arancibia Clavel* Case, No. 259 (2004), 24 August 2004 (Boggiano, J., concurring). Judge Boggiano, after defining terrorism as "a crime *juris gentium*", wrote:

> [T]errorism involves the commission of cruelties upon innocent and defenceless people causing unnecessary suffering and danger against the lives of the civilian population. It is a system of subversion of order and public security that, although the commission of certain isolated events could be fixed to a particular State, has recently been characterized by ignoring the territorial limits of the affected State, constituting in this way a serious threat to the peace and security of the international community. This is why its prosecution is not the exclusive interest of the State directly injured by it, but rather it is an aim whose achievement benefits, ultimately, all civilized nations, who are thereby obligated to cooperate in the global fight against terrorism, both through international treaties and through the coordination of national law aimed at the greater efficiency of the said struggle. ... [O]n the other hand, customary international law and conventional law echo the need for international cooperation for the repression of terrorism, as well as any indiscriminate attack against a defenceless civilian population.

(at pp. 51-52, paras 21-22 of version on file with STL) (unofficial STL translation).

[134] While the court avoided the label of "terrorism", it held that "in light of the universal condemnation of organized and systematic suicide bombings and other murderous acts intended to intimidate or coerce a civilian population, this court finds that *such conduct violates an established norm of international law.* " *Almog v Arab Bank*, 471 F. Supp. 2d 257, 284 (E.D.N.Y. 2007) (emphasis added). See also *United States v Yunis*, 924 F.2d 1086 (D.C. Cir. 1991), in which the Court of Appeals for the D.C. Circuit noted:

> Nor is jurisdiction precluded by norms of customary international law. [...] Under the universal principle, states may prescribe and prosecute "*certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism,*" even absent any special connection between the state and the offense.

Id at 1091 (emphasis added) (quoting *Restatement (Third) of the Foreign Relations Law of the United States* §§ 404, 423 (1987)).

88. Let us first consider international and multilateral instruments that include a definition of the crime of international terrorism. Numerous regional treaties have defined terrorism as *criminal* acts intended to *terrorise populations* or *coerce an authority*.[135] By the same token, UN General Assembly resolutions have, since 1994, insisted that "*criminal* acts intended or calculated to *provoke a state of terror* in the general public, a group of persons or particular persons for political purposes are *in any circumstance* unjustifiable[.]"[136] Likewise, in 2004 the Security Council, by a *unanimous* decision taken under Chapter VII of the UN Charter, "recall[ed]" in Resolution 1566 that:

> *criminal acts*, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the *purpose to provoke a* state *of terror in the general public* or in a group of persons or particular person, intimidate a population *or compel a government or an international organization to do or to abstain from doing any act*, which

[135] **Council of the European Union**, Council Framework Decision 2002/475/JHA, On Combating Terrorism, arts 1-4, 2002 O.J. (L 164) 3, 4-5; **Organization of African Unity**, Convention on the Prevention and Combating of Terrorism, 14 July 1999, 2219 U.N.T.S. 179, arts 1 & 3; **Organisation of the Islamic Conference**, Convention of the Organisation of the Islamic Conference on Combating International Terrorism ("*Islamic Conference Convention*"), 1 July 1999, Res. 59/26-P, Annex, art. 1 (*available at* http://www.oic-oci.org/english/convenion/terrorism_convention.htm); **Commonwealth of Independent States**, Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 4 June 1999, art. 1 (*available at* http://treaties.un.org/doc/db/Terrorism/csi-english.pdf), **League of Arab States**, Arab Convention for the Suppression of Terrorism ("*Arab Convention*"), 22 April 1998, arts 2-3 (*available in English at* https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf); **Communauté Economique et Monétaire de l'Afrique Centrale**, Convention relataive à la lute contre le terrorism en Afrique Centrale ("*CEMAC Convention*"), 5 February 2005, Règlement N° 08/05-OEAC-057-CM-13, art. 1(2) (*available in French at* https://www.unodc.org/tldb/pdf/cemac_regl_lutte_terr_2005.doc); **Cooperation Council for the Arab States of the Gulf**, Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism ("*CCASG Convention*"), 4 May 2004, art. 1 (*available in French at* https://www.unodc.org/tldb/pdf/conv_gcc_fr.doc); **Shanghai Cooperation Organization**, Shanghai Convention on Combating Terrorism, Separatism and Extremism ("*Shanghai Convention*"), 15 June 2001, art. 1 (*available at* http://www.sectsco.org/EN/show.asp?id=68). See also **Council of Europe**, Convention on the Prevention of Terrorism ("*Council of Europe Convention*"), 15 May 2005, art. 1 (*available at* http://conventions.coe.int/Treaty/en/treaties/html/196.htm), which notes in the preamble that "acts of terrorism have the purpose by their nature or context to seriously intimidate a population or unduly compel a government or an international organization to perform or abstain from performing any act or seriously destablise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization."

The South Asian Association for Regional Cooperation's Regional Convention on Suppression of Terrorism includes a definition of terrorism that differs somewhat from these standard elements, in that it is limited to certain violent criminal acts "when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property". **SAARC**, Regional Convention on Suppression of Terrorism, 4 November 1987, art. I (*available at* http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf). However, the Additional Protocol to this Convention (which entered into force on 12 January 2006) more closely follows the definition used in other conventions and requires a special intent to intimidate a population or coerce an authority. **SAARC**, Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism, 6 January 200, art. 3 (*available at* https://www.unodc.org/tldb/pdf/SAARC_ADDITIONAL_PROTOCOL_2004.pdf).

[136] A/RES/49/60 Annex (1994), at para. 3 (emphasis added); see also A/RES/64/118 (2009), at para. 4; A/RES/63/129 (2008), at para. 4; A/RES/62/71 (2007), at para. 4; A/RES/61/40 (2006), at para. 4; A/RES/60/43 (2005), at para. 2; A/RES/59/46 (2004), at para. 2; A/RES/58/81 (2003), at para. 2; A/RES/57/27 (2002), at para. 2; A/RES/56/88 (2001), at para. 2; A/RES/55/158 (2000), at para. 2; A/RES/54/110 (1999), at para. 2, A/RES/53/108 (1998), at para. 2; A/RES/52/165 (1997), at para. 2; A/RES/51/210 (1996), at para. 2; A/RES/50/53 (1995), at para. 2.

constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are *under no circumstances* justifiable[...][137]

A similar definition has found a large measure of approval in the Ad Hoc Committee tasked to draft a Comprehensive Convention on Terrorism.[138] For now, the 1999 International Convention for the Suppression of the Financing of Terrorism ("Financing Convention") provides the UN's clearest definition of terrorism, which includes the elements of (i) a criminal act (ii) intended to intimidate a population or compel an authority, and is limited to those crimes containing (iii) a transnational aspect.[139]

89. The Financing Convention and most of the regional and multilateral conventions regarding terrorism incorporate into their definition of terrorism the specific offences criminalised in a long line of terrorism-related conventions.[140] Among the terrorist offences so criminalised are the taking

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[137] S/RES/1566 (2004), at para. 3 (emphasis added). The fact that the Security Council used the verb "recall" suggests that this definition is already found elsewhere in international law. However, the Security Council restricted this particular reference to those acts already criminalised under the international conventions listed below (see footnotes 141-143).

[138] In 2002, the Coordinator of the Comprehensive Convention on Terrorism proposed the following definition of terrorism (which was considered "acceptable" by those delegates who took a position on the matter the following year, namely in 2003; see *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210*, A/58/37 (2003), at 10):

> 1 Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
>
> (a) Death or serious bodily injury to any person; or (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss,
>
> *when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.*
>
> 2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of this article.

See *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210*, A/57/37 (2002), at 6 (emphasis added).

[139] International Convention for the Suppression of the Financing of Terrorism ("*Financing Convention*"), 9 December 1999, 2178 U.N.T.S. 197, arts 2(1)(b) and 3. See also *Bouyahia Maher Ben Abdelaziz et al.*, in which the Italian Supreme Court of cassation noted:

> Due to the decades-long disagreements among UN member states on terrorist acts perpetrated during liberation wars and armed struggles for self-determination, a global convention on terrorism does not exist. Having said that, it should be noted that the wording of the 1999 Convention [for the Suppression of the Financing of Terrorism] ... is so broad that it can be considered a general definition, capable of being applied in both times of peace and times of war.

Cass. crim., sez. I, 17 January 2007, n. 1072, at para. 2.1 (STL unofficial translation).

[140] See, for example, *Financing Convention*, art. 2(1)(a); **Black Sea Economic Cooperation Organization**, Additional Protocol on Combating Terrorism to Agreement Among the Governments of the Black Sea Economic Cooperation Participating States on Cooperation in Combating Crime, in Particular in its Organized Form ("*BSEC Terrorism Convention*"), 3 December 2004, art. 1 (*available at* http://www.bsec-

of hostages,[141] the hijacking of planes,[142] and the harming of diplomatic representatives.[143] For political expediency at the time of their drafting, the earliest of these conventions focus solely on particular conduct that is universally condemned and do not require a particular intent (*e.g.*, to terrorise or to coerce).[144] Such an intent element, however, has been specified in the most recent conventions.[145] Further, all of these conventions also require—through the definition of the *actus reus* (the material element of a crime) or by additional provision—a transnational element to the crime.[146] Indeed, the three most recent universal conventions share a nearly identical Article 3, which states:

> This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in

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organization.org/documents/LegalDocuments/agreementmous/agr3/Pages/agr3.aspx); *Council of Europe Convention*, art. 1; *CEMAC Convention*, art. 2; *CCASG Convention*, art. 1; *Shanghai Convention*, art. 1; **Organization of American States**, Inter-American Convention Against Terrorism, 3 June 2002, art. 2 (*available at* http://www.oas.org/xxxiiga/english/docs_en/docs_items/AGres1840_02.htm); *Islamic Conference Convention*, art. 1(4); *Arab Convention*, art. 3; see also **Association of Southeast Asian Nations**, Convention on Counter Terrorism, 30 January 2007, art. II (*available at* http://www.aseansec.org/19250.htm) (not yet in force).

[141] International Convention Against the Taking of Hostages ("*Hostage Convention*"), 17 December 1979, 1316 U.N.T.S. 206.

[142] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation ("*Montreal Convention*"), 23 September 1971, 974 U.N.T.S. 178; Convention for the Suppression of Unlawful Seizure of Aircraft ("*Hague Convention*"), 16 December 1970, 860 U.N.T.S. 106; Convention on Offenses and Certain Other Acts Committed on Board Aircraft ("*Tokyo Convention*"), 14 September 1963, 704 U.N.T.S. 219. On 10 September 2010, the International Civil Aviation Organization adopted two new conventions related to the hijacking of planes: the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, which will replace the *Montreal Convention*, and the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, which will amend the *Hague Convention*. The 2010 Convention and Protocol are currently open for signature and have not yet entered into force. The new treaties, as well as additional documents related to the Beijing conference during which they were adopted (available at http://www.icao.int/DCAS2010/), provide for new offences, expanded jurisdiction, and more efficient regimes in areas of extradition and mutual assistance.

[143] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Personnel ("*New York Convention*"), 14 December 1973, 1035 U.N.T.S. 168.

Other such conventions include the International Convention for the Suppression of Acts of Nuclear Terrorism ("*Nuclear Terrorism Convention*"), 14 September 2005, 2445 U.N.T.S. 89; UN Convention for the Suppression of Terrorist Bombings ("*Terrorist Bombing Convention*"), 12 January 1998, 2149 U.N.T.S. 256; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("*SUA Maritime Convention*"), 10 March 1988, 1678 U.N.T.S. 222; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March 1988, 1678 U.N.T.S. 304; and Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 24 February 1988, 1489 U.N.T.S. 474.

[144] But see the *Hostage Convention*, where the offence of hostage taking is defined as the seizure or detainment of a person "*in order to compel* a third party, namely a State, an international organization, a natural or judicial person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage." *Hostage Convention*, art. 1(1) (emphasis added).

[145] *Nuclear Terrorism Convention*, art. 2; *Financing Convention*, art. 2(b).

[146] For examples, see the *Tokyo Convention*, art. 1(2); *Montreal Convention*, art. 4; *New York Convention*, arts 1 and 2; *Hostage Convention*, art. 13; *SUA Maritime Convention*, art. 4; *Terrorist Bombing Convention*, art. 3.

> the territory of that State and no other State has a basis [under subsequent articles of the Convention] to exercise jurisdiction [...][147]

It is to be emphasised that the requirement of a cross-border element goes not to the definition of terrorism but to its character as *international* rather than *domestic*. The two elements of (i) criminal act and (ii) intention to intimidate a population or compel an authority are common to both domestic and international terrorism.

90. Regarding this transnational element, it will typically be a connection of perpetrators, victims, or means used across two or more countries, but it may also be a significant impact that a terrorist act in one country has on another—in other words, when it is foreseeable that a terrorist attack that is planned and executed in one country will threaten international peace and security, at least for neighbouring countries.[148] The requirement of a transnational element serves to exclude from the definition of *international* terrorism those crimes that are purely domestic, in planning, execution, and direct impact.[149] However, such purely domestic crimes may be equally serious in terms of human loss and social destruction. The exclusion of the transnational element from the *domestic* crime of terrorism, as defined by most countries' criminal codes, does not detract from the essential communality of the concept of terrorism in international and domestic criminal law. The exclusion allows those countries to apply the heightened investigative powers, deterrence mechanisms, punishment, and public condemnation that attach with the label "terrorism" to serious crimes that may not have international connections or a direct "spill over" effect in other countries.

91. Other than the exclusion of this transnational element, however, the national legislation of countries around the world consistently defines terrorism in similar if not identical terms to those used in the international instruments just surveyed. Consistent national legislation can be another important source of law indicative of the emergence of a customary rule. The ICTY, in determining the definition of rape to be applied by the tribunal, concluded that "it is necessary to look for principles of criminal law common to the major legal systems of the world," which "may be derived,

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[147] *Terrorist Bombing Convention*, art. 3; see also *Nuclear Terrorism Convention*, art. 3; *Financing Convention*, art 3.

[148] See, for example, U.K., Court of Appeal, *Al-Sirri v Secretary of State for the Home Department*, [2009] EWCA Civ 364, para. 51, where the court found the transnational element to be "the use of a safe haven in one state to destabilise the government of another by the use of violence".

[149] For example, the Oklahoma City bombing of 1995, various ETA bombings in Spain, and the Red Brigades (*Brigate Rosse*) in Italy in the 1980s.

with all due caution, from national laws."[150] The appropriate process to be followed is illustrated in the *Furundžija* and *Kunarac* Trial Judgments of the ICTY: Reference must not be made to one national legal system only—for example, either common law or civil law to the exclusion of the other[151]—although the distillation of a shared norm does not require a comprehensive survey of all legal systems of the world.[152] It is important to avoid "mechanical importation or transposition" from national law into international criminal proceedings.[153] As was rightly noted by a great authority in international law, Dionisio Anzilotti, "laws that ensure a certain conduct of a State towards other States and which are not motivated by special interests of that State (for as a rule no State does for the other States, without gaining any advantage, more than it believes it must do)" constitute "very important indicia about the existence of a customary rule". However, the mere existence of concordant laws does not prove the existence of a customary rule, "for it may simply result from an identical view that States freely take and can change at any moment".[154] Thus, for instance, the fact that all States of the world punish murder through their legislation does not entail that murder has become an international crime. To turn into an international crime, a domestic offence needs to be regarded by the world community as an attack on universal values (such as peace or human rights) or on values held to be of paramount importance in that community; in addition, it is necessary that States and intergovernmental organisations, through their acts and pronouncements, sanction this attitude by clearly expressing the view that the world community considers the offence at issue as amounting to an international crime.

92. In this instance, there is more than a mere concordance of laws. The Security Council, acting under Chapter VII of the UN Charter, has instructed member States to adopt laws outlawing

[150] ICTY, *Furundžija*, Trial Judgment, 10 December 1998 ("*Furundžija* TJ"), para. 177.

[151] ICTY, *Furundžija* TJ, para. 178; ICTY, *Kunarac et al*, Trial Judgment, 22 February 2001, para. 439.

[152] See ICTY, *Erdemović*, Appeals Judgment, Separate Opinion of Judges McDonald and Vohrah, 7 October 1997, para. 57 ("[I]t is generally accepted that [a] comprehensive survey of all legal systems of the world [is not required,] as this would involve a practical impossibility and has never been the practice of the International Court of Justice or other international tribunals which have had recourse to Article 38(1)(c) of the ICJ Statute."); *id*, Separate Opinion of Judge Stephen, para. 25 ("[N]o universal acceptance of a particular principle by every nation within the main systems of law is necessary before lacunae can be filled[.]").

[153] *Furundžija* TJ, para. 178; see also ICTY, *Erdemović*, Appeals Judgment, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, paras 2-6.

[154] D. Anzilotti, *Corso di diritto internazionale*, Vol. I, 4th edn. (Padova: CEDAM 1955), at 100, for the French translation, see D. Anzilotti, *Cours de Droit International*, Vol. I, 3rd edn. (trans. G. Gidel) (Paris: Recueil Sirey, 1929), at 108. As another great master of international law put it : « Le droit international coutumier se concrétise souvent sous forme de normes du droit interne. Le droit de la haute mer, celui de la mer territoriale et en particulier celui des ports maritimes a ses origines dans des règles de droit interne ». P. Guggenheim, *Traité de droit international public*, Tome I, Genève, Librairie de l'Université, Georg & Cie S. A., 1953, p. 51.

terrorism and related crimes (such as the financing or incitement of terrorism), to ratify the recent anti-terrorism conventions, and to report periodically to the Council's Counter-Terrorism Committee on steps taken to bring national law into conformity with international standards in this field.[155] In the last ten years, many States have reported back to the Counter-Terrorism Committee not only their success in doing so, but also their understanding that terrorism is an international crime and/or that their laws increasingly align with a global standard.[156] That the attitude taken in these laws is concordant and not subject to transient national interests evinces a widespread stand on and a shared view of terrorism.

93. Elements common across national legislation defining terrorism include the use of criminal acts to terrorise or intimidate populations, to coerce government authorities, or to disrupt or destabilise social or political structures. Among countries that have ratified the Arab Convention for the Suppression of Terrorism, for example, national laws criminalise (i) criminal acts that (ii) endanger social order and (iii) spread fear or harm among the population or damage property or

[155] See S/RES/1373 (2001), para. 6, in which the Security Council called on States "to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism" and instructing States to "[t]ake the necessary steps to prevent the commission of terrorist acts" and "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts." See also S/RES/1624 (2005), para. 5.

[156] **Egypt** has suggested that it considers terrorism, at least as defined in international agreements binding on it, as a crime akin to war crimes and genocide, *i e* , an international crime. See *Report to the Counter-Terrorism Committee* (Egypt), 23 May 2006, S/2006/351, at 5. **Jordan** explicitly stated that its definition of terrorism was amended in 2001 in order to comply with Security Council Resolution 1373 (2001). See *Report to the Counter-Terrorism Committee* (Jordan), 24 March 2006, S/2006/212, at 11. **Tunisia** has referenced its efforts "to become involved in the *global system* against terrorism and [has] supported international efforts in this regard." *Report to the Counter-Terrorism Committee* (Tunisia), 4 February 2005, S/2005/194, at 3. **Iran** announced that "the Islamic Republic of Iran attaches great importance to the implementation of the United Nations Security Council Resolutions, particularly resolution 1373 (2001)" *Report to the Counter-Terrorism Committee* (Iran), 27 December 2001, S/2001/1332, at 1. **Brazil** has "always sought to comply with United Nations General Assembly and Security Council Resolutions on terrorism" and "has been taking the domestic steps necessary to link the country to all international agreements on terrorism" *Report to the Counter-Terrorism Committee* (Brazil), 26 December 2001, S/2001/1285, at 1.

South Africa explicitly sought to align its national legislation with international conventions and obligations binding on the community of nations when it adopted a new terrorism law in 2004. Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 preamble ("[W]hereas our national laws do not meet all the international requirements relating to the prevention and combating of terrorist and related activities [...] and realizing the importance to enact appropriate domestic legislation necessary to implement the provisions of relevant international instruments dealing with terrorist activities[...]"). Likewise, in adopting its Terrorism Suppression Act of 2002, **New Zealand** intended to align its terrorism law more closely with international standards, particularly the UN conventions and Resolution 1373. See R. Young, "Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation", 29 *Boston College Int'l & Comp L Rev* (2006) 23, at 83-85.

infrastructure in a way that endangers society. These countries include Jordan,[157] Iraq,[158] the United Arab Emirates,[159] Egypt,[160] and Tunisia.[161] Members of the European Union have incorporated the

[157] **Jordan:** Terrorism, criminalised in Article 148 of the Criminal Code, is defined in Article 147(1) as follows:

> [T]he use of violence or threat of violence, regardless of its motives or purposes, to carry out an individual or collective act aimed at disturbing public order or endangering public safety and security where such is liable to spread alarm or terror among the public or jeopardize their lives and security or cause damage to the environment, public facilities or property, private property, international facilities or diplomatic missions, or where it is aimed at occupying or taking over such premises, endangering national resources or obstructing the application of the provisions of the Constitution and laws.

In addition, Anti-Terrorism Law No. 55 of 2006, Official Gazette No. 4790, at 4264, 1 November 2006, criminalises terrorism as defined as:

> [E]very intentional act, committed by any means and causing death or physical harm to a person or damage to public or private properties, or to means of transport, infrastructure, international facilities or diplomatic missions and intended to disturb public order, endanger public safety and security, cause suspension of the application of the provisions of the Constitution and laws, affect the policy of the State or the government or force them to carry out an act or refrain from the same, or disturb national security by means of threat, intimidation or violence.

Id at arts 2-3. (English translations from UN Office on Drugs and Crime, Counter-Terrorism Legislation Database, https://www.unodc.org/tldb/laws_legislative_database.html ("UNODC Database")).

[158] **Iraq:** Article 1 of Anti-Terrorism Act No. 13 of 2005 defines terrorism as "any criminal act undertaken by an individual or group of individuals or by official or unofficial groups or organizations that causes damage to public or private property with the aim of upsetting the security situation or stability and national unity or of producing terror, fear and alarm among the populace or of provoking chaos in the pursuit of terrorist aims". Article 2 considers the following to be terrorist acts:

> (i) Violence or threats designed to strike terror among the populace or to expose their lives, freedoms and security to danger and their property and possessions to damage, for whatever motive or purpose, in execution of a systematic terrorist design by an individual or group; (ii) The use of violence and threats with the intent to destroy, demolish, ruin or damage public buildings or property, government offices, institutions or bodies, State agencies, private sector organizations, public utilities, public places intended for public use or public gatherings frequented by crowds, or public assets, or the attempt to occupy or take control thereof, to expose to risk or to prevent their proper use with the aim of undermining security and stability; (iii) The organization, direction or control of the leadership of an armed terrorist group that engages in, plans, participates or collaborates in such activity; (iv) The use of violence and threats to instigate sectarian strife, civil war or sectarian fighting by arming civilians or encouraging them to bear arms against one another by incitement or funding; (v) Aggression by means of arms, biological agents or similar substances, radioactive materials or toxins, (vi) Kidnapping, restriction of the freedom of individuals or holding them to [*sic*] ransom for purposes of gain of [*sic*] a political, sectarian, ethnic, religious or racial nature in such a way as to threaten security and national unity and to promote terrorism.

Report to the Counter-Terrorism Committee (Iraq), 19 April 2006, S/2006/280, at 5.

[159] **The United Arab Emirates:** Decree by Federal Law No. 1 of 2004 on Combating Terrorist Offences defines (in article 2) terrorism as:

> [E]very act or omission, the offender commits himself to execute a criminal design, individually or collectively, with intention to cause terror between people or terrifying them, if the same causes breach of the public order or endangering the safety and security of the society or injuring persons or exposing their lives, liberties, security to danger including Kings, Heads of States and Governments, Ministers and members of their families, or any representative or official of a State or an international organization of an inter-governmental character and members of their families forming part of their household entitled pursuant to international law to protection or causes damage to environment, any of the public, private utilities or domain, occupying, seizing the same or exposing any of the natural resources to danger.

(English translation from UNODC Database.)

[160] **Egypt:** Article 86 of the Penal Code defines "terrorism" as:

> [A]ll use of force, violence, threatening, or frightening, to which a felon resorts in execution of an individual or collective criminal scheme, with the aim of disturbing public order or exposing the safety and security of society to

definition included in the Council Framework Decision of 13 June 2002 on combating terrorism, which specifies that certain criminal acts are deemed to be terrorist offences when "they may seriously damage a country or an international organisation" and were "committed with the aim of [i] seriously intimidating a population, or [ii] unduly compelling a Government or international organisation to perform or abstain from performing any act, or [iii] seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation". As noted in the Institute for Criminal Law and Justice Brief, Sweden,[162] Belgium,[163] Germany,[164] Austria,[165] and the Netherlands,[166] among others, have incorporated this definition almost verbatim into their laws; France's criminal code more succinctly labels as terrorist offences particular criminal acts intended to seriously disturb public order through intimidation or terror.[167] Similarly, Finland added in 1993 the criminalisation of certain listed criminal acts when

danger, if this is liable to harm the persons, or throw horror among them, expose their life, freedom or security to danger, damage the environment, causes detriment to communications, transport, property and funds, buildings, public or private properties, occupying or taking possession of them, preventing or impeding the work of public authorities, worship houses, or educational institutions, interrupting the application of the constitution, laws or statutes.

(English translation from UNODC Database.) Reportedly, Egyptian law does not concern itself solely with the criminalisation of terrorist acts committed in Egypt or directed against Egyptian nationals, but also extends the scope of criminality to terrorist acts committed anywhere in the world, irrespective of the nationality of the injured party or parties.

[161] **Tunisia:** Article 4 of Law 2003-75 against Terrorism and Money-Laundering, 10 December 2003, provides:

Est qualifiée de terroriste, toute infraction quels qu'en soient les mobiles, en relation avec une entreprise individuelle ou collective susceptible de terroriser une personne ou un groupe de personnes, de semer la terreur parmi la population, dans le dessein d'influencer la politique de l'État et de le contraindre à faire ce qu'il n'est pas tenu de faire ou à s'abstenir de faire ce qu'il est tenu de faire, de troubler l'ordre public, la paix ou la sécurité internationale, de porter atteinte aux personnes ou aux biens, de causer un dommage aux édifices abritant des missions diplomatiques, consulaires ou des organisations internationales, de causer un préjudice grave à l'environnement, de nature à mettre en danger la vie des habitants ou leur santé, ou de porter préjudice aux ressources vitales, aux infrastructures, aux moyens de transport et de communication, aux systèmes informatiques ou aux services publics."

On Tunisia's commitments vis-à-vis international obligations to update its terrorism legislation, see also *Report to the Counter-Terrorism Committee* (Tunisia), 26 December 2001, S/2001/1316, at 10.

[162] **Sweden:** Law (2003:148) on the crime of terrorism.

[163] **Belgium:** See Article 137 para 1 of the Criminal Code.

[164] **Germany:** *Strafgesetzbuch* [StGB] [Criminal Code] 4 July 2009, *Bundesgesetzblatt* [Federal Law Gazette] I 3322, *as amended*, s. 129(a), para. 2.

[165] **Austria:** See Section 278c of the Criminal Code.

[166] **The Netherlands:** Crimes of Terrorism Act, 24 June 2004, Bulletin of Acts and Decrees [Stb.] 2004, 290, art. 1(D), codified at *Wetboek van Strafrecht* [Sr] [Criminal Code], arts 83 and 83a.

[167] **France :** « Constituent des actes de terrorisme, lorsqu'elles sont intentionellement en relation avec une entreprise individuelle ou collective ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur, les infractions suivantes : 1) les atteintes volontaires à la vie [etc.]. » Code Pénal art. 421-1.

committed by a person "with terrorist intent and in a manner that is likely to cause serious harm to a State or to an international organization".[168]

94. The United Kingdom's definition includes the subjective element of intent to coerce a governmental authority or intimidate a population, but it also requires a political, religious, racial or ideological purpose.[169] The national laws of Australia,[170] New Zealand,[171] Canada,[172] and Pakistan[173] adopt a very similar definition. South Africa likewise identifies specific categories of serious crimes and labels them as "terrorist activity" when they are intended to threaten the country's security, spread fear, or coerce authorities or the public, and when they are committed at least in part for a political, religious, ideological or philosophical cause.[174]

95. Latin American countries such as Colombia,[175] Peru,[176] Chile,[177] and Panama[178] require the intent to spread fear and the use of means capable of causing havoc or public danger. Mexico requires the use of violent means that spread fear and an intent to threaten national security or

[168] **Finland:** Section 34a of the Criminal Code.

[169] **The United Kingdom:** Section 1 of the Terrorism Act 2000, as amended by the Terrorism Act 2006 and Counter-Terrorism Act 2008, provides:

> (1) In this Act "terrorism" means the use or threat of action where—(a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.
>
> (2) Action falls within this subsection if it— (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
>
> (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

[170] **Australia:** Criminal Code Act 1995 (Cth), s 100.1.

[171] **New Zealand:** Terrorism Suppression Act 2002, 2002 S.N.Z. No. 34, s. 5.

[172] **Canada :** Criminal Code, R S C., ch. C-46, s. 83.01

[173] Pakistan's inclusion of a political or ideological purpose appears not to be a distinct element, but rather an alternative to the intent to coerce an authority or terrorise the population. See **Pakistan**, Anti-Terrorism Act 1997, s. 6, *as amended by* Ordinance No. XXXIX of 2001, Act II of 2005, and Ordinance No. XXI of 2009; see also National Public Safety Commission, *Anti-Terrorism Manual* (Islamabad: National Police Bureau 2008), which traces the recent development of Pakistan's terrorism laws (*available at* https://www.unodc.org/tldb/pdf/Pakistan_Anti-terrorism_Manual_2008.pdf).

[174] **South Africa:** Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 s. 1(xxv).

[175] **Colombia:** Article 343 of the Criminal Code.

[176] **Peru:** Decree Law No. 25475, art. 2. See also *Polay Campo* case, Sala Penal Nacional, Judgment of 21 March 2006 (cited in Institute for Criminal Law and Justice Brief, fn. 65), which holds that the special intent of subverting the constitutional order and the political order in its general meaning is a facet of the crime in question.

[177] **Chile:** Law No. 18314, arts 1 and 2. Chile also requires the terrorist act to be intended to coerce or impel government action.

[178] **Panama:** Article 287 of the Criminal Code.

pressure government authorities.[179] Argentina adds to these elements the requirement that the criminal act be based on an ethnic, religious or political ideology; and using military weapons, explosives, or other means that endanger human life.[180] Ecuador requires the purpose of creating public alarm and a motivation based on patriotic, social, economic, political, religious, revolutionary, racial, or local vindication.[181]

96. The common themes of (i) criminal acts, (ii) the spread of fear, and (iii) unlawful coercion of the government can also be found in the laws of countries as different as the United States,[182] the Russian Federation,[183] India,[184] the Philippines,[185] Uzbekistan,[186] and the Seychelles.[187] Mention

[179] **Mexico:** *Código Penal Federal* [C.P.F.], *as amended, Diario Oficial de la Federación* [D.O.], 20 August 2009, art. 139.

[180] **Argentina:** *Código Penal*, art. 213*ter*.

[181] **Ecuador:** Articles 158, 159, and 160.1 of the Criminal Code.

[182] **United States:** 18 U.S.C. § 2331 defines *international terrorism* as:

> [A]ctivities that [...] involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; [and] appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and [which] occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

(The definition of *domestic terrorism* is largely the same, except that it applies to crimes that "occur primarily within the territorial jurisdiction of the United States".) Title 22 of the United States Code provides another definition, in relation to the annual terrorism reports created by the State Department: "the term 'terrorism' means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents". 22 U.S.C. § 2656f(d)(2).

[183] **The Russian Federation:** Article 3 of the Federal Law no 35-FZ of 6 March 2006 on Counteraction against Terrorism provides in part:

> 1) terrorism shall mean the ideology of violence and the practice of influencing the adoption of a decision by public authorities, local self-government bodies or international organizations connected with frightening the population and (or) other forms of unlawful violent actions;
>
> 2) terrorist activity shall mean activity including the following: a) arranging, planning, preparing, financing and implementing an act of terrorism; b) instigation of an act of terrorism; c) establishment of an unlawful armed unit, criminal association (criminal organization) or an organized group for the implementation of an act of terrorism, as well as participation in such a structure; d) recruiting, arming, training and using terrorists; e) informational or other assistance to planning, preparing or implementing an act of terrorism; f) popularisation of terrorist ideas, dissemination of materials or information urging terrorist activities, substantiating or justifying the necessity of the exercise of such activity;
>
> 3) terrorist act shall mean making an explosion, arson or other actions connected with frightening the population and posing the risk of loss of life, of causing considerable damage to property or the onset of an ecological catastrophe, as well as other especially grave consequences, for the purpose of unlawful influence upon the adoption of a decision by public authorities, local self-government bodies or international organizations, as well as the threat of committing the said actions for the same purpose [...]

See also Article 205 of the Criminal Code (as of 2004): "Terrorism, that is, the perpetration of an explosion, arson, or any other action endangering the lives of people, causing sizable property damage, or entailing other socially dangerous consequences, if these actions have been committed for the purpose of violating public security, frightening

must also be made of the prohibition against terrorism under *Chari'a* law, for example as incorporated into the laws of Saudi Arabia.[188]

97. It is indeed not startling that these laws, despite peripheral variations normally motivated by national exigencies, share a core concept: terrorism is a criminal action that aims at spreading terror or coercing governmental authorities and is a threat to the stability of society or the State. This notion is so deeply embedded in the legislation of so many diverse countries, that one is warranted to

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the population, or exerting influence on decision-making by governmental bodies, and also the threat of committing said actions for the same ends [...]". (English translations from UNODC Database.)

[184] **India:** Under section 4 of the Unlawful Activities (Prevention) Amendment Act 2008, No. 35:

> Whoever, [...] with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country (a) by using [...] any other means of whatever nature to cause or likely to cause (i) death of, or injuries to, any person or persons; or (ii) loss of, or damage to, or destruction of, property; or (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or (b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or (c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.

[185] **The Philippines:** "Any person who commits an act punishable under any of the following provisions of the Revised Penal Code [...] thereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand shall be guilty of the crime of terrorism [...]." Human Security Act of 2007, Rep. Act No. 9372, s. 3.

[186] **Uzbekistan:** Article 155 of the Criminal Code, as amended by the Law of the Ruz. No. 254-II, 29 August 2001, defines terrorism as:

> [V]iolence, use of force, or other acts, which pose a threat to an individual or property, or the threat to undertake such acts in order to force a state body, international organization, or officials thereof, or individual or legal entity, to commit or to restrain from some activity in order to complicate international relations, infringe upon sovereignty and territorial integrity, undermine security of a state, provoke war, armed conflict, destabilize sociopolitical situation, intimidate population, as well as activity carried out in order to support operation of and to finance a terrorist organization, preparation and commission of terrorist acts, direct or indirect provision or collection of any resources and other services to terrorist organizations, or to persons assisting to or participating in terrorist activities [...].

(English translation from UNODC Database.)

[187] **The Seychelles:** Prevention of Terrorism Act 2004, 25 June 2004, s. 2. In *Republic v Dahir* (26 July 2010), the Supreme Court of Seychelles succinctly summarised this definition: "Terrorism usually involves indiscriminate violence with the *objective of influencing governments or international organizations* for *political ends*." *Id*, para. 37 (emphasis in original).

[188] **Saudi Arabia:** See *Report to the Counter-Terrorism Committee* (Saudi Arabia), 26 December 2001, S/2001/1294, at 5. According to an Interpol document, "The Kingdom's Council of Senior Religious Scholars issued a statement on terrorism in which it declared that 'bloodshed, the violation of honour, the theft of private and public property, the bombing of dwellings and vehicles and the destruction of installations are, by the consensus of Muslims, legally forbidden because they violate the sanctity of the innocent, destroy property, security and stability and take the lives of peaceable human beings in their homes and at their work.' Under the Islamic Shariah, crimes of terrorism are included in crimes of hirabah. Such crimes warrant the highest penalties as set forth by the Koran." (*available at* www.interpol.int/public/bioterrorism/nationallaws/SaudiArabia).

conclude that those countries share the same basic view of terrorism and are not in the least likely to depart from it.

98. We have mentioned the requirement, in the legislation of a number of common law states and civil law states, as well as in some of the UN Terrorism Conventions and the draft Comprehensive Convention, for a political, religious, racial or ideological purpose. However, the overwhelming weight of state opinion, reinforced by the international and multilateral instruments, to which these states are party, does not yet contain that element.[189]

99. Finally, *national court decisions* must also be taken into account to prove the existence of a customary rule. It is notable that even the Permanent Court of International Justice, in the celebrated *Lotus* case where it still took a voluntarist view of custom, attached importance to national decisions, although it concluded that in the case at bar those decisions did not show consistency.[190] According to authoritative teaching based on a strictly positivist construction of custom, one can rely on "national decisions that constantly apply certain principles which aim to safeguard international exigencies, and which are therefore predicated on the incorporation of international rules into national legal systems for the purpose of rendering possible the fulfilment of international obligations."[191]

100. In recent years courts have reached concordant conclusions about the elements of an international crime of terrorism. They have either explicitly referred to a customary international rule on the matter[192], as noted above, or have advanced or upheld a general definition of terrorism that is

[189] For further discussion, see para. 106.

[190] *Case of the S S Lotus (Turkey v France),* 1927 PCIJ Series A, No. 10, at 28-29.

[191] D. Anzilotti, *Corso di diritto internazionale*, Vol. I, 4th edn. (Padova: CEDAM, 1955), at 100; see also *id*, at 74. For the French, see *Cours de Droit International*, Vol. I, 3rd edn. (trans. G. Gidel) (Paris: Recueil Sirey, 1929), at 107-108.

[192] See the cases discussed in para. 86, above. In the *Abdelaziz* case in particular, the **Italian** Supreme Court of cassation held that:

> Due to the decades-long disagreements among UN member states on terrorist acts perpetrated during liberation wars and armed struggles for self-determination, a global convention on terrorism does not exist. Having said that, it should be noted that the wording of the 1999 Convention, which was implemented in Italy through law No. 7 of 27 January 2003, is so broad that it can be considered a general definition, capable of being applied in both times of peace and times of war. This definition includes all conduct intended to cause death or serious bodily harm to a civilian or, in wartime, 'to any other person not taking an active part in the hostilities in a situation of armed conflict' with the aim of spreading terror among the population or to compel a government or an international organization to do or to abstain from doing any act. In order for conduct to be qualified as a 'terrorist act', it must be characterized not only by the actus reus and the mens rea, as well as by the identity of victims (civilians or persons not engaged in war operations), but it is generally understood that it must also include a political, religious, or ideological purpose. *This is pursuant to the rule of customary international law* embodied in various resolutions by the UNGA and the UNSC, as well as in the 1997 Convention for the Suppression of *Terrorist* Bombings.

broadly accepted.[193] Judicial decisions stating instead that no generally accepted definition of terrorism exists are far and few between, and their number diminishes each year.[194] Furthermore, those courts that have upheld a shared definition of terrorism have done so with consistency. They have therefore met and exceeded the test propounded by the International Court of Justice, in the *Nicaragua* case, where the Court did not consider discrepancies to be fatal to the formation of a rule of customary law,[195] but that practice instead "should, in general, be consistent with such rules".[196] We are satisfied that the additional requirement of political, religious, racial or ideological purpose found in legislation of some states and UN instruments is a discrepancy covered by the *Nicaragua* principle. Indeed, those national courts dealing with terrorism have shown more than a mere consistent tendency to take the same view of terrorism. In other words we are not faced simply with a concordance of views, a judicial practice of courts constantly manifested through identical or similar judgments in similar legal controversies (the *auctoritas rerum perpetuo similiter judictarum*, to cite the well-known tag from Justinian's *Digest*[197]). It is notable that those decisions that have upheld a shared definition of terrorism, whenever they dealt with a foreigner, have never been contested or objected to by the national State of the accused. These judgments were not delivered out of "considerations of convenience or simple political expediency"[198] or simply to meet transient

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Cass. Crim., sez. I, 17 January 2007, n. 1072, at para. 2.1 (STL unofficial translation) (second emphasis added).

[193] For instance, in the *E H L* case (judgment of 15 February 2006), the **Belgian** Court of cassation stated that terrorist acts involve « la mise en danger intentionnelle de vies humaines par violences, destructions ou enlèvements, dans le but d'intimider gravement une population ou de contraindre indûment des pouvoirs publics ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte» (unpublished, on file with the STL, at p.4).

In **U.K.**, Court of Appeal, *Al-Sirri v Secretary of State for the Home Department*, [2009] EWCA Civ 364, Lord Justice Sedley defined international terrorism, relying in part from UN resolutions, as "the use for political ends of fear induced by violence"; that is, the use of (i) violent acts (ii) to spread fear (iii) for a political purpose. He also noted that *international* terrorism (iv) "must have an international character or aspect". *Id*, paras 31-32.

[194] Mention can be made of the old case of *Tel Oren v Libyan Arab Republic,* where a U.S. Federal Court of Appeal denied in 1984 the existence of a customary rule. Judge Bork in his concurring opinion said.

> Appellants' principal claim, that appellees violated customary principles of international law against terrorism, concerns an area of international law in which there is little or no consensus and in which the disagreements concern politically sensitive issues that are especially prominent in the foreign relations problems of the Middle East. Some aspects of terrorism have been the subject of several international conventions [..]. But no consensus has developed on how properly to define "terrorism" generally.

Tel-Oren v Libyan Arab Republic, 726 F.2d 774, 806-807 (D.C. Cir. 1984) (Bork, J., concurring). See also cases cited in footnote 127, above.

[195] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Judgment, I.C.J. Reports (1986) 14, at 98, para. 186: "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule."

[196] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Judgment, I.C.J. Reports (1986) 14, at 98, para. 186.

[197] Digest, 1.3.38.

[198] *Asylum (Colombia v Peru)*, Judgment, I.C.J. Reports (1950) 266, at 286.

national exigencies. In sum, those judgments, viewed in combination with national legislation and the international attitude of States as taken in international fora, evince that the courts thereby intend to apply at the domestic level a notion that is commonly accepted at the international level. In other words, those decisions reflect a legal opinion (*opinio juris*) as to the fundamental elements of the crime of terrorism. Those decisions aim to safeguard national and international exigencies, and are therefore predicated on the notion that there exists an international obligation to prosecute and punish terrorism as a crime based on commonly accepted legal ingredients.

101. We shall add *ad abundantiam* another argument to support the Appeals Chamber's finding based on convergent national judgments. Even if the view were taken that those national judgments do not advert, not even implicitly, to a customary international rule nor explicitly note that they reflect an international obligation of the State nor express a feeling of international legal obligation, nevertheless our conclusion stands. It is supported by the legal criteria suggested on the basis of careful scrutiny of international case law by a distinguished international lawyer, Max Sørensen. According to him one should assume as a starting point the *presumption* of the existence of *opinio juris* whenever a finding is made of a consistent practice; it would follow that if one sought to deny in such instances the existence of a customary rule, one must point to the reasons of expediency or those based on comity or political convenience that support the denial of the customary rule.[199]

102. The conclusion is therefore warranted that a customary rule has evolved in the international community concerning terrorism, the elements of which we outlined in paragraph 85. Relying on the notion of international custom as set out by the International Court of Justice in the *Continental Shelf* case,[200] it can be said that there is a settled practice concerning the punishment of acts of terrorism, as commonly defined, at least when committed in time of peace; in addition, this practice is evidence of a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessitatis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*). Pursuant to the aforementioned notion expressed in the *Nicaragua* case, such a rule must be

[199] M. Sørensen, 'Principes de droit international public', in *Recueil des Cours de l'Académie de La Haye*, 19760-III, at 51: « Cela [the perusal of international case law] nous permet peut-être de prendre comme point de départ une présomption pour l'existence de l'*opinio juris* dans tous les cas où une pratique constante a été constatée, de sorte qu'il faut démontrer les motifs d'opportunité, de courtoisie, etc. pour nier l'existence d'une coutume. »

[200] *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark*; *Federal Republic of Germany v Netherlands*), Judgment, I.C.J. Reports (1969) 4, at 43-44, paras 76-77: "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."

expressed in terms of international rights and obligations. In our case the customary rule can be held (i) to impose on any State (as well as other international subjects such as rebels and other non-State entities participating in international dealings) the obligation to refrain from engaging through their officials and agents in acts of terrorism, as defined in the rule; (ii) to impose on any State (and other international subjects and entities endowed with the necessary structures and judicial machinery) the obligation to prevent and repress terrorism, and in particular to prosecute and try persons on its territory or in territory under its control who are allegedly involved in terrorism, as defined in the rule; (iii) to confer on any State (and other international subjects endowed with the necessary structures and judicial machinery) the right to prosecute and repress the crime of terrorism, as defined in the rule, perpetrated on its territory (or in territory under its control) by nationals or foreigners, and an obligation on any other State to refrain from opposing or objecting to such prosecution and repression against their own nationals (unless they are high-level state agents enjoying personal immunities under international law). It would seem that this customary rule does not yet impose an obligation to cooperate with other States in such repression. However, a rule with such a tenor is plausibly nascent in the international community.[201]

103. The Appeals Chamber acknowledges that the existence of a customary rule outlawing terrorism does not automatically mean that terrorism is a criminal offence under international law. According to the legal parameters suggested by the ICTY Appeals Chamber in the *Tadić* Interlocutory Decision with regard to war crimes, to give rise to individual criminal liability at the international level it is necessary for a violation of the international rule to entail the individual criminal responsibility of the person breaching the rule.[202] The criteria for determining this issue were again suggested by the ICTY in that seminal decision: the intention to criminalise the prohibition must be evidenced by statements of government officials and international organisations, as well as by punishment for such violations by national courts. Perusal of these elements of practice will establish whether States intend to criminalise breaches of the international rule.[203]

[201] Consider for instance the binding obligations created by UN Security Council Resolution 1373 and the near-universal adoption of such treaties as the Convention for the Suppression of the Financing of Terrorism (which currently has 173 States Parties), which require States to take preventative measures and to cooperate with other States in investigations and extraditions.

[202] ICTY, *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 94.

[203] *Id.*, paras 128-137.

104. In the case of terrorism, demonstrating the requisite practice and *opinio juris seu necessitatis*, namely the legal view that it is necessary and indeed obligatory to bring to trial and punish the perpetrators of terrorist acts, is relatively easy. Indeed, the formation process of the international criminalisation of terrorism is similar to that of war crimes. This latter category of criminal offences was originally born at the domestic level: States began to prosecute and punish members of the enemy military (then gradually also of their own military) who had performed acts that were termed either as criminal offences perpetrated in time of war (killing of innocent civilians, wanton destruction of private property, serious ill-treatment of prisoners of war, and so on), or as breaches of the laws and customs of war. Gradually this domestic practice received international sanction, first through the Versailles Treaty (1919) and the following trials before the German Supreme Court at Leipzig (1921), then through the London Agreement of 1945 and the trials at Nuremberg. Thus, the domestic criminalisation of breaches of international humanitarian law led to the international criminalisation of those breaches and the formation of rules of customary international law authorising or even imposing their punishment. Similarly, criminalisation of terrorism has begun at the domestic level, with many countries of the world legislating against terrorist acts and bringing to court those allegedly responsible for such acts. This trend was internationally strengthened by the passing of robust resolutions by the UN General Assembly and Security Council condemning terrorism, and the conclusion of a host of international treaties banning various manifestations of terrorism and enjoining the contracting parties to cooperate for the repression of those manifestations. As a result, those States which had not already criminalised terrorism at the domestic level have increasingly incorporated the emerging criminal norm into domestic penal legislation and case-law, often acting out of a sense of international obligation. The characterisation of terrorism as a threat to international peace and security through UN Security Council "legislation" strengthens this conclusion. It is notable that the Security Council has generally refrained from characterising other national and transnational criminal offences (such as money laundering, drug trafficking, international exploitation of prostitution) as "threats to peace and security". The difference in treatment of these various classes of criminal offences, and the perceived seriousness of terrorism, bears out that terrorism is an international crime classified as such by international law, including customary international law, and also involves the criminal liability of individuals.

105. Thus, the customary rule in question has a twofold dimension: it addresses itself to international subjects, including rebels and other non-State entities (whenever they exhibit such

features as to enjoy international legal personality), by imposing or conferring on them rights and obligations to be fulfilled in the international arena; at the same time, it addresses itself to individuals by imposing on them the strict obligation to refrain from engaging in terrorism, an obligation to which corresponds as correlative the right of any State (or competent international subject) to enforce such obligation at the domestic level.

106. We make two further observations about the continuing and prospective evolution of this customary norm. First, regarding the element of intent, we note that the terrorist's intent to coerce an authority or to terrorise a population will often derive from or be grounded in an underlying political or ideological purpose, which thus differentiates terrorism from criminal acts similarly designed to spread fear among the civilian population but pursuing merely private purposes (such as personal gain, revenge, and so on). This political or ideological aspect of the intent element of terrorism has been increasingly noted by the UN General Assembly in its many resolutions concerning terrorism,[204] in judicial and commissional analyses,[205] and in national legislation.[206] As the Report of the Policy Working Group on the United Nations and Terrorism summarised in 2002:

> [W]ithout attempting a comprehensive definition of terrorism, it would be useful to delineate some broad characteristics of the phenomenon. Terrorism is, in most cases, essentially *a political act*. It is meant to inflict dramatic and deadly injury on civilians and to create an

[204] See resolutions cited in footnote 136, above.

[205] In *Bouyahia Maher Ben Abdelaziz et al.* case, the Italian Supreme Court of cassation concluded:

> In order for conduct to be qualified as a 'terrorist act', it must be characterized not only by the actus reus and the mens rea, as well as by the identity of victims (civilians or persons not engaged in war operations), but *it is generally understood that it must also include a political, religious, or ideological purpose*. This is pursuant to the rule of customary international law embodied in various resolutions by the UNGA and the UNSC, as well as in the 1997 Convention for the Suppression of *Terrorist* Bombings

Cass. crim., sez. I, 17 January 2007, n. 1072, at para. 2.1 (STL unofficial translation) (first emphasis added). Likewise, the Genova Assize Appeal Court in the notorious *Achille Lauro* case inferred the terrorist nature of an attack from the fact that it involved indiscriminate violent means affecting the State as guarantor of the safety of persons and property within its jurisdiction: "even though no explicit request was made to the Italian State, the State was objectively involved due to [inter alia] the inevitable domestic political consequences" of the terrorist act in question. *Abul Abbas et al*, Genova Assize Appeal Court, No. 22/87, 23 May 1987 (at pp. 46-47 of the typed judgment on file with the STL) (unofficial STL translation).

In its 2002 Report on Terrorism and Human Rights, the Inter-American Commission on Human Rights noted that no comprehensive international legal definition of terrorism had so far been codified through a universal convention (as noted by the Defence Office in its submission at fn. 123), yet it identified several "characteristics" of international terrorism based on coalescing international consensus, including that "the motivations driving the perpetrators of terrorism tend to be ideological or political in nature". IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr, paras 15-17 (2002).

[206] See, for example, the laws of the United Kingdom, Australia, New Zealand, Pakistan, Canada, South Africa, Argentina, and Ecuador, cited above.

atmosphere of fear, *generally for a political or ideological (whether secular or religious) purpose*. Terrorism is a criminal act, but it is more than mere criminality.[207]

Making this purpose requirement explicit has an additional benefit: it clarifies the scope of conduct that can be charged as an international crime of terrorism, thereby furthering the principle of legality by preventing its over-expansive application. However, this aspect of the crime of terrorism has not yet been so broadly and consistently spelled out and accepted as to rise to the level of customary law. Thus it remains to be seen whether one day it will emerge as an *additional element* of the international crime of terrorism.

107. Second, the Appeals Chamber takes the view that, while the customary rule of an international crime of terrorism that has evolved so far only extends to terrorist acts *in times of peace,* a broader norm that would outlaw terrorist acts *during times of armed conflict* may also be emerging. As the ICTY and the SCSL have found, acts of terrorism can constitute war crimes,[208] but States have disagreed over whether a distinct crime of terrorism should apply during armed conflict. Indeed, both within the drafting committee of the Comprehensive Convention on Terrorism and in reservations to the UN Convention for the Suppression of the Financing of Terrorism,[209] some members of the Islamic Conference have expressed strong disagreement with the notion of considering as terrorist those acts of "freedom fighters" in time of armed conflict (including belligerent occupation and internal armed conflict) which are directed against innocent civilians. They have insisted both on the need to safeguard the right of peoples to self-determination and on the necessity to also punish "State terrorism".[210]

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[207] A/57/273 (2002), Annex, at para. 13 (emphasis added)

[208] The crime of "acts or threats of violence the primary purpose of which is to spread terror", see for instance ICTY, *Galić*, Trial Judgment, 5 December 2003, paras 91-138; ICTY, *Galić*, Appeals Judgment, 30 November 2006, paras 81-104; SCSL, *Brima et al* , Trial Judgment, 20 June 2007, paras 660-671.

[209] Egypt, Jordan and Syria made reservations concerning Article 2(1)(b) of the Convention. As for the definitions of terrorism contained in the criminal legislations of these countries, see above, notes 157 and 160. While some residual doubts could therefore be raised as to terrorism in times of armed conflict, there is no doubt that Egyptian and Jordanian legislation is in consonance with the developing international law norm discussed here. The definition in Article 304 of Syrian Criminal Code, instead, follows very closely the definition in Article 314 of the Lebanese Criminal Code, with the only notable difference that the former adds "weapons of war" among the means that can be used to commit a terrorist act. See *Report to the Counter-Terrorism Committee* (Syrian Arab Republic), 2 August 2006, S/2006/612, at 4; M. Yacoub, *The Legal Concept of Terrorism – an Analytical and Comparative Study* [in Arabic] (Beirut: Zein Legal Publications, 2011), at 227-228.

[210] See for example the summary of discussions regarding a comprehensive convention in *Report of the Ad Hoc Committee established by GA resolution 51/210*, A/65/37 (2010), at 5-8; *Report of the Ad Hoc Committee established by GA resolution 51/210*, A/64/37 (2009), at 5-6.

108. Nevertheless, it is necessary to emphasise three circumstances. First, the very high number of States that have not only ratified the Convention for the Suppression of the Financing of Terrorism (currently numbering 173), but also refrained from making any reservation with regard to its definition of terrorism, a definition that refers to armed conflicts without any reference to a "freedom fighters" exception (these States currently number 170).[211] Second, the unique content of this Convention, namely the fact that unlike other Conventions on terrorism it deals with conduct that is not criminal *per se*, and in addition is conduct preliminary or prodromic to violent terrorist acts; it follows that criminalising such conduct as terrorism is crucial in time of armed conflict, because the financing of attacks on civilians not taking an active part in hostilities is not per se forbidden under the laws of war. In other words, the Convention, more than any other treaty on the matter, is a turning point in the fight against terrorism, for it reaches out to activities that otherwise would go unpunished (either by criminal law or by international humanitarian law). Since it covers such a wide range of activities, the Convention is a veritable litmus test for the attitude of States towards criminalising terrorism. Third, the 170 States that have undertaken by ratification or accession to comply with the Convention and have not made any reservation to the provision on armed conflict are widely representative of the world community: they include not only the five permanent members of the Security Council but also such major countries as Brazil, India, Pakistan,[212] Indonesia, Saudi Arabia, Turkey and Nigeria. Furthermore, and strikingly, eleven Arab countries that are parties to the Arab Convention on Terrorism (a Convention that, as noted above, excepts from the category of terrorists the class of "freedom fighters") have ratified the Convention for the Suppression of the Financing of Terrorism without making any reservation, thereby accepting the notion that the financing of persons or groups attacking innocent civilians in time of armed conflict,

[211] Article 2(1) b of the Convention provides that "1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:[...] (b) Any [...] act intended to cause death or serious bodily injury to a civilian, *or to any other person not taking an active part in the hostilities in a situation of armed conflict*, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." (emphasis added).

[212] While Pakistan is one of the few remaining countries often mentioned as opposing the definition of terrorism in the Comprehensive Convention and registered a declaration regarding "freedom fighters" upon its accession to the Convention for the Suppression of Terrorist Bombings in 2002, it should be noted that it has (i) ratified the Convention for the Suppression of the Financing of Terrorism in 2009, adhering to its definition of terrorism, and (ii) committed itself "to combating terrorism in all its forms and manifestations" and to implementing fully Security Council Resolution 1373. *Report to the Counter-Terrorism Committee* (Pakistan), 27 December 2001, S/2001/1310, at 3.

as well as, in consequence, the perpetration of such attacks, may be categorised as "terrorism".[213] These three circumstances warrant the proposition that an overwhelming majority of States currently takes the view that acts of terrorism may be repressed even in time of armed conflicts to the extent that such acts target civilians who do not take an active part in armed hostilities; these acts, in addition, could also be classified as war crimes (whereas the same acts, if they are directed against combatants or civilians participating in hostilities, may *not* be defined as either terrorist acts or war crimes, unless the requisite conditions for war crimes were met). It is notable that Canadian legislation[214] as well as case-law[215] have explicitly taken the same stand as the Convention in terms of the applicability of the international crime of terrorism in times of conflict. To grasp the role that the Convention for the Suppression of the Financing of Terrorism (a convention implicitly going beyond the issue of financing terrorism and actually hinging on a new notion of terrorism in time of armed conflict) as well as the attitude of the contracting parties to the Convention may play in the development of a customary rule on the matter, it is worth recalling the important remarks made by Judge Sørensen in the *North Sea Continental Shelf* case (*Federal Republic of Germany v. Denmark*) on the possibility for the provisions of a treaty to turn into customary law. He noted that:

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[213] The countries are: Algeria, Bahrain, Libya, Mauritania, Morocco, Qatar, Saudi Arabia, Sudan, Tunisia, United Arab Emirates, Yemen. Of note, the Ad Hoc Committee drafting the comprehensive convention on terrorism has looked to the approach taken by the Convention for the Suppression of Terrorist Bombings and the Convention for the Suppression of Acts of Nuclear Terrorism as a means for resolving any remaining concerns about the scope of the comprehensive convention. See *Report of the Ad Hoc Committee established by GA resolution 51/210*, A/62/37 (2007), at 7-8.

[214] See Criminal Code, R.S.C., ch. C-46, s. 83.01(B)(II).

[215] In *R. v Khawaja*, 2010 ONCA 862, the appellant argued that the armed conflict exception applied to exempt his actions from the ambit of "terrorist activity" as defined under the Canadian Criminal Code. He submitted that the exception applied at trial because the Crown conceded on the directed verdicts motion that the war in Afghanistan was a form of "armed conflict" and that the insurgent fighting in that country constituted "terrorist activity". Given these concessions, the appellant argued that it was incumbent on the Crown to establish that the exception was inapplicable based on evidence that his impugned acts did not comply with international law governing the conflict in Afghanistan. The Ontario Court of Appeals rejected the argument. It stated that:

> The exception is concerned with armed conflict in the context of the rules of war established by international law. It is designed to exclude activities sanctioned by international law from the reach of terrorist activity as defined in the *Criminal Code*. We agree with Sproat J.'s observation in *R v N Y*, 2008 CanLII 24543 (ON S.C.), at para. 12, that, "[t]he armed conflict exception reflects the well recognized principle ... that combatants in an armed conflict, who act in accordance with international law, do not commit any offence." The parties accept that, where shown to apply, the exception operates much like a traditional defence.

Id at paras 159-160. The Court went on to say that: "all that is required to trigger the exception is some evidence that: (1) an accused's acts or omissions were committed "during" an armed conflict; and (2) those acts or omissions, at the time and at the place of their commission, accorded with international law applicable to the armed conflict at issue. " *Id* at para. 165. It concluded that "There was simply no evidence in this case that the appellant acted in accordance with international law, or that the hostilities by the insurgents in Afghanistan were undertaken in compliance with international law." *Id* at para. 166.

> It is generally recognized that the rules set forth in a treaty or convention may become binding upon a non-contracting State as customary rules of international law or as rules which have otherwise been generally accepted as legally binding international norms. It is against this particular background that regard should be had to the history of the drafting and adoption of the Convention, to the subsequent attitudes of States, and to the relation of its provisions to the rules of international law in other, but connected, fields.[216]

109. Thus, the conclusion is warranted that a customary rule is incipient (*in statu nascendi*) which also covers terrorism in time of armed conflict (or rather, the contention can be made that the current customary rule on terrorism is being gradually amended). It is plausible to envisage that state practice (consisting of statements, national legislation, judicial decisions and so on), in particular acts with the same value and importance as Security Council Resolution 1566 (2004) previously noted,[217] may gradually solidify the view taken by so many States through Article 2(1)(b) of the Convention for the Suppression of Financing of Terrorism. If this occurs and State practice in addition extends such view to other manifestations of terrorism, one day the conclusion will be warranted that the customary rule currently in force has broadened so as to also embrace terrorism in time of armed conflict.

110. At present we can at least state the following about a customary rule defining an international crime of terrorism in a time of peace. We have shown how international conventions, regional treaties, UN Security Council and General Assembly resolutions,[218] as well as national legislation and case law have increasingly coalesced around a common definition of the crime of international terrorism. Such definition is the product of a law-making process in the course of which the UN Security Council, through a resolution adopted pursuant to Chapter VII of the UN Charter, has stated that "terrorism in all its forms and manifestations constitutes one of the most serious threats to peace

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[216] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, Judgment, I C.J. Reports (1969) 4, at 242 (Sørensen, J., dissenting).

[217] See above, para. 88.

[218] As for the norm-creating powers of the United Nations, consider the statement of the Government of Indonesia that "[t]he United Nations' universality of membership endows it with *Charter-based legitimacy* to overcome the threat of international terrorism in a manner which is inclusive; wherein states and peoples [..] unite in solidarity against this common scourge. Moreover, it is to the United Nations that Member States must turn to ensure that instruments for combating international terrorism are multi-dimensional in nature." Moreover, "the importance of the work within the different organs and committees of United Nations, including the General Assembly in particular through the Sixth Committee (Legal), and the Security Council in *norm setting and in laying the legal framework* for combating international terrorism is without question." *Report to the Counter-Terrorism Committee* (Indonesia), 21 December 2001, S/2001/1245, at 1 and 10 (emphasis added). Again, similar statements are routinely made by many governments in considering their obligations stemming from international law instruments (see, among others, *Report to the Counter-Terrorism Committee* (Brazil), 26 December 2001, S/2001/1245, at 4).

and security".[219] The very few States still insisting on an exception for "freedom fighters" and therefore objecting to the coalescing international definition of terrorism could, at most, be considered persistent objectors thereof, and possibly in breach of the call by the Security Council for "all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature".[220]

111. In sum, the subjective element of the crime under discussion is twofold, (i) the intent or *dolus* of the underlying crime and (ii) the special intent (*dolus specialis*) to spread fear or coerce an authority. The objective element is the commission of an act that is criminalised by other norms (murder, causing grievous bodily harm, hostage taking, etc.). The crime of terrorism at international law of course requires as well that (ii) the terrorist act be transnational.

112. It must be added, with regard to the notion of fear, terror or panic, that those who are victim of such state of mind need not necessarily make up the whole population. In this respect the Appeals Chamber agrees with the broad interpretation of the victims of fear that the German High Federal Court (*Bundesgerichsthof*) propounded, although while applying the German Criminal Code, in the *H.A., S. E. and B.* case, also called the *Freikorps* case (Judgment 3 STR 263/05 of 10 January 2006). The accused had formed an association for the purpose of carrying out arson attacks against businesses run by foreigners in their region, with the aim of forcing those foreigners to leave. In upholding the trial court's finding that the association was a "terrorist association", the Court held, among other things,[221] that the requirement that terrorist activities should be aimed at (and capable of) intimidating a population is fulfilled also where it is only a part of the overall population that is targeted and intimidated, e.g. an ethnic or religious minority.[222] The Appeals Chamber holds that the

[219] See S/RES/1566 (2004).

[220] See S/RES/1566 (2004). "Such acts" refers to "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature". *Ibid*

[221] The Court also stated that members of a terrorist association often pursue their objectives through a large number of small attacks (*Nadelstichtaktik*). According to the Court, the notion of terrorism does not require an individual attack which on its own is capable of terrorising a population or coercing a government (paras 6 and 7).

[222] *Id* at para 8. The Court said the following: "In assessing whether the arsonist acts were intended to 'significantly intimidate the population', the Superior Regional Court correctly considered it sufficient that the acts were aimed at the intimidation of the foreign population, and thus of a part of the overall population. It is true that article 129(a)(2) of the Criminal Code uses the term 'population', which could be understood to refer to the overall population, as if in contrast to 'parts of the population' in article 130 of the Criminal Code. Such considerations, inspired by the notion of consistent

same broad construction is warranted in international criminal law, in the light of the object and purpose of the relevant international rule.

113. A comparison between the crime of terrorism as defined under the Lebanese Criminal Code and that envisaged in customary international law shows that the latter notion is much *broader* with regard to the means of carrying out the terrorist act, which are not limited under customary international law, whereas it is *narrower* in that (i) it only deals with terrorist acts in time of peace, (ii) it requires both an underlying criminal act and an intent to commit that act,[223] and (iii) it involves a transnational element.

b) Applicability of Customary International Law in the Lebanese Legal Order

114. In the following paragraphs we conclude that (i) customary international law can be and normally is applied by Lebanese courts; (ii) however, this body of international law may not be applied in penal matters absent a piece of national legislation incorporating international rules into Lebanese criminal provisions; (iii) nevertheless, the Tribunal can still take into account customary law in construing Lebanese criminal law.

115. Unlike many national systems, which provide for the implementation of customary international law in their Constitution, in their ordinary law, or in case law, Lebanese law does not expressly and specifically advert to the application of customary rules or principles of international law—although such reference can be deduced from the general purport of Article 4 of the Lebanese Code of Civil Procedure.[224]

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use of terminology, however, carry little weight because in this respect the new text of 129(a)(2) of the Criminal Code merely took over the wording of the [European Council] Framework Decision [of 13 June 2002]. Moreover, and this is the decisive point, such a narrow interpretation would not do justice to the purpose of the provision. [..] Furthermore, considering that terrorist activities are often directed against ethnically, religiously, nationally or racially defined parts of the population, a literal interpretation would leave out a very significant portion of typical terrorist criminal acts. Therefore, an interpretation of the provision in accordance with its purpose is required, whereby it is sufficient for the acts of the association to be intended to significantly intimidate at least a noteworthy part of the population." (Unofficial STL translation.)

[223] Further, under the customary definition of terrorism, the requisite special intent may be to coerce an authority instead of to terrorise a population (as required by Lebanese law), but since a terrorist generally coerces *by spreading fear*, these two articulations of the special intent required for the crime of terrorism, in practical terms, largely overlap with each other. The additional basis for finding special intent under international law (*e.g*, the intent to coerce an authority) is thus not a critical distinction.

[224] Article 4 reads, in part: "If the law is obscure, the judge shall interpret it in a manner consistent with its purpose and with other texts. In the absence of a law, the judge shall apply the general principles of law, customs, and the principles of justice."

116. To be sure, Lebanese courts have occasionally disregarded customary rules. This is illustrated, for instance, by the indictment issued on 21 August 2008 by the investigating judge of the Court of Justice in the *Gaddafi* case: the Judge issued an arrest warrant against the Libyan leader Gaddafi for the alleged kidnapping and detention of a Lebanese Shiite imam. He did not mention, let alone take into account the customary rule of international law granting personal immunity to incumbent Heads of State,[225] a rule that had been relied upon, with regard to the same Libyan leader, considered as Libyan head of state ("*chef d'État en exercice*"), by the French Court of cassation.[226] This decision is however contradicted by others, appropriately applying international customary law directly in relation to immunity.[227]

117. In spite of this negative attitude by some Lebanese authorities towards customary international law, most Lebanese courts do advert to customary international rules. In this respect mention should be made of the *Rachid* case, in which the Beirut Single Judge, in a decision of 10 September 2009, did refer to international customary law. The prosecution had asserted that the entry of an Iraqi national into Lebanon via Syria and his gaining of refugee status was contrary to Article 32 of the Lebanese law on entering, residing in and exiting Lebanon. The Beirut Court held that the right to asylum accruing to those whose life is in peril or who risk being subjected to torture is laid down in various international treaties and derives from a general principle of law and customary international law providing that everybody is entitled to life and to not forfeit life. In the Judge's view, this principle may even restrain the application of criminal law in Lebanon ("this court sees no objection to the general principle standing in the way of the application of the penal law in limited cases, as mentioned in the defendant's brief"); as discussed above, the Judge applied the Convention against Torture in refusing to impose the Lebanese penalty of exclusion. The Judge also stated that both treaty law and international customary law impose on refugees an obligation to comply with the law applicable in the asylum State; he went on to note that the illegal entry into a territory is justified

[225] See however P. W. Nasr, *Droit pénal général* (Liban: Imprimerie Saint-Paul, 1997), at 89, a Lebanese criminal law scholar according to whom international customary law does recognise the immunity of Heads of State.

[226] See Court of cassation, 13 March 2001, 107 *Revue générale de droit international public* (2001), 474, *reprinted in English in* 125 I.L.R. 490. In fact Gadaffi is the "Leader of the 1st September Great Revolution of the Socialist People's Libyan Arab Jamahiriya"; he is generally considered and treated by foreign countries as the Head of State, for he exercises those functions *de facto*.

[227] See the Judgment of 29 March 2001 by the single judge in Metn, in which the judge applied the international law of sovereign immunity to dismiss a suit brought against the United States: Single civil Judge in Metn, decision n°0, 29 March 2001, in *Al-moustashar- majmou'at al-moussannafat lil Kadi Afif Chamseddine* [Judge Afif Chamseddine's collection].

by the right to asylum only with regard to the first country of asylum.[228] The Lebanese Court of cassation (Civil Chamber) allowed lower judges to refer to international customary law in commercial matters since at least 1968, when it stated that "these customs constitute an unwritten law which the judge is assumed to know in the same way as he knows other laws".[229] The Council of State also referred to international customary law in two rulings regarding displaced children.[230]

118. This is the correct approach. Customary international law must perforce play a role within the Lebanese legal system. All States and other international legal subjects are under the obligation at international law to comply with international rules: in modern times the old rule *pacta sunt servanda* (treaties must be complied with) goes hand in hand with the rule *consuetudo est servanda* (customary rules must be respected), a principle that in the past boiled down to restating the former principle, since customary rules were held to be *pacta tacita*, namely tacit agreements among a plurality of States. Consequently no State is allowed to disregard generally accepted rules of customary international law.[231] International custom embraces not only rules enshrining universal values such as peace, human rights, self-determination and justice, but also rules hinging on reciprocity and establishing bilateral relationships (for instance, rules on the treatment of foreigners, on diplomatic protection, on non-interference into domestic affairs, on the rights and obligations of States in territorial waters, and on the fair conduct of war), rules where therefore the interest of other States—and the international community as a whole—in strict compliance is very strong.

119. Since Lebanese statutory law does not expressly provide for the implementation of customary rules and in addition fails to specify the rank that such rules enjoy within the Lebanese legal system, it falls to courts to establish how these rules become applicable in Lebanon and what rank they enjoy within the hierarchy of Lebanese sources of law.

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[228] The Court said that "the treaties that the Defendant mentioned himself, as well as international custom and general principles of law, all emphasize the duty of the refugee to abide by the domestic laws of the State where he seeks refuge; Additionally, the more recent treaties, and the principles and customs he himself invokes distinguish between the first country of asylum and other States; in this respect what is allowed to a refugee in a first country of asylum is not always allowed in another state."

[229] Court of cassation, civil Chamber, decision n° 39, 4 April 1968. in *Al-moustashar- majmou'at al-moussannafat lil Kadi Afif Chamseddine* [Judge Afif Chamseddine's collection].

[230] See M.-D. Méouchy Torbey, *L'internationalisation du droit pénal* (Beirut: Delta, 2007), at 155.

[231] "[I]nternational law requires that states fulfill their obligations and they will be held responsible if they do not." R. Jennings and A. Watts (eds), *Oppenheim's International Law*, Vol. I, 9th edn. (Oxford: Oxford University Press, 2008), sec. 21; see also I. Brownlie, *Principles of Public International Law*, 7th edn. (Oxford: Oxford University Press, 2008), at 35: "[T]here is a general duty to bring internal law into conformity with obligations under international law".

120. Based on the aforementioned Lebanese case law, one can take the view that international customary rules which are self-executing, in addition to binding Lebanon in interstate relations, also take effect within Lebanese domestic law and are binding on State officials and individuals. By the same token their scope and content changes or they cease to apply as soon as the corresponding rule applicable in the world community is amended or is nullified. In other words, the incorporation of customary international rules into Lebanese law is automatic, and any change in international law automatically produces its legal effects in the Lebanese legal system.

121. Within the Lebanese legal system, legal rules emanating from an external legal system may not logically possess a rank higher than that of laws passed by the Lebanese Parliament, namely the rank of constitutional norms, because only the Constitution itself could provide international customary rules with such a privileged position overriding the will of the lawmaker.[232]

122. However, the obligation for the whole Lebanese State to comply with international law makes it necessary to grant customary international rules, *other than those which have evolved from the texts referred to in the Preamble of the Lebanese Constitution*[233] and which therefore possess constitutional rank, at least the same status as legislation passed by the Lebanese Parliament. Indeed, it is only in this manner that compliance by Lebanon with international custom can be ensured. Thus, the inference is warranted that, in Lebanon, international customary rules have the rank of ordinary legislation, with the consequence that they can implicitly amend contrary legislative provisions previously adopted by the Lebanese Parliament, but can in turn be amended or repealed by explicit

[232] This has occurred, for example, with the Universal Declaration of Human Rights to the extent that it reflects customary law, as it is explicitly incorporated in paragraph b) of the Preamble of the Constitution. From the case law of the Lebanese Constitutional Council, it appears that the Preamble is considered an integral part of the Constitution and therefore holds the same legal status as other constitutional provisions (see following footnote). It follows that the Preamble and all the texts to which it refers—including the Universal Declaration on Human Rights—have constitutional status. All these principles become therefore *constitutional* principles on the basis of the Lebanese Constitution itself, trumping conflicting ordinary laws. See, for instance, the ruling of the Constitutional Council of 12 September 1997, declaring unconstitutional a law contrary to the ICCPR (Decision No. 1/97), quoted in M.-D. Méouchy Torbey, *L'internationalisation du droit pénal* (Beirut: Delta, 2007), at 145, as well as Constitutional Council, decision n° 2/2001, 10 May 2001, in *Al-majless al-doustouri [2001-2005]* [Constitutional Council review [2001-2005]], at 155, and Constitutional Council, decision n° 4/2001, 29 September 2001, in *id*, at 165-167.

[233] The preamble of the Lebanese Constitution provides that : « Le Liban est arabe dans son identité et son appartenance. Il est membre fondateur et actif de la Ligue des Etats Arabes et engagé par ses pactes ; de même qu'il est membre fondateur et actif de l'organisation des Nations-Unies, engagé par ses pactes et par la Déclaration Universelle des Droits de l'Homme. L'Etat concrétise ces principes dans tous les champs et domaines sans exception ». The Lebanese Constitutional Council has held that "[i]t is established that these international conventions which are expressly mentioned in the Preamble of the Constitution form an integral part along with said Preamble and Constitution, and enjoy constitutional authority". Constitutional Council, decision n° 2/2001, 10 May 2001, published in *Al-majless al-doustouri [2001-2005]* [Constitutional Council review [2001-2005]], at 150.

subsequent Lebanese legislation on the strength of the principles *lex posterior derogate priori* [subsequent law may derogate from previous law], *lex specialis derogat generali* [a special law prevails over a general law], and *lex posterior generalis non derogat priori speciali* [a subsequent general law does not derogate from a prior special law]. It is notable that this approach is also taken in other countries of Romano-Germanic tradition such as France, even though no constitutional provision imposes respect for customary international law nor a fortiori elevates customary rules to the rank of constitutional or quasi-constitutional provisions.[234]

123. However, despite the existence of a customary international law definition of the crime of terrorism in time of peace, and its binding force on Lebanon, it cannot be *directly* applied by this Tribunal to the crimes of terrorism perpetrated in Lebanon and falling under our jurisdiction. As we have previously noted, the text of Article 2 of the Tribunal's Statute makes clear that codified Lebanese law, not customary international law, should be applied to the substantive crimes that will be prosecuted by the Tribunal.

3. Reliance on International Law for the Interpretation of Lebanese law

124. The above conclusion does not, however, mean that the Tribunal will completely disregard international law when construing the relevant provisions of Lebanese law mentioned in the Statute. That domestic legislation deals with terrorist acts occurring in Lebanon regardless of whether or not they have a transnational dimension—that is, whether or not they are acts of national or international terrorism. But the allegations falling under the jurisdiction of the Tribunal have been uniquely regarded by the UN Security Council as a "threat to international peace and security" and have also justified the establishment of an international Tribunal entrusted with the task of prosecuting and trying the alleged authors of those facts. This patently proves that those terrorist attacks were considered by the Security Council as particularly grave acts of terrorism with international implications. Thus, faced with this criminal conduct and the Security Council's response to it, the Tribunal, while fully respecting Lebanese jurisprudence relating to cases of terrorism brought before Lebanese courts, cannot but take into account the unique gravity and transnational dimension of the facts at issue, which by no coincidence have been brought before an international court. The Tribunal

[234] In the well-known *Aquarone* case the French *Conseil d'État* held that « ni cet article [55 of the Constitution, relating to treaties] ni aucune disposition de valeur constitutionnelle ne prescrit ni n'implique que le juge administratif fasse prévaloir la coutume internationale sur la loi en cas de conflit entre ces deux normes. » Conseil d'État, *Aquarone*, 6 June 1997, *Revue générale de droit international public*, 1997 at 838.

therefore holds that it is justified in interpreting and applying Lebanese law on terrorism in light of international legal standards on terrorism, given that these standards specifically address transnational terrorism and are also binding on Lebanon. The issue under this score that the Appeals Chamber will address in particular is that of the instrumentalities used to carry out a terrorist act.

a) The Question of the Means or Instrumentalities Used for Carrying out a Terrorist Act

125. We have seen above that Lebanese courts have interpreted the expression "means liable to create a public danger" (*danger commun*) in Article 314 as covering those means or instrumentalities listed therein and that produce conspicuous and vast effects (such as bombs), thus excluding those means (such as guns or rifles) which are not listed in Article 314 and which produce modest outside effects, although they may imperil the life of many persons other than the target victim or otherwise create widespread panic. This, however, is not the only possible interpretation of the text of Article 314, nor is it the most persuasive. The Appeals Chamber believes that a more congruous construction of the expression used by Article 314 is warranted, on the basis of the assessment of the relevant facts, in circumstances such as those in the *al-Halabi* and *Chamoun* cases, at least when Article 314 is applied by the Tribunal.

126. What Article 314 requires is that the means used to carry out a terrorist act be capable of causing a "public danger", namely that the means, in addition to injuring the physical target of the act, be such as to expose other persons to adverse consequences. This may occur even when a terrorist shoots at a person in a public road, thereby imperilling a large number of other persons simply because they are present at the same location.

127. Moreover, a "public danger" may also occur when a prominent political or military leader is killed or wounded, even if this occurs in a house or in any other closed place with no other persons present. In such cases, the danger may consist in other leaders belonging to that same faction or group being assassinated or in causing a violent reaction by other factions. These consequences are undoubtedly capable of causing a common or "public danger", as required by Article 314 of the Lebanese Criminal Code, regardless of the weapon used.

128. Furthermore, it is difficult not to see the close link between the aim of the crime (to "cause a state of terror") and the result of the terrorist act (to create a "public danger"). Clearly, the two concepts are closely intertwined: often a terrorist can be said to aim at causing panic and terror

because he uses means that endanger the broader population;[235] or, a terrorist act may create a public danger by spreading terror, for instance by killing a political leader and thereby alarming a portion of the population that will foreseeably respond with violent protests, riots, or retaliations against opposing factions—all of which, especially in the context of political instability, may create a public danger. In particular, in contemporary societies—where media are swift to bring attention to the smallest act of violence against political targets around the globe, thus arousing passions and tensions—the expression "liable to create a public danger" has to be interpreted differently than in the 1940s.

129. This interpretation of the "means" element, in addition to appearing better suited to address contemporary forms of terrorism than the more restrictive approach employed by some Lebanese courts, is also warranted by the need to interpret national legislation as much as possible in such a manner as to bring it into line with binding relevant international law. We have seen above that both the Arab Convention and the customary international rule on terrorism do not envisage any restriction based on the kind of weapons or means used to carry out a terrorist attack. To construe Article 314 in this way would render this provision more consonant with the international rules just mentioned, rules that are binding on Lebanon at the international level even if not yet explicitly implemented through domestic legislation.

130. However, this interpretation may *broaden* one of the objective elements of the crime as it has been applied in prior Lebanese cases. We must therefore consider whether this is permissible under the principle of legality (*nullum crimen sine lege*).

b) Nullum Crimen Sine Lege *and Non-Retroactivity*

131. The Appeals Chamber will therefore discuss the principle of legality (*nullum crimen sine lege*) as enshrined in Article 8 of the Lebanese Constitution and Article 1 of the Lebanese Criminal Code, as well as the scope and import of Article 15 of the International Covenant on Civil and Political Rights ("ICCPR"), which has been ratified by Lebanon and enjoys constitutional rank and value in the Lebanese legal system through the Constitution's preamble. Those rules state:

[235] This was the inference made in the *Michel Murr* case, as discussed above in paragraph 60 and footnote 84.

Constitution of Lebanon

Preamble: *Le Liban est arabe dans son identité et son appartenance. Il est membre fondateur et actif de la Ligue des Etats Arabes et engagé par ses pactes ; de même qu'il est membre fondateur et actif de l'organisation des Nations-Unies, engagé par ses pactes et par la Déclaration Universelle des Droits de l'Homme. L'Etat concrétise ces principes dans tous les champs et domaines sans exception.*

Article 8 [Personal Liberty, *nullum crimen nulla poena sine lege*]: Individual liberty is guaranteed and protected by law. No one may be arrested, imprisoned, or kept in custody except according to the provisions of the law. No may be established or penalty imposed except by law.

Lebanese Criminal Code

Section I (Temporal scope of application of criminal law), Subsection 1 (Legality of offences)

Article 1: No penalty may be imposed and no preventive or corrective measure may be taken in respect of an offence that was not defined by statute at the time of its commission.
An accused person shall not be charged for acts constituting an offence or for acts of principal or accessory participation, committed before the offence in question has been defined by statute.

International Covenant on Civil and Political Rights

Article 15 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

132. According to the principle of legality, everybody must know in advance whether specific conduct is consonant with, or a violation of, penal law. In addition to Article 8 of the Lebanese Constitution, the preamble of the Constitution incorporates the principle of legality as set out in the ICCPR, according to Article 15 of which no breach of the *nullum crimen* principle exists when the act was criminal "under national or *international* law, at the time when it was committed".[236]

[236] ICCPR, Article 15 (emphasis added).

133. This provision does not necessarily entail, however, that the authorities of a State party to the ICCPR may try and convict a person for a crime that is provided for in international law but not yet codified in the domestic legal order: in criminal matters, international law cannot substitute itself for national legislation; in other words, international criminalisation alone is not sufficient for domestic legal orders to punish that conduct. Nevertheless, Article 15 of the ICCPR allows at the very least that fresh national legislation (or, where admissible, a binding case) defining a crime that was already contemplated in international law may be applied to offences committed *before* its enactment without breaching the *nullum crimen* principle. This implies that individuals are *expected and required to know* that a certain conduct is criminalised in international law: at least from the time that the same conduct is criminalised also in a national legal order, a person may thus be punished by domestic courts even for conduct predating the adoption of national legislation.[237]

134. The import of Article 15 as set out here has been upheld by the UN Human Rights Committee[238] and various national courts.[239] More recently, it has been restated by the Court of

[237] Of course, if the elements and scope of the crime contemplated in national legislation is broader than that previously envisaged in international law, then conduct taken prior to the passing of national legislation can only be prosecuted under that national legislation if the conduct falls within the more narrow international criminalisation.

[238] For example, in *Baumgarten*, in considering a complaint of an alleged retrospective application of German law, the HRC stated that it would "limit itself to the question of whether the author's acts, at the material time of commission, constituted sufficiently defined criminal offences under the criminal law of the GDR *or* under international law" (emphasis added). HRC, *Baumgarten v Germany*, Communication No. 960/2000, UN Doc. CCPR/C/78/D/960/2000 (2003), para. 9.3. In considering a similar complaint in *Nicholas v Australia*, the HRC did not depart from this view: "If a necessary element of the offence, as described in national (*or* international) law, cannot be proven to have existed, then it follows that a conviction of a person for the act of omission in question would violate the principle of nullum crimen sine lege" (emphasis added) HRC, *Nicholas v Australia*, Communication No 1080/2002, UN Doc. CCPR/C/80/D/1080/2002 (2004), para. 7.5.

[239] In *Re Extradition of Demjanjuk* an Israeli extradition request of an alleged guard at the Treblinka concentration camp during World War II was challenged in the United States District Court of North Dakota. The appellant argued that, *inter alia*, the criminal statute under which the accused was sought was *ex post facto*, given that Israel did not come into existence until 1948. The Court stated that: "The Israeli statute does not declare unlawful what had been lawful before; rather, it provides a new forum in which to bring to trial persons for conduct previously recognized as criminal. [...] Respondent is charged with offenses that were criminal at the time they were carried out. At the time in question, the murder of defenseless civilians during wartime was illegal under international law [citing the Hague Conventions of 1899 and 1907 and sources from World War II]. Furthermore, it is absurd to argue that operating gas chambers, and torturing and killing unarmed prisoners were not illegal acts under the laws and standards of every civilized nation in 1942-43. [...] The statute is not retroactive because it is jurisdictional and does not create a new crime. Thus, Israel has not violated any prohibition against the ex post facto application of criminal laws which may exist in international law." U.S., Federal Trial Court, *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 567 (D.N.D. 1985).

Another is the case of *Polyukhovich v Commonwealth* of the Australian High Court. There, the court was faced with the question of whether the *War Crimes Act 1945* (Cth) could be used to prosecute an individual for events that took place in the Ukraine between 1942-1943. The question, according to the Court, was whether: "the statutory offence created by s. 9 of the [*War Crimes*] Act corresponds with the international law definition of international crimes existing at the relevant time. If it does, the Act vests jurisdiction to try alleged war criminals for crimes which were crimes under the applicable (international) law when they were committed; its apparent retrospectivity in municipal law is no bar to the

Justice of the Economic Community of the West African States in the *Habré v. Republic of Senegal* case.[240] Likewise, in the *Ojdanić* case, when determining the question of "foreseeability" of a criminal offence, the ICTY Appeals Chamber held that non-codified international customary law could give an individual "reasonable notice" of conduct that could entail criminal liability.[241] This facet of the *nullum crimen* principle should not be surprising: international crimes are those offences that are considered so heinous and contrary to universal values that the whole community condemns them through customary rules. Individuals are therefore required and expected to know that, as soon as national authorities take all the necessary legislative (or judicial) measures necessary to punish those crimes at the national level, they may be brought to trial even if their breach is prior to national legislation (or judicial pronouncements).[242] The same applies to crimes punished at the international level by way of bilateral or multilateral treaties.

135. Furthermore, the principle of legality does not preclude "the progressive development of the law by the court".[243] Such "progressive development" is necessary because, as Jeremy Bentham

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exercise of a universal jurisdiction recognized by international law and that is sufficient to enliven the external affairs power to support the Act which vests that jurisdiction." The Court went on to find, by a majority, that the *War Crimes Act 1945* (Cth) did not breach the Australian Constitution by virtue of its retroactive application. Australia, High Court, *Polyukhovich v Commonwealth*, (1991) 172 CLR 501, at 576.

[240] ECOWAS, *Habré v Sénégal*, No. ECW/CCJ/JUD/06/10, 18 November 2010. Hissène Habré had argued that the passing in Senegal, where he resided, of a law criminalizing torture committed abroad, and his subsequent prosecution there for such crimes as allegedly committed many years earlier (1984-1990), was contrary to the *nullum crimen* principle. Senegal invoked Article 15 of the ICCPR. It argued that « la compétence rétroactive de ses juridictions pour les faits de génocide, de crimes contre l'humanité, de crimes de guerre n'institute pas une nouvelle incrimination avec effet rétroactif dans la mesure ou ces faits sont tenus pour criminels par les règles du droit international à la date de leur commission. » (at para 47). The Court agreed with the defendant State. After quoting Article 15, it said:

> Du premier paragraphe de ce texte [Article 15], la Cour note que si les faits à la base de l'intention de juger le requérant ne constituaient pas des *actes délictueux d'après le droit national* sénégalais (d'où le Sénégal viole le principe de non rétroactivité consacré dans le texte), ils sont au regard du *droit international*, tenus comme tels. Or, c'est pour éviter l'impunité des actes considérés, *d'après le droit international comme délictueux* que le paragraphe 2 de L'article 15 du Pacte prévoit la possibilité de juger ou de condamner « *tout individu en raison d'actes ou omissions qui, au moment où ils ont été commis, étaient tenus pour criminels, d'après les principes généraux de droit reconnus par l'ensemble des nations* ». La Cour partage donc, les nobles objectifs contenus dans le mandat de l'Union Africaine et qui traduit l'adhésion de cette Haute Organisation aux principes de l'impunité de violations graves des droits humains et de la protection des droits des victimes.

(at para. 58; emphasis in original). However, later on the Court stated that this retroactive application of the Senegalese law was only admissible if carried out by an international tribunal – a conclusion that does not appear to be logically and legally justified.

[241] ICTY, *Milutinović et al*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 ("*Milutinović* JCE Decision"), para. 41.

[242] At least in common law jurisdictions (which does not include Lebanon), courts can also interpret existing crimes to include elements or aspects of the crime as it is defined under customary international law—in other words, they may interpret national laws in new ways to bring domestic law into conformity with customary international law.

[243] ICTY, *Vasiljević* Trial Judgment, 29 November 2002 ("*Vasiljević* TJ"), para. 196. See also ECHR, *Kokkinakis v Greece*, Judgment of 25 May 1993, Series A, No. 260-A, paras 36 and 40; ECHR, *E K v Turkey*, 7 February 2002,

explained, "the legislator, who cannot pass judgment in particular cases, will give directions to the Tribunal in the form of general rules, and leave them with a certain amount of latitude in order that they may adjust their decision to the special circumstances".[244] Thus the ICTY Appeals Chamber has held that the principle of legality does not prevent a court from interpreting and clarifying the elements of a particular crime.[245] Further, the application of these elements to new circumstances may in some instances better align domestic practice with a nation's international obligations. At times, domestic and international courts have even come to the conclusion that conduct previously considered legal can be construed as embraced within an existing offence, for instance if it relates to "an area where the law has been subject to progressive development and there are strong indications that still wider interpretation by the courts of the inroads on the immunity was probable"[246]—that is, as long as the circumstances made this criminalisation foreseeable. This principle would be better expressed by saying that the *application* of the law may be subject to development as social conditions change, as long as this application was foreseeable.

136. What matters is that an accused must, at the time he committed the act, have been able to understand that what he did was criminal, even if "without reference to any specific provision".[247] Similarly, "[a]lthough the immorality or appalling character of an act is *not* a sufficient factor to warrant its criminalisation under customary international law," it may nevertheless be used to "refute any claim by the Defence that it did not know of the criminal nature of the acts".[248]

Application No. 28496/95, para. 52; ECHR, *S W v United Kingdom*, 22 November 1995, Series A, No. 335-B, paras 35-36. Outside of criminal law, courts often have to interpret domestic law or treaties anew in light of significant social developments. See, e.g., U.K., Exchequer Division, *Attorney-General v Edison Telephone Co of London* (1880) 6 QBD 244 (holding that the policies underlying the *Telegraph Act* (1869) apply equally to the telephone, which had not been invented at the time the legislation was adopted); *Belgium v The Netherlands (The Iron Rhine "Ijzeren Rijn" Railway)*, R.I.A.A., Vol. XXVII, 35 (2005), at 66-67 (noting the evolution of a general principle of law regarding the importance of environmental considerations in the context of economic development).

[244] J. Bentham, *Theory of Legislation* (Etienne Dumont ed. 1914), at p. 62.

[245] ICTY, *Aleksovski*, Appeals Judgment, 24 March 2000, para. 127; ICTY, *Delalić et al*, Appeals Judgment, 20 February 2001, para. 173.

[246] ECHR, *C R. v United Kingdom*, 22 November 1995, Series A, No. 335-C, para. 38 (with reference to the arguments of the UK Government and the Commission), finding that a conviction for attempted rape could be legitimately entered against a husband even though English law at the time stated that "[...] the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract" (at para. 11). See also para. 42 for the relevance of the evolution of previously held conception in assessing whether arbitrary prosecution, conviction or punishment occurred.

[247] ICTY, *Hadžihasanović et al*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 34.

[248] ICTY, *Milutinović* JCE Decision, para. 42 (emphasis added).

137. However, there are important limits to the general principle that the law is always speaking. As the ICTY has correctly held:

> [f]rom the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was insufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.[249]

138. With these principles in mind, we conclude that it was foreseeable for a Lebanese national or for anybody living in Lebanon that any act designed to spread terror would be punishable, regardless of the kind of instrumentalities used as long as such instrumentalities were likely to cause a public danger.

139. This proposition is borne out by the fact that neither the Arab Convention nor customary international law, both applicable within the Lebanese legal order, restrict the means used to perpetrate terrorism, and both of these sources of law are binding on Lebanon.[250] Furthermore, Lebanon's legislature has gradually authorised or approved ratification of or accession to a number of international treaties against terrorist action, which likewise do *not* contain any such limitation as to the means to be used for a terrorist act. The instruments in question are: the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (ratified on 11 June 1974); the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (acceded to on 10 August 1973); the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (ratified on 23 December 1977); the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (acceded to by Lebanon on 3 June 1997), Article 2 of which does not envisage any limitation as to the means of attacking a protected person; the 1979 International Convention against the Taking of Hostages (acceded to on 4 December 1997), which criminalises the taking of hostages without envisaging any restriction on the ways a hostage may be taken; the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Montreal Convention (ratified on 27 May 1996); the Rome 1988 Convention for the Suppression of Unlawful Acts against the

[249] *Vasiljević* TJ, para. 193.

[250] See above, Section I(I)(B)(1)(b) and Section I(I)(B)(2)(b).

Safety of Maritime Navigation (acceded to on 16 December 1994); that Convention's supplementary Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (acceded to on 11 November 1997); and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (ratified on 13 November 2006).

140. All these international treaties were integrated into the Lebanese legal system by means of authorisation or approval by ratification or accession by Parliament, i.e., by an act having the force of (ordinary) law. According to the Lebanese system for implementing international treaties referred to above (see paragraphs 71-76) the provisions of those treaties automatically produce their effects in Lebanese law (except for those cases where the passing of further implementing legislation is needed). All this entails that any Lebanese citisen or any person living in Lebanon was required and expected to be aware of the bans following from those international treaties.

141. Admittedly, the broad range of acts prohibited by those treaties always referred to or revolved around the *specific conduct* envisaged in each treaty: offences on board aircraft, attacks against civil aircraft, attacks on internationally protected persons, hostage-taking, and attacks against or onboard ships on the high seas. In authorising or approving ratification or accession of these treaties through legislative instruments, however, the Lebanese parliament effectively enlarged the range of acts that can fall under the ban on terrorism, so that all persons living in Lebanon were to know that, by the 1990s, a much broader range of acts than those envisaged in 1943 could fall under the prohibition of terrorism. An individual subject to Lebanese criminal jurisdiction, knowing that shooting (or threatening to shoot) passengers onboard an aircraft for the purpose of hijacking the plane was a prohibited terrorist act, can safely be expected to conclude that the same behaviour with the same intent to spread fear in other circumstances (for instance, in a crowded road) would also be regarded as terrorism.

142. Finally, Lebanon is not a country where a formal doctrine of binding precedent (*stare decisis*) is adopted. Thus, there is no general expectation that individuals will rely definitively on the prior interpretations of Article 314 by Lebanese courts. Different circumstances could lead Lebanese courts in the future to different conclusions regarding the scope of Article 314. This is something to be taken into account by the Tribunal when interpreting the Lebanese Criminal Code.

143. On the basis of the considerations above, the Appeals Chamber concludes that the aforementioned interpretation of Article 314 by the Tribunal is permissible because it meets the requisite conditions: (i) it is consistent with the offence as explicitly defined under Lebanese law; (ii) it was accessible to the accused, especially given the publication of the Arab Convention and other international treaties ratified by Lebanon in the *Official Gazette*; (iii) hence, it was reasonably foreseeable by the accused.[251]

144. Thus, the approach taken here—to provide a modern interpretation to the "means" element—does not amount to adding a new crime to the Lebanese Criminal Code or a new element to an existing crime. The Appeals Chamber simply allows a reasonable interpretation of the existing crime that takes into account significant legal developments within the international community (as well as in Lebanon). This interpretation is not binding *per se* on courts other than the Special Tribunal for Lebanon, although it may of course be used as an interpretation of the applicable legal provisions in other cases where terrorism is charged.

C. The Notion of Terrorism Applicable before the Tribunal

145. To sum up, we hold that the Tribunal must apply the crime of terrorism as defined by Lebanese law. There are two significant differences between the crime of terrorism under international customary law and under the Lebanese Criminal Code. First, under the former but not the latter, the underlying conduct must be a crime, which means the perpetrator must also harbour the *mens rea* required for that crime in addition to the special intent required for the crime of terrorism. Instead, 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); thus in the cases submitted to the Tribunal, the Prosecutor will have to prove only that the underlying act was volitional, in addition to the special intent to "cause a state of terror". Second, under the latter but not the former, the means used for perpetrating the terrorist act must be of a type that will endanger the public. The type of means that can create a public danger has been interpreted rather narrowly by some Lebanese courts in the past. We have explained why this Tribunal will instead apply a less narrow interpretation to the

[251] Apart from the ICTY judgments cited above, see in this respect also: ECHR, *S W v United Kingdom*, 27 October 1995, Series A, No. 335-B; ECHR, *Cantoni v France*, 15 November 1996, Application No. 17862/91. On the need for a criminal offence to be foreseeable, see ICTY, *Tadić*, Decision on the Defence Motion on Jurisdiction, 10 August 1995, paras 72-73.

phrase "means liable to create a public danger", in light of international law binding on Lebanon and depending on the particular circumstances of the cases brought before it.

146. In light of the foregoing, the answers to the questions posed by the Pre-Trial Judge in relation to terrorism are as follows:

147. (i), (ii) and (iii): The Statute clearly refers to provisions of the Lebanese Criminal Code only, and not to Lebanese law in general or to international law. **The Tribunal, when applying the notion of terrorist acts, should therefore look at Article 314 of the Lebanese Criminal Code.** However, a proper construction of Lebanese law leads to the conclusion that, when interpreting Article 314 and other relevant provisions of the Lebanese Criminal Code, international law binding upon Lebanon may not be disregarded. **Article 314 of the Lebanese Criminal Code shall be interpreted in consonance with international law,[252] thus enshrining the following elements:**

a. the volitional commission of an act;

b. through means that are liable to create a public danger;[253] and

c. the intent of the perpetrator to cause a state of terror.

148. (iv) Considering that the elements of the notion of terrorism applicable before the Tribunal do not require an underlying crime, such as intentional homicide, the perpetrator of an act of terrorism that resulted in deaths would be liable for terrorism (assuming that all other elements discussed above are met), and the deaths would be an aggravating circumstance, according to Article 6 of the Law of 11 January 1958. Additionally, the perpetrator may also, and *independently*, be liable for the underlying crime, for example homicide or attempted homicide. His or her liability for the underlying crime must be examined in light of the elements for that crime, in particular to ensure he or she had the requisite intent, whether direct or indirect. In short, the accused's liability for the crime of terrorism and for any underlying crime, such as the crime of intentional homicide or attempted homicide, must be evaluated *separately*. The following section will deal with the elements of these two crimes to be applied before this Tribunal.

[252] On the international customary definition of terrorism, see paragraph 85; on the definition of terrorism contained in the Arab Convention, see paragraphs 65-67.

[253] In particular, 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.

II. Crimes and Offences Against Life and Personal Integrity

A. Intentional Homicide

149. The Pre-Trial Judge has asked:

> ix) In order to interpret the constituent elements of the notions of intentional homicide with premeditation and attempted intentional homicide with premeditation, should the Tribunal take into account not only Lebanese law, but also conventional or customary international law?
>
> x) Should the question raised in paragraph ix) receive a positive response, is there any conflict between the definitions of the notions of intentional homicide with premeditation and attempted intentional homicide with premeditation as recognised by Lebanese law and those arising out of international law and, if so, how should it be resolved?
>
> xi) Should the question raised in paragraph ix) receive a negative response, what are the constituent elements of these notions in Lebanese law in the light of case law pertaining thereto?
>
> xii) Can an individual be prosecuted before the Tribunal for intentional homicide with premeditation for an act which he is alleged to have perpetrated against victims who might be considered not to have been personally or directly targeted by the alleged criminal act?

150. As explained above (see paragraphs 33 and 43) and as urged by the Prosecution and Defence Office,[254] the Tribunal is bound by Article 2 of its Statute to apply the Lebanese Criminal Code to the crime of intentional homicide. Further, unlike our foregoing discussion of terrorism, it will suffice to consider the elements of intentional homicide only under Lebanese law, since international criminal law does not rely on an autonomous definition of murder as such and as the underlying crime of war crimes, crimes against humanity, or genocide. We therefore focus our analysis on the definition of intentional homicide under the Lebanese Criminal Code in order to address question (xi), which also leads us to answer question (xii) in the affirmative.

151. In Lebanon murder is punished primarily under Articles 547 to 549 of the Lebanese Criminal Code. The elements of intentional homicide are determined in Article 547, whereas Articles 548 and 549 provide only for aggravating circumstances to the crime mentioned in Article 547.

> **Article 547** – Anyone who intentionally kills another person shall be punishable by hard labour for a term of between 15 and 20 years.

[254] See Prosecution Submission, para. 53; Defence Office Submission, para. 142.

Article 548 – Article 548 was amended by Article 3 of the Act of 24 May 1949 and Legislative Decree No. 110 of 30 June 1977, as follows:

Intentional homicide shall be punished by hard labour for life if it was committed:

1. For a base motive;
2. To obtain a benefit resulting from a misdemeanour;
3. This paragraph was revoked by Legislative Decree No. 110 of 30 June 1977 and replaced with the following text by Article 32 of Legislative Decree No. 112 of 16 September 1983; Through mistreatment of the corpse by the criminal after the homicide.
4. Against a minor under 15 years of age;
5. Against two or more persons.

Article 549 - Article 549 was amended by Articles 3 and 4 of the Act of 24 May 1949; Article 1 of the Act of 9 January 1951 modified Article 4 of the Act of 24 May 1949:

Intentional homicide shall entail the death penalty if it was committed in the following circumstances:

1. With premeditation;
2. To prepare for, facilitate or execute a felony or misdemeanour, to facilitate the escape of instigators or perpetrators of, or accomplices to, such a felony or to preclude their punishment;
3. Against an ascendant or descendant of the offender;
4. If the offender committed acts of torture or cruelty against persons;

The following paragraph was added to Article 549 by Legislative Decree No. 110 of 30 September 1983:

5. Against a public official during, in connection with or on account of the performance of his duties;

The following paragraphs were added to Article 549 by Legislative Decree No. 112 of 16 June 1977:

6. Against a person on account of his religious affiliation or as an act of revenge for a felony committed by another member of his religious community, his relatives or members of his party;
7. Using explosive materials;
8. To conceal the commission of a felony or misdemeanour or traces thereof.

152. We examine first the objective and subjective elements of the crime before considering the aggravating factor of premeditation.

1. Actus reus

153. The actus reus of intentional homicide under Lebanese law is composed of the following elements: (i) conduct; (ii) result; (iii) a nexus between the conduct and the result.

a) Conduct

154. The conduct is defined as an *act or culpable omission*[255] aimed at *impairing the life* of another human being. There is a distinction between the behaviour aiming at committing the crime (which consists of a series of movements) and the means used to commit it (in other words, the tool used to perpetrate the crime).

155. The means may be physical, such as the perpetrator's hands, a gun or a knife. These physical means can be lethal or non-lethal by nature, connected or not connected to the body of the perpetrator, and may lead directly to death or be only an indirect cause of death. Alternatively, the means may as well be non-physical, for example creating fear that leads to death, such as by giving bad news to an individual with a heart disease, resulting in his death. However, if the means do not lead to the death of the individual, the crime in itself does not exist (for example, the use of sorcery to commit a murder cannot be considered a means of achieving death). Indeed, Lebanese courts always refer to the type of tool used to achieve the criminal conduct.[256]

b) Result

156. The criminal result is the *death of the victim.* This death has to be a direct result of the criminal activity, even though it might not occur immediately. If the death does not occur for reasons falling outside the perpetrator's will (such as medical intervention), the perpetrator is prosecuted for attempted homicide.[257] The absence of proof relating to the physical existence of the victim's corpse or dead body is not an impediment to the existence of the criminal result. Therefore it is sufficient to

[255] See Article 204 of the Lebanese Criminal Code which provides that:
A causal link between an act and *omission* on the one hand, and the criminal consequence on the other, shall not be precluded by the concurrent existence of other previous, simultaneous or subsequent causes, even if they were unknown to the perpetrator or independent of his act.
If, however, the subsequent cause is independent and sufficient in itself to bring about the criminal consequence, the perpetrator shall incur the penalty only for the act that he committed.
(emphasis added).

[256] See *inter alia*: Court of cassation, 6th Chamber, decision n°47/99, 9 March 1999, in *Cassandre* 3-1999, at 265. Court of Cassation, 6th Chamber, decision n°37/99, in *Cassandre* 2-1999, at 220.

[257] Attempted homicide is discussed below, see paras 176-183.

rely on facts such as the timing when the victim was last seen, the person he or she was seen with (the accused), etc.[258]

157. Finally, if the murder is committed by multiple individuals, they are all considered as co-perpetrators if all of them share the same intention, without distinction between those who administered the fatal blow and those who did not (e.g., a victim being beaten to death by three or four persons).[259] The actions of each are said to have resulted in the death of the victim. However, if no intention of co-perpetration is proved, the perpetrators are held responsible for different crimes. One must distinguish between perpetrators (*auteurs*) of the crime who participate in all the objective elements of the crime, where the activity of each individual is by itself likely to realise the crime (such as two persons shooting at a single victim), and co-perpetrators (*co-auteurs*) who directly cooperate to achieve the objective elements of the crime (for example a person holds the victim so that another person can kill him or her). Both scenarios are provided for under Article 212 of the Lebanese Criminal Code.

c) Nexus

158. The last element of the actus reus of murder under Lebanese law is the *nexus* between the activity and the result. If the result is due to different activities or reasons,[260] such as in the case of a death occurring not only after the commission of the criminal act but also after a medical mistake made by a doctor while treating the injury sustained by the victim, two theories have been propounded: that of the equivalence of causes, and the theory of the adequate or sufficient cause. Article 204 of the Lebanese Criminal Code provides for both theories in an ambiguous manner. The Article sets the theory of equivalence of causes as a general rule, but adds an important exception in the form of the theory of adequate or sufficient cause.

[258] According to the Court of cassation "Death is a factual matter which can be proven by any possible means": Court of cassation, 6th Chamber, decision n° 38, 23 March 1999, in *Sader fil-tamyiz* [Sader in the cassation], 1999, at 304.

[259] This was held for instance in a case of a fight between individuals from two families where two persons from one family shot the victim without a definite proof as to who administered the fatal struck. The intent was inferred from the fight, and both perpetrators were convicted of murder: Court of Cassation, 1st Chamber, decision n° 75, 25 October 2004, in *Sader fil-tamyiz* [Sader in the cassation], 2004, p. 76.

[260] The theory of causation, see G. Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998); Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998. See also Moustapha El-Awji, *Al-kanoun al-jinai al-am, al-jizi' al-awal, al-nazariya al-ama lil jarima* [General Criminal Law, first part, The General Theory of the Crime], (Beirut: Nawfal publishing), 1988.

159. Indeed, and as the Defence Office notes,[261] when the additional cause leading to death is independent and sufficient by itself to achieve such a result, and when it is subsequent (*ultérieur*) to the conduct of the accused, courts cannot hold the accused responsible for the result. For example, the victim of a murder attempt dies as a result of a car accident while he was being taken to the hospital: the accident is subsequent to the murder attempt and suffices by itself to cause the death.

160. However, Article 568 of the Lebanese Criminal Code provides that if the author had no knowledge of the reasons and facts which led, together with his criminal activity, to the death or the injury of the victim, this amounts to a mitigating circumstance leading to a reduced sentence. In other words, the author is considered responsible for the death of the victim, but the sentence is mitigated. This reasoning is more in line with the theory of equivalence of causes. Nonetheless, it can be inferred from a comprehensive reading of the Code together with the jurisprudence that Lebanese law applies mainly the theory of the adequate or sufficient cause. In other words, the perpetrator is held liable for his criminal act coupled with criminal intent even if he ignored other reasons which, combined with his act, led to the victim's death. This analysis is also in line with the origins of the Lebanese Criminal Code. Indeed, the Lebanese text in this respect is originally taken from the Italian criminal code of 1930, which in turn adopts the theory of the adequate or sufficient cause.[262]

2. Mens rea

161. The *subjective elements* encompass (i) knowledge and (ii) intent.

162. In order to convict an individual for intentional homicide, the Lebanese Criminal Code requires first that the perpetrator have knowledge of the circumstances of the offence. In other words, the perpetrator has to know that he is aiming his act at a living person; he has to know as well that the tool he is using may cause the death of the victim.

163. Knowledge alone, however, is insufficient. Intentional homicide also requires *intent*, for the perpetrator is seeking not only to behave in a certain manner, but also to achieve the criminal result: the death of the victim. For instance, the individual who suddenly faints or who is pushed violently

[261] Defence Office Submission, para. 146.

[262] Moustapha El-Awji, *Al-kanoun al-jinai al-am, al-jizi' al-awal, al-nazariya al-ama lil jarima* [General Criminal Law, first part, The General Theory of the Crime], (Beirut: Nawfal publishing), 1988, at 501.Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 214-215.

by another person, leading him to fall on a child, thereby causing the child's death, had no intent to behave in such a manner.

164. Therefore, the perpetrator must have the intent, as defined by Articles 188[263] or 189[264] of the Lebanese Criminal Code, vis-à-vis the death of the victim as a result of his behaviour. With regard to Article 188 of the Lebanese Criminal Code, it is not enough for the perpetrator to foresee the result of his actions or behaviour or to know that his behaviour is prohibited by law; he should be aiming at it as a direct result of his behaviour.[265] Lebanese courts have held that since the perpetrator's intent is usually hidden in his mind, it can be inferred from outward criteria such as the circumstances of the crime, the means used by the perpetrator, the part of the body where the victim was hit, or where the perpetrator was aiming, etc.[266] In a case where the homicide was committed during a fight by a perpetrator who picked up a rock and hit the victim repeatedly on the head, causing his or her death, the Court of cassation held that the conduct in itself was a strong indicator as to the perpetrator's intent.[267]

165. Under Article 189, if both knowledge and intent can be found, the mens rea exists, even though the criminal intent (*dol*) is indirect, meaning that it is *dolus eventualis*.[268] The mens rea still exists even though the victim is not predetermined (such as in the case of an individual wishing to kill anyone, and not a specific person), and despite an error on the identity of the victim (*erreur sur la personne*), or an error in the nexus (such as in the case of an individual throwing a victim over a bridge, with the purpose to see his victim drown: he is still held responsible for the crime of

[263] Article 188 of the Lebanese Criminal Code provides: "Intent consists of the will to commit an offence as defined by law".

[264] Article 189 of the Lebanese Criminal Code provides: "An offence shall be deemed to be intentional, even if the criminal consequence of the act or omission exceeds the intent of the perpetrator, if he had foreseen its occurence and thus [*sic*] accepted the risk". The word "thus" in the English translation is wrong in as much as it infers the acceptance of the risk from the forseeability, whereas the original French and official Arabic versions phrase the acceptance of the risk as an independent condition.

[265] See Court of Appeal of North Lebanon, decision n°1, 12 January 1952, in *Al-Mouhami* [The Lawyer], 1952, at 82.

[266] See *id*, and Court of cassation, 6th Chamber, decision n°127, 30 June 1998, in *Sader fil-tamyiz* [Sader in the cassation], 1998, at 563 where the Court held that "the fact that many bullets hit the victim in dangerous places in the body is a presumption of the existence of the intent to commit murder". See as well Court of cassation, 7th Chamber, decision n°8, 22 January 2004, in *Sader fil-tamyiz* [Sader in the cassation], 2004, at 906; Court of cassation, 7th Chamber, decision n° 24, 26 February 2004, in *Sader fil-tamyiz* [Sader in the cassation], 2004, at 919; Court of cassation, 6th Chamber, decision n°275, 19 October 2004, in *Sader fil-tamyiz* [Sader in the cassation], 2004, at 797.

[267] Court of cassation, 3rd Chamber, decision n°458, 27 November2002, in *Cassandre* 11-2002, at 1242.

[268] *Id.*, and Court of cassation, 3rd Chamber, decision n° 318, 10 July 2002, in *Cassandre* 7-2002, at 874. As noted above, the notion of *dolus eventualis* is provided for under Lebanese law in Article 189 of the criminal code. A perpetrator can be held responsible for a murder he did not intend to commit, if he however has foreseen the result of his conduct and accepted the risk of its occurrence.

intentional homicide, even though the victim dies because he or she hit the stones beneath the bridge and not because of drowning). We return to a more extended discussion of *dolus eventualis* below.[269]

166. The mens rea is not affected by the *motive* of the author to commit the crime. The motive plays a role in aggravating or mitigating the sentence only.[270] In addition, the criminal intent has to be contemporary to the criminal activity, and not necessarily to the criminal result, such as an individual who shoots a gun at the victim, then taken by regret, tries to medically assist her. In that case, even though the individual regrets his initial act (*repentir*), he nonetheless is held responsible for his criminal activity.

3. Premeditation

167. The Pre-Trial Judge asks specifically about *premeditated* intentional homicide. Both parties have agreed that under Lebanese law, premeditation is not an element of the crime, but an aggravating circumstance relevant to sentencing.[271] In this respect, the Pre-Trial Judge's question may be misleading in as much as it suggests premeditated homicide is a separate crime. This renders the question as written moot; however, for purposes of fairness, an overview of the Lebanese law on premeditation is necessary to ensure that an accused is fully informed of the charges against him, if these charges include premeditation.

168. The criterion required to prove premeditation is an initial plan to commit the crime, conceived and developed by the perpetrator.[272] As Lebanese courts have held, a premeditated murder is a well-conceived and designed crime, prepared with a clear and calm mind, and where the perpetrator's intent is revealed by a firm and lasting determination to commit the crime.[273] Premeditation is based on two elements: (i) a calm and clear mind while planning and executing the

[269] See paras 169, 175, 181-183, and 231-234.

[270] See Articles 192 to 195 of the Lebanese Criminal Code, and Court of cassation, 6th Chamber, decision n°88, 1st June1999, in *Cassandre* 6-1999, at 775.

[271] Article 549 of the Lebanese Criminal Code provides that a death penalty sentence is to be given to perpetrators of premeditated homicides.

[272] Criminal Court of Mount Lebanon, Judgment of 15 February 1975, in *Al-Adel* [Journal of the Beirut Bar], 1986, vol. 2, at 218.

[273] Court of Appeal of North Lebanon, decision n°1, 12 January 1952, in *Al-Mouhami* [The Lawyer], 1952, at 82; Court of cassation 7th Chamber, decision n°74, 31 March 1999, in *Cassandre* 3-1999, at 364. The Court held that the planning to commit the crime has to be accomplished with extreme care, and the execution has to follow the plan with the same care. Court of cassation, 6th Chamber, decision n°47, 9 March 1999, in *Cassandre 3*-1999, at 365: "The murder was the result of a rational mind, has been executed in cold blood and for selfish reasons and was previously planned and conceived".

crime,[274] so that the perpetrator is shown to be emotionally detached, not acting upon rage or anger,[275] and is therefore considered to be a dangerous criminal justifying the aggravating circumstance; (ii) the lapse of a period of time before the commission of the crime, which should allow the perpetrator to think, and plan, and regain calmness.[276] However, this second element is not predetermined. Instead, it is to be evaluated by the Judge according to the circumstances of each case.[277]

169. In light of the Pre-Trial Judge's twelfth question, it is necessary to examine more thoroughly the notion of *dolus eventualis* under Article 189 of the Lebanese Criminal Code. According to this Article, a crime is to be considered intentional even though the result exceeds the initial intent of the author, when this result is foreseeable by the author and when he accepted the risk his activity entails. Therefore, under Lebanese law, *dolus eventualis* involves two elements: the foreseeability of the criminal result, and the acceptance by the perpetrator of the potential risk his activity might produce. Indeed, it is the unwavering will of the perpetrator to proceed with his activity despite the risk of a potential criminal result which testifies to his desire to carry out the crime and renders the crime itself intentional.[278] Lebanese courts have often convicted individuals on the basis of *dolus eventualis*, when, in committing the initial crime against the intended victim, the perpetrator has caused the death of other victims. As noted by the Prosecutor,[279] this has been held in the *Karami* case, where the perpetrators were convicted of the murder of the passengers of the helicopter in which the intended victim was flying when the explosion occurred, on the basis of *dolus eventualis*.[280]

170. The Pre-Trial Judge's question (xii) refers to the case of a premeditated crime leading to the death of individuals other than the intended victim (that is, intentional homicide based on *dolus*

[274] Court of Cassation, 3rd Chamber, decision n°154, 15 April 1998, in *Cassandre* 4-1998, at 425.
[275] Court of Cassation, 3rd Chamber, decision n°11, 22 February 1994, in *Al-nashra al-kada'iya* [Revue Judiciaire] 1994, vol. 3, at 263
[276] Criminal Court of Mount Lebanon, Judgment of 28 February 1991, in *Al-Adel* [Journal of the Beirut Bar], 1992, vol. 1-4, at 432.
[277] Court of Cassation, 6th Chamber, decision n°37, 23 February 1999, in *Cassandre* 2-1999, at 217.
[278] Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 247.
[279] Prosecution Submission, para. 64.
[280] The Court has held that the perpetrator insisted on committing the crime, although he was perfectly aware that that would lead to the death of the helicopter's crew and passengers who were not the intended victim of the assassination, and in that respect he is to be held responsible of those murders on the basis of *dolus eventualis*. See p. 161 of the English translation.

eventualis). The important point in this case is that there is a single underlying act. Assuming the perpetrator premeditated that act, then his premeditation applies as an aggravating factor to all the criminal results. This is because, as Lebanese courts have held, what matters in assessing the degree of culpability of an accused for a premeditated homicide is the seriousness of the criminal intent even more than the result itself. For example, if the perpetrator committed an act with the premeditated and direct intent to kill a particular person, but he instead kills others (as a foreseeable result of his conduct), the crime remains a premeditated homicide even though the criminal activity led to the death of individuals other that the intended victim. Therefore, giving two legal characterisations to a single intentional act based merely on its result is wrong.[281] 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.

171. Thus it is wrong to suggest, as the Pre-Trial Judge's question might, that premeditation *applies to dolus eventualis*.[282] Rather, the crime committed by the perpetrator is an intentional homicide, committed with a *dolus eventualis*, and the sentence is to be aggravated due to the existence of a well-prepared and planned crime. This was held by the Court of Justice in a case of armed robbery in a jewellery store which resulted in the killing of the owners. The court asserted that "whereas the accused had foreseen the possibility of some resistance from the victims during the robbery, they both armed themselves with a military firearm, and, despite a potentially lethal result, planned to use this firearm. Therefore, all the elements of premeditation are fulfilled, because pursuant to Article 189 of the Lebanese Criminal Code, the Lebanese legislature made *dolus eventualis* equivalent in result to a direct intent".[283]

172. Thus if the base offence was premeditated—if the accused plotted his murder of a particular person—and the fact of premeditation led to additional deaths that were reasonably foreseeable, then under Article 549 of the Lebanese Criminal Code the premeditation of the base offence is an aggravating factor both of the targeted homicide and of the additional homicides. The accused should

[281] Criminal court of Beirut, 8th Chamber, Decision n° 1469, 5 March 1998, in *Al-nashra al-kada'iya* [Revue Judiciaire], 1998, vol. 3, at 304.

[282] In this respect, premeditation does not alter the elements of the crime, because applying premeditation to the subjective element of the crime leads to a distinction in the characterisation of the crime, between a summary offence, a misdemeanor or a felony.

[283] Court of Justice, decision n°1, 12 April 1994, in *Al-nashra al-kada'iya* [Revue Judiciaire], 1995, vol.1 at 3.

thus receive a more severe penalty when the homicides for which he is convicted on the basis of *dolus eventualis* resulted from a base offence that was premeditated.

173. This result is logical and just. In effect, if the accused carefully planned an intentional homicide which he knew might result in the deaths of additional persons, he should be held to greater account for those resulting incidental deaths than if the base offence were of a more spontaneous nature: he had the opportunity to reflect on the likely destructive consequences of his plan of action yet nonetheless coldly calculated to take the risk that others beyond his intended victim would also be harmed.[284]

174. Moreover, pursuant to Article 216 of the Lebanese Criminal Code,[285] material aggravating circumstances are applicable to perpetrators, co-perpetrators and accomplices alike. "Material" circumstances are those linked to the objective element of the crime; for example, breaking and entering is a material circumstance that aggravates the crime of theft. "Personal" circumstances, which are circumstances like premeditation that are linked to the subjective element of the crime, are also applicable to all participants in the crime, but only when these circumstances facilitated the commission of the crime; otherwise, "personal" circumstances are only applicable to the individuals to whom they relate. Therefore, premeditation on the part of the perpetrator is only applicable to accomplices if it facilitated the commission of the additional crime, or if the accomplices share the perpetrator's plan and calmness of mind.[286]

175. 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

[284] Court of Justice, *Rachid Karami case*, decision n° 2/1999, 25 June 1999, available on the STL website.

[285] Article 216 provides that: "The effects of material circumstances entailing aggravation or mitigation of or exemption from the penalty shall be applicable to all co-perpetrators and accomplices to an offence. The effects of personal or mixed aggravating circumstances that facilitated the commission of the offence shall also be applicable to them. The effect of any other circumstance shall be applicable only to the person to whom it relates".

[286] Ali Abed El-Kader Kahwaji, *Kanoun al-oukoubat, al-kism al-khass, jara'im al-itida'ala al-masslaha al-aama, wa ala al-insan wal-mal* [Criminal Law, Special section, Crimes against public interest, the human being and property], (Beirut, Al-Halabi publishers, 2002), at 269-270, where the author criticizes a Lebanese judgment which held that premeditation was a material aggravating circumstance. In the same line, Samir Alia. *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998.

direct intent or *dolus eventualis*) and to all perpetrators and accomplices who share the premeditation. If accomplices do not share the premeditation, the premeditation cannot be applied as an aggravating circumstance as to their culpability unless it facilitated the crime. The remaining aspect of the Pre-Trial Judge's questions regarding homicide is how to characterise the result of injury when the perpetrator acted with intent to cause death. This leads us to the treatment of attempt under Lebanese law.

B. Attempted Homicide

176. Under Lebanese law, the attempt to commit specific crimes is provided for in four Articles of the Lebanese Criminal Code:

> **Article 200**: Article 200 was amended by Article 21 of the Act of 5 February 1948, as follows:
>
> Any attempt to commit a felony that began with acts aimed directly at its commission shall be deemed to constitute the felony itself if its completion was prevented solely by circumstances beyond the control of the perpetrator.
> The penalties prescribed by law may, however, be commuted as follows:
> The death penalty may be replaced with hard labour for life or fixed-term hard labour for 7 to 20 years;
> Hard labour for life may be replaced with fixed-term hard labour for at least five years; life imprisonment may be replaced with fixed-term imprisonment for at least five years;
> Any other penalty may be commuted by one half to two thirds.
> Any person who begins to commit an act and then voluntarily desists shall be punished only for acts that he committed which constituted offences *per se*.
>
> **Article 201:** Article 201 was amended by Article 22 of the Act of 5 February 1948, as follows:
>
> If all acts aimed at the commission of a felony were completed but produced no effect owing to circumstances beyond the control of the perpetrator, the penalties may be commuted as follows:
> The death penalty may be replaced with hard labour for life or by fixed-term hard labour for 10 to 20 years;
> Hard labour for life may be replaced with fixed-term hard labour for 7 to 20 years.
> Life imprisonment may be replaced with fixed-term imprisonment for 7 to 20 years, and any other penalty may be commuted by up to one half.
> The penalties mentioned in this Article may be commuted by up to two thirds if the perpetrator voluntarily prevented his act from producing its consequence.
>
> **Article 202:** Article 202 was amended by paragraph 18 of Article 51 of Legislative Decree No. 112 of 16 September 1983, as follows:

Neither an attempted nor an abortive misdemeanour shall be punished except in cases explicitly provided for by law.
The penalty incurred for a completed misdemeanour may be commuted by up to one half in the case of an attempted misdemeanour and by up to one third in the case of an abortive misdemeanour.

Article 203: An attempt shall be punished, even if its aim was unattainable owing to a factual circumstance unknown to the perpetrator. The perpetrator shall not be punished, however, if his act stemmed from a lack of understanding.
Furthermore, a person who commits an act in the mistaken belief that it constitutes an offence shall not be punished.

177. According to Article 200 of the Lebanese Criminal Code, three elements constitute attempt under Lebanese law: (i) an objective element defined as the beginning of the execution of the crime, which consists in a preliminary action aimed at committing the crime[287]; (ii) a subjective element defined as the intent to commit the crime, namely the intent required for the completed offence; and (iii) the absence of a voluntary abandonment of the offence before it is committed.

178. Lebanese law requires a preliminary physical action that marks the beginning of the execution of the crime and should lead, within the normal course of events, to achieving the criminal purpose.[288] This physical act reveals also that the perpetrator's intent is aimed at committing the crime. Therefore a mere preparatory act is insufficient to establish the existence of an attempt.[289] In that respect, Lebanese law requires the preliminary action to reveal both the *actus reus* and the *mens rea* in order to criminalise the attempt.[290] As the Prosecutor notes, the court in the *Al-Halabi* case identified "the planning of an attack, the preparation of weapons, the surveillance of the target, and

[287] Court of cassation, 7th Chamber, decision n°81, 25 March 1997, in *Al-nashra al-kada'iya* [Revue Judiciaire], 1997, vol. 2, at 882 : «Toute tentative de crime manifestée par des actes tendant directement à le commettre».

[288] See Defence Office Submission, para. 150.

[289] Lebanese courts have often discussed the distinction between the beginning of the execution of a crime and a preparatory act. See the Indictment Court (*Chambre d'accusation*) in North Lebanon, decision n°175, 27 November 1995, *Al-Adel* [Journal of the Beirut Bar], 1995, vol. 1, at 429, where the Court held that: "distinguishing between a preparatory act, and the beginning of execution is a relative matter amounting to an evaluation of the nature and the circumstances surrounding the crime intended by the perpetrator [...]. The Lebanese judiciary considers that acts aiming at the commission of the crime are the ones directly connected to the desired result of the crime [...]. The mere preparatory act cannot be punished due to the absence of an objective element to the crime". Compare New Zealand, Court of Appeal, *R v Harpur*, [2010] NZCA 319 (23 July 2010), where the Court held the defendant liable for attempt where his conduct demonstrated a clear intent to complete the offence; he performed a number of acts that, taken together, demonstrated that he had "moved beyond mere preparation"; and his conduct "was proximately connected with the intended offence".

[290] Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 224-225.

the division of roles among the perpetrators" as acts that were aimed directly at the commission of the crime, as required by Article 200.[291]

179. In addition, the beginning of the execution of the crime must be suspended or must have failed due to circumstances independent of the perpetrator's will or beyond his control.[292] On the other hand, the abandonment is considered to be voluntary when it is taken by the perpetrator himself. In that respect, the various reasons motivating the voluntary abandonment, such as pity or remorse, are not pertinent; either way, the attempt to commit the crime ceases to exist. The abandonment can also be partial, such as in the case of a thief who, while breaking into a house, hears some noise and abandons his crime out of fear. Some have said that this is a voluntary abandonment. Others have gone against it. The solution that might be given to such a controversial situation is to leave it to the Judge's evaluation, who decides on a case-by-case basis. Be that as it may, if the abandonment occurs after the commission of the crime, it is no longer a valid abandonment, but a repentance (*repentir actif*) which has no effect on the legal consequences of the criminal act, and does not erase its criminal nature.

180. An additional note should be made to a specific kind of attempt: the abortive offence. Article 201 of the Lebanese Criminal Code provides that these offences occur when all acts aimed at the commission of the crime were completed but produced no effect owing to circumstances beyond the control of the perpetrator.[293] In this respect, the distinction between an attempt to commit a certain crime and an aborted offence is mainly relevant with regard to the sentence to be imposed: Article 202 of the Lebanese Criminal Code provides that the penalty incurred for a completed offence may be commuted by up to one half in the case of attempt but only up to one third in the case of abortive offences.

181. Finally, the situation where a perpetrator commits an intentional homicide against an intended victim and in doing so injures other victims draws some controversy. A first opinion would be to consider that the perpetrator is responsible for personal injury, committed with *dolus eventualis*, based on the assumption that since the perpetrator did not plan a criminal action against the other victims, he should be held responsible only for the actual result of his crime. However, this

[291] Prosecution Submission, para. 61

[292] Court of Cassation, 7th Chamber, decision n° 102, 19 March 2002, in *Cassandre* 3-2002, at 321.

[293] Beirut Criminal Court, decision n° 135, 10 October 1996, *Al-nashra al-kada'iya* [Revue Judiciaire], 1996, vol. 1, at 214.

line of thought artificially separates the crime from the perpetrator's intent. The perpetrator's mind is orientated towards the commission of the homicide. Therefore it would seem more logical to hold him responsible for an attempted murder, rather than for personal injury, but this might depend on the specific circumstances of the case.

182. According to all that is mentioned above, an attempt to commit an intentional homicide has occurred, pursuant to Articles 547 and 200 of the Lebanese Criminal Code, when the perpetrator has direct intent to commit homicide and began executing the elements of the crime but did not reach the intended result due to circumstances beyond his control. Where the perpetrator has *dolus eventualis* for intentional homicide against unspecified victims, and where all the elements of the crime have been executed but have not attained the expected result due to circumstances beyond the control of the perpetrator, leading to personal injury instead of death, there has been an aborted offence, pursuant to Articles 547 and 201 of the Lebanese Criminal Code. Finally, if the intended crime was premeditated, the attempt or aborted offence to achieve that crime warrants an aggravated sentence under Article 549 and pursuant to Article 200, which provides that the attempt shall be deemed to constitute the crime itself if its completion was prevented solely by circumstances beyond the control of the perpetrator.

183. In answering the Pre-Trial Judge's question (iv) above regarding the death and injury of unintended victims of a terrorist act,[294] we asserted that the perpetrator might be separately liable for the underlying crime and deferred further discussion until we had discussed the specifics of those crimes. Returning to this question, we can now add that, with regard to the death of unintended victims, the perpetrator is responsible for an intentional homicide on the basis of *dolus eventualis* if he had foreseen the possibility of the additional deaths and accepted the risk of their occurrence. With regard to unintended victims who were injured, the perpetrator is responsible for an aborted intentional homicide, because although the perpetrator has executed all the elements of the crime of intentional homicide with *dolus eventualis*, he did not achieve the expected result for reasons beyond his control.

[294] See above, para. 59.

C. Summary

184. To repeat our answers more concisely to the Pre-Trial Judge's questions, the Tribunal should apply the Lebanese law of intentional homicide (question (ix)). This renders question (x) moot.

185. The elements of the Lebanese crime of intentional homicide (question (xi)) are:

a. An act or a culpable omission aimed at impairing the life of another 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, whether direct or *dolus eventualis*.

186. Premeditation is an aggravating circumstance, not an element of the crime of intentional homicide. It is a well-conceived and designed plan, prepared with a clear and calm mind and demonstrating a firm and lasting commitment to perpetrate the crime.

187. The elements of attempted homicide under Lebanese law are:

a. A preliminary act aimed at committing the crime (the beginning of 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.

188. As for question (xii), premeditation can be, in the case discussed above at paragraph 171, an aggravating circumstance for an intentional homicide committed with *dolus eventualis*.

III. Conspiracy (*Complot*)

189. Regarding conspiracy, the Pre-Trial Judge has asked:

> v) In order to interpret the constituent elements of the notion of conspiracy, should the Tribunal take into account, not only Lebanese law, but also conventional or customary international law?
>
> vi) Should the question raised in paragraph v) receive a positive response, is there any conflict between the definition of the notion of conspiracy as recognised by Lebanese law and that arising out of international law, and if so, how should it be resolved?
>
> vii) Should the question raised in paragraph v) receive a negative response, what are the constituent elements of the conspiracy that must be taken into consideration by the Tribunal, from the point of view of Lebanese law and case law pertaining thereto?
>
> viii) As the notions of conspiracy and joint criminal enterprise might, at first sight, share some common elements, what are their respective distinguishing features?

190. Under Lebanese law, conspiracy is provided for in two articles:

> **Article 270 of the Lebanese Criminal Code:** "Any agreement concluded between two or more persons to commit a felony by specific means shall be qualified as a conspiracy".
>
> **Article 7 of the Law of 11 January 1958:** "Every person who enters into a conspiracy with a view to the commission of any of the offences contemplated in the preceding articles shall be liable to the death penalty".

191. We answer question (viii) first, as this will clarify the remainder of the discussion: Lebanese criminal law treats conspiracy as a (fairly particular) substantive crime and not as a mode of liability. On the other hand, the doctrine of joint criminal enterprise relates to modes of criminal responsibility for participating in a group with a common purpose.[295] Although, as the Prosecutor and Defence Office point out, both conspiracy and joint criminal enterprise are based on the existence of an agreement or common purpose, they are entirely distinct concepts.[296]

192. Turning to question (v), we agree with the Prosecution[297] and the Defence Office[298] that the Tribunal must apply Lebanese law, pursuant to Article 2 of the Statute. As with intentional homicide,

[295] See below, paras 236-262.
[296] Prosecution Submission, para. 45; Defence Office Submission, paras 136 and 139.
[297] Prosecution Submission, para. 37.
[298] Defence Office Submission, para. 126.

and also in accord with the positions of the Prosecution and Defence Office,[299] we find no need to interpret the Lebanese law of conspiracy in light of international customary or conventional law, as international criminal law includes no equivalent crime.[300] Thus question (vi) is moot, and we focus our attention on question (vii): identifying the elements of the crime of conspiracy under Lebanese law.

193. Conspiracy in Lebanese law is considered as a form of "criminal agreement", i.e. an agreement between two or more individuals to commit a crime. While Articles 335 to 339 of the Lebanese Criminal Code prohibit other, more inclusive forms of criminal agreement such as "criminal associations" and "secret societies", the crime of conspiracy must involve a criminal plan that threatens security and public order in a State.[301] The intent of the Lebanese legislature to restrict the crime of conspiracy to crimes that threaten State security is revealed by the positioning of the articles related to conspiracy in the Criminal Code. Article 270 is found in Book II, Chapter I of the Criminal Code, titled: "Offences against State security", whereas Article 7 of the Law of 11 January 1958 is found under Chapter II of Title I: "Offences against internal State security" (as it replaces Article 315 of the Criminal Code).

194. Based on the provisions mentioned above, it is possible to identify five elements of the crime of conspiracy[302]: (i) two or more individuals; (ii) concluding or joining an agreement; (iii) aiming at committing crimes against the security of a State; (iv) with a predetermination of the means to be used to commit the crime; and finally (v) a criminal intent.[303]

195. (i) *Two or more individuals:* Conspiracy is a bilateral or multilateral agreement. But there is no requirement concerning the identification of all the participants. This means that a single person

[299] Prosecution Submission, para. 38; Defence Office Submission, para. 129.

[300] As the Defence Office notes (paras 129-130), the only substantive crime of conspiracy that has developed in international criminal law is the conspiracy to commit genocide, which is materially distinct from the crime referred to as "conspiracy" under the Lebanese Criminal Code, namely the conspiracy to commit a crime that will threaten State security.

[301] See para. 198.

[302] Court of Justice, *Ballamand Monastry case,* decision n° 124/1994, 26 October 1994, cited in Elias Abou Eid, *Al-qararat al-kubra fi al-ijtihad al-loubnani wal-moukaran* [The major decisions in Lebanese and comparative jurisprudence], vol. 22, at 98. It should however be noted that the Lebanese case law on conspiracy is very sparse. In the aforementioned case, although the Court did not convict the accused of conspiracy, it however identified all the constituent elements of the crime.

[303] Mohammed El-Fadel, *Jara'im amen al dawla,* [Crimes against State security], 2nd ed., (Damascus: Damascus University publishings,1963), at 83.

can be tried for conspiracy, when it is proved that he agreed with others to commit the relevant crime, even though these "others" remain unknown.[304]

196. (ii) *An agreement:* Seen as a merger of wills, the agreement is reached when the conspirators agree completely, and their agreement is final. It falls to the prosecution to prove these elements and that the conspirators' wills were consolidated and united towards committing the crime. Furthermore, no specific form for the agreement is required. The simple combination or fusion of wills is enough. Even though it is unlikely for a conspiracy agreement to be created otherwise, no secrecy in the process is required. The agreement can be conditional, depending on a foreseeable particular circumstance or a likely future event. In other words, the conspirators can agree on the commission of the crime if the circumstance or the event occurs. For conspirators joining the conspiracy later, they must also meet this merger of wills requirement. Finally, no explicit time-line is required for the validity of the agreement. The agreement stands, even though it is a long-term one or has no predefined or foreseen term.

197. (iii) *The aim of the agreement is to commit a crime against the security of the State:* As mentioned above, the agreement has to be geared to the commission of a particular type of crime. The word "crime" is used here *stricto sensu*, to indicate a felony. Therefore, no conspiracy is possible for misdemeanours, unless provided separately by the law. Furthermore, a specific type of crime is designated, as opposed to all crimes: those committed against State security. The need for a specific aim is justified by the fact that conspiracy draws its criminal characterisation from the criminal classification of the purpose that the conspirators aim to achieve. Therefore, if an agreement between two or more individuals was not directed at committing a crime against State security, but was aimed at committing a different crime, it cannot be considered a "conspiracy". It may, however, be characterised as a "criminal association" under Article 335 of the Lebanese Criminal Code. In a conspiracy to commit terrorism, the purpose of the conspirators must therefore be the commission of an act of terrorism. Conspiracy to commit terrorism is expressly penalised under Article 7 of the Law of 11 January 1958.

198. The crimes against State security are listed in articles 273 to 320 of the Lebanese Criminal Code. In addition to terrorism, they include: treason, espionage, illegal relations with the enemy,

[304] Mohammed El-Fadel, *Jara'im amen al dawla,* [Crimes against State security], 2nd ed., (Damascus: Damascus University publishings,1963), at. 89.

violations of international law, the infringement of the State's prestige and of the "national sentiment" (*sentiment national*), crimes committed by suppliers (during war time), crimes against the Constitution, the illegal exercise (*usurpation*) of a civil or political power or of a military command, sedition, terrorism, crimes against national unity, or crimes disturbing the harmony between the people, the infringement of the State credit, or financial position (*le crédit de l'Etat*). However, the jurisdiction of this Tribunal only extends to conspiracy to commit acts of terrorism.[305]

199. (iv) *The means used to commit the crime:* The agreement has also to contemplate the means and tools that the conspirators want to use to commit the crime. The agreement would be incomplete, and the conspiracy would not stand, if the conspirators did not agree on the means to achieve their aim.[306] However, a precise determination of the means is not required. If the conspirators agree that they will use a means described as terrorist, it is sufficient to say that they agree on the means to execute the agreement. In this respect, the conspiracy to commit a terrorist act must include agreement on means meeting the requirements of Article 314, in other words, means liable to create a public danger.

200. (v) *The criminal intent:* Conspiracy is an intentional crime. The intent must relate to the object of the conspiracy: the perpetrators are aware that the purpose of conspiracy is to engage in criminal conduct against State security. Further, the mere existence of the agreement fulfils the criminal intent.[307] Criminal intent does not materialise if a co-conspirator believed that the conspiracy, which afterwards turned out to be unlawful, was instead lawful. As with all intentional crimes, the motive is not taken into consideration, unless to mitigate or aggravate the sentence. With regard to attempt, it does not exist in conspiracy. Before the merger of wills, there is no crime; after the merger of wills, the crime of conspiracy has already been executed. As the Prosecutor notes, "Under Article 270 of the [Lebanese Criminal Code], the agreement '*is the crime itself*'. Conspirators are punishable even though they did not materialise their agreement to commit felonies

[305] See Article 2 STLSt.

[306] Mohammed El-Fadel, *Jara'im amen al dawla*, [Crimes against State security], 2nd ed., (Damascus: Damascus University publishings,1963), at 94.

[307] Samir Alia, *Al-wajiz fi chareh al-jara'im al-wakiaa aala amen al-dawla – Dirassa moukarana* [Explanation of the Crimes committed against State security – Comparative study], 1st edn. (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1999, at 88.

against state security."[308] Thus there can be no "attempted conspiracy". All conduct preceding this merger is but a mere preparatory act.[309]

201. In addition, without entering into details with regard to modes of liability, which will be examined below, special attention should be paid to complicity to commit conspiracy. Complicity is admissible in conspiracy, since an accomplice can in fact bring his support to the crime without adhering to the agreement itself, such as in the case of an individual offering his residence as a meeting point for the conspirators, or acting as an intermediary to bring together the conspirators. The accomplice must rely on the means provided for in Article 219 of the Lebanese Criminal Code,[310] without entering the agreement and without participating in establishing the plans or deciding on the means. He however should be *aware* of his participation in the commission of conspiracy.[311]

202. To summarise our answers to the Pre-Trial Judge's questions: The Tribunal should apply the Lebanese law of conspiracy (question (v)). This renders question (vi) moot. The elements of conspiracy under Lebanese law (question (vii)) are:

a. Two or more individuals;

b. Who conclude or join an agreement;

c. Aimed 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);

e. The existence of a criminal intent.

[308] Prosecution Submission, para. 51 (quoting Judgment No3/1994, 26 October 1994) (footnote omitted).

[309] Mohammed El-Fadel, *Jara'ım amen al dawla*, [Crimes against State security], 2nd ed., (Damascus: Damascus University publishings,1963), at 97.

[310] We discuss Article 219 further below, see paras 218-224.

[311] Mohammed El-Fadel, *Jara'im amen al dawla*, [Crimes against State security], 2nd ed., (Damascus: Damascus University publishings,1963), at 98-99, Samir Alia, *Al-wajız fi chareh al-jara'ım al-wakiaa aala amen al-dawla – Dırassa moukarana* [Explanation of the Crimes committed against State security – Comparative study], 1st edn. (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1999, at 80-81.

203. Finally, as for question (viii), the notions of conspiracy (under Lebanese law) and joint criminal enterprise are distinct: the former is a substantive crime, the latter is a mode of criminal responsibility.

SECTION II: MODES OF RESPONSIBILITY

I. Harmonising Articles 2 and 3 of the Tribunal's Statute

204. Close scrutiny of Articles 2 and 3 of the Tribunal's Statute shows that, in some respects, these two provisions may overlap, because they both deal with modes of responsibility (although Article 2 also contemplates the crimes subject to the Tribunal's jurisdiction). It is this ambiguity that motivates the Pre-Trial Judge's thirteenth question:

> xiii) In order to apply modes of criminal responsibility before the Tribunal, should reference be made to Lebanese law, to international law or to both Lebanese and international law? In this last case, how, and on the basis of which principles, should any conflict between these laws be resolved, with specific reference to commission and co-perpetration?

In answering this question, we will also discuss in greater depth questions (iv) and (xii), which relate to the characterisation of offences in the presence of *dolus eventualis*.

205. Article 2 states that the Tribunal shall apply provisions of the Lebanese Criminal Code relating to "criminal participation" (as a mode of responsibility) and "conspiracy", "illicit association" and "failure to report crimes and offences" (as crimes *per se*).

206. Article 3 incorporates principles of international criminal law regarding various modes of criminal liability, including commission, complicity, organising or directing others to commit a crime, and contribution to the commission of crimes by a multitude of persons or an organised group. The language of Article 3 draws verbatim from the Statutes of the ICC, the ICTY, the Nuremberg International Military Tribunal, and the more recent international conventions against terrorism; it reflects the status of customary international law as articulated in the case law of the ad hoc tribunals.[312] It thus implicitly incorporates into the Tribunal's Statute the body of international law setting out and applying these principles of individual criminal responsibility. However, as the Secretary General noted in his report to the Security Council on the establishment of this tribunal,

[312] Compare Article 3(1)(b) of the STL Statute to Article 25(3)(d) of the Rome Statute of the ICC, Article 2(3) of the International Convention for the Suppression of Terrorist Bombing, and Article 2(4) of the International Convention for the Suppression of Acts of Nuclear Terrorism; Article 3(2) of the STL Statute to Article 28(b) of the Rome Statute of the ICC; and Article 3(3) of the STL Statute with Article 7(4) of the ICTY Statute and Article 8 of the Charter of the IMT. See also Article 7(3) ICTYSt; Article 33 ICCSt; *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, S/2006/893 (2006), para. 26. See also cases cited below in footnotes 355-362.

Article 3(1)(a) also "reflect[s]" the Lebanese Criminal Code,[313] presumably the provisions on criminal participation referenced in Article 2.

207. Since the matters covered by Article 2 are regulated by Lebanese law, whereas the concepts envisaged in Article 3 are governed by international criminal law, the question before us is how to harmonise the two bodies of law whenever there appears to be inconsistencies or differences in legal regulation.

208. According to the Prosecutor, while the Statute does not provide any express rule on the hierarchy applicable to the modes of criminal responsibility set out in Articles 2 and 3 of the Statute, the sentence in Article 2 "subject to the provisions of the Statute" "could be interpreted to mean that Article 3 modes of responsibility take precedence over any conflicting provision of the Lebanese law made applicable under Article 2, thereby indicating a preference for Article 3 modes of criminal responsibility over those in Lebanese law".[314] However, according to the Prosecutor, the better interpretation is that the Statute "allows for the application of modes of criminal responsibility from both Lebanese law and international criminal law",[315] with the consequence that "there exists no actual conflict between Articles 2 and 3" of the Statute.[316] The Prosecutor goes on to say that "no issue relating to conflicting modes of criminal responsibility arises so long as the Prosecutor has specified the meaning and elements of any mode of criminal responsibility it [*sic*] alleges in an indictment".[317] Insisting on the practical side of the application of the two provisions in question, the Prosecutor notes that "in any case, any potential unfairness or legal difficulty arising out of charges based on provisions from both Articles 2 and 3 may be resolved prior to trial and in any case would not result in any prejudice or unfairness to an accused".[318] In the Prosecutor's view, "[c]onsistent with the aims of uncovering the truth and ensuring the highest international standards of justice, the mode [of criminal responsibility] that most accurately captures the conduct of an accused may be applied".[319]

[313] S/2006/893 (2006), para. 26.
[314] Prosecution Submission, para. 71.
[315] Prosecution Submission, para. 85.
[316] Prosecution Submission, para. 107.
[317] Prosecution Submission, para. 89.
[318] Prosecution Submission, para. 107.
[319] Prosecution Submission, para. 107.

209. The Defence Office takes a radically different view. In its opinion Lebanese criminal law is "the controlling law" for the Tribunal with regard both to the definition of crimes and to modes of responsibility, since one may not disentangle one "segment" of law from the other: as both areas of criminal law are subjected to and safeguarded by the principle of legality, the exclusive application of Lebanese criminal law to crimes under the Tribunal's jurisdiction perforce entails that also modes of responsibility must be exclusively regulated by Lebanese criminal law. In consequence:

> If the Tribunal's Statute provides for a particular mode of liability but that [*sic*] this particular mode of liability did not exist in Lebanese criminal law (the *controlling* body of criminal law) at the relevant time, the Tribunal would have no authority to apply it. The same would be true where an international tribunal applies a form of liability that does not exist in the *controlling* legal order (Lebanese criminal law for the STL; customary international law for the ICTY). In *Stakic*, for instance, the ICTY Appeals Chamber found that the Trial Chamber had erred when relying upon a doctrine of liability ("co-perpetratorship") that did not exist in its *controlling* legal order (i.e., customary international law). Where a mode of liability is either absent from the text of the Statute or is provided for in the Statute but did not exist under Lebanese criminal law at the relevant time, the Tribunal would have to refuse to apply that particular mode of liability as it would fall beyond the realm of its permissible statutory framework (as is set by a combination of the text of the Statute and a *renvoi* to Lebanese criminal law) and would violate the principle of legality.[320]

According to the Defence Office this approach would mean that, should the Prosecution seek to indict any individual on the basis of Article 3(1)(b), "the Pre-Trial Judge would [...] be required to decline to do so with a view to remain[ing] within the permissible boundaries of his jurisdiction and to protect the principle of legality".[321] Another consequence that the Defence Office draws from its general approach to modes of responsibility in the Statute, is that "neither of the 'modes of liability' provided in Article 3(2) and 3(1)(b) of the Statute are applicable to proceedings before this Tribunal."[322]

210. In the end, we agree with neither the Prosecution nor the Defence Office. Several principles guide our analysis, and should also guide the Pre-Trial Judge and the Trial Chamber when they consider specific cases before them. The Tribunal must reconcile any inconsistencies between Articles 2 and 3 in light of the general principles of interpretation enunciated above. First, as discussed above regarding the definition of terrorism, the drafters of the Statute favoured Lebanese law over international criminal law in terms of substantive crimes, as set out in Article 2. However,

[320] Defence Office Submission, para. 153.
[321] Defence Office Submission, para. 163.
[322] Defence Office Submission, para. 165.

and this is our second remark, Article 2 also includes the proviso that Lebanese law, including the regulation of "criminal participation", should apply "subject to the provisions of this Statute", and it is clear that the drafters of the Statute intended to incorporate through Article 3 modes of criminal responsibility recognised in international criminal law. The Appeals Chamber cannot just assume that Article 3 was a mistake and should not be considered part and parcel of the Statute. Third, the principle of *nullum crimen* (in particular, its non-retroactivity requirement) applies not only to substantive crimes, but also to modes of criminal responsibility.

211. Applying these three principles, we conclude that generally speaking the appropriate approach is to (i) evaluate on a case-by-case basis whether there is any actual conflict between the application of Lebanese law and that of the international criminal law embodied in Article 3; (ii) if there is no conflict, apply Lebanese law; and (iii) if there is a conflict, apply the law that would lead to a result more favourable to the rights of the accused.

212. We do not undertake here a comprehensive survey of the modes of criminal responsibility that may be charged and prosecuted before this Tribunal. Instead we consider two particular modes: (i) perpetration and co-perpetration, under Lebanese and international law (including joint criminal enterprise as a mode of perpetration and co-perpetration under international law), as specifically mentioned by the Pre-Trial Judge in question (xiii); and (ii) complicity (or aiding and abetting), which shows how a conflict between Lebanese and international criminal law could result in the application, in this particular instance, of Lebanese law.[323]

[323] We do not, for example, consider "instigation", a significant mode of criminal responsibility under Lebanese law.

II. Modes of Liability

A. Perpetration and Co-Perpetration

1. Lebanese Law

213. Pursuant to Article 212 of the Lebanese Criminal Code, "[t]he perpetrator [*auteur*] of an offence is anyone who brings into being the constitutive elements of an offence or who participates directly in its commission". Thus, the perpetrator must have accomplished the objective and subjective elements of the crime. A co-perpetrator (*co-auteur*) is anybody who has cooperated in the execution of those elements. Under Article 213 of the Lebanese Criminal Code, "[e]ach of the co-perpetrators of an offence shall be liable to the penalty prescribed by law for the offence".

214. In what we will term "core" co-perpetration, a co-perpetrator is a person who executes the same action as the perpetrator. For instance, according to the Lebanese Court of cassation, the second defendant who, sharing the same mens rea, had fired on the victim who had remained alive after being shot at by the first defendant must be considered as co-perpetrator.[324]

215. Lebanese law also recognises cases where the co-perpetrator might commit some but not all of the objective elements of the crime, or even provide a supporting or instigative role in the crime without himself committing it. For example, a co-perpetrator may participate in a crime that requires multiple actions (thus, the forgery of a document may be committed by two persons, one forging the content of the document, the other the signature). Under the second form of perpetration mentioned in Article 212 of the Lebanese Criminal Code, namely a direct contribution to the commission of the crime, the agent who plays a principal and direct role in the commission of the crime can also be a co-perpetrator, even though his role does not fulfil all the objective elements of the crime (for example, in the event of a theft, one person knocks down the door of a house while another steals the money inside).[325] In the *Attempted Assassination of Minister Michel Murr* case, the Court of Justice noted that two defendants who helped plan a car bombing—by devising the plan, supervising its implementation, arranging for surveillance of the target, and making preparations for the execution

[324] Court of Cassation, decision n° 170, 24 May 2000, in *Cassandre* 2002 See also Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 301.
[325] *Id* at 301-302 and footnote 73, where the author cites relevant Lebanese cases.

of the crime—"participated in bringing about elements of the crimes of intentional homicide and attempted homicide" and thus were guilty as co-perpetrators of those crimes under Article 213 of those Lebanese Criminal Code.[326] Further, under Article 213, such a co-perpetrator would receive a heavier penalty if he "organizes the participation in the offence or directs the action of the persons taking part in it". These additional concepts of co-perpetration, however, will be considered in greater depth below, under "Participation in a Group with a Common Purpose."

2. International Criminal Law

216. The essential concepts of international criminal law on this subject are not dissimilar from the core concept described above. The perpetrator, according to international criminal law, includes whoever physically carries out the prohibited conduct, with the requisite mental element. When a crime is committed by a plurality of persons, all persons performing the same act (as for instance in the case of a military unit firing on civilians) are termed co-perpetrators, namely persons who take part in the actual commission of the crime, with the same mens rea.[327]

3. Comparison between Lebanese and International Criminal Law

217. The above examination shows that the two sets of rules in fact overlap in terms of perpetration and the core concept of co-perpetration (where all actors engage in the objective and subjective elements of the crime). Thus both international and Lebanese case law may be considered in applying the notion of core co-perpetration. Although Lebanese law includes additional concepts of co-perpetration, such concepts are more akin to the notion of Joint Criminal Enterprise ("JCE") in international criminal law and will be considered below under "Participation in a Group with a Common Purpose."

B. Complicity (Aiding and Abetting)

1. Lebanese Law

218. Article 219 of the Lebanese Criminal Code provides as follows:

[326] See *Murr case* at p. 54 of the English translation, available on the STL website.

[327] United States Military Commission, *Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy* ("The Jaluit Atoll Case"), Case No. 6, 7 December 1945 – 13 December 1945, United Nations War Crimes Commission – Law Reports of War Criminals, Vol. I, p. 71.

Article 219 was amended by Article 11 of Legislative Decree No. 112 of 16 September 1983, as follows.

The following shall be deemed to be accomplices to a felony or misdemeanour:

1 Anyone who issues instructions for its commission, even if such instructions did not facilitate the act;
2 Anyone who hardens the perpetrator's resolve by any means;
3 Anyone who, for material or moral gain, accepts the perpetrator's proposal to commit the offence;
4 Anyone who aids or abets the perpetrator in acts that are preparatory to the offence
5 Anyone who, having so agreed with the perpetrator or an accomplice before commission of the offence, helped to eliminate the traces, to conceal or dispose of items resulting therefrom, or to shield one or more of the participants from justice;
6 Anyone who, having knowledge of the criminal conduct of offenders responsible for highway robbery or acts of violence against state security, public safety, persons or property, provides them with food, shelter, a refuge or a meeting place.

219. The *objective* elements of complicity are (i) an understanding (whether immediate or long-standing),[328] (ii) assistance in a form specified in Article 219,[329] and (iii) conduct by the perpetrator amounting to a crime. As to the second element, Lebanese case law has insisted on the notion that no conduct other than that enumerated exhaustively in the six subheadings of Article 219 may amount to complicity.[330] As these six forms of accomplice liability make clear, however, the assistance can be provided (i) before the crime, such as in the examples mentioned under subparagraphs 1, 2 and 3, (ii) during the perpetration of the crime, amounting to the sole example under subparagraph 4, or (iii) thereafter, as in subparagraphs 5 and 6.

220. The *subjective* elements are: (i) *knowledge* of the intent of the perpetrator to commit a crime; and (ii) *intent* to assist the perpetrator in his commission of the crime.[331] Thus, the fact of indicating

[328] Court of cassation, 3rd Chamber, decision n° 457, 17 November 2002, in *Al-Adel* [Journal of the Beirut Bar] 2003, at 261; 3rd Chamber, decision n° 30, 29 January 2003, in *Cassandre*, 1-2003, at 87; 3rd Chamber, decision n° 171, 2 July 2003, in *Cassandre*, 7-2003, at 120.

[329] Beirut Court of Appeal, criminal Chamber, decision n° 277, 18/12/2007, *Al-Adel* [Journal of the Beirut Bar], 2008, vol. 2, at 886.

[330] See Court of cassation, 5th Chamber, decision n°112, 25 March 1974, in S. Alia (ed). *majmouat ijtihadat mahkamat al-tamyiz* [Samir Alia's collection of the Court of cassation decisions], at 188; Court of cassation, 7th Chamber, decision n°8, 11 January 2000, *Sader fil-tamyiz* [Sader in the cassation], 2000 at 849. See also Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 319.

[331] See Court of cassation, 7th Chamber, decision n° 8, 11 January 2000, in *Cassandre* 1-2000, at 94; Court of Cassation, 3rd Chamber, decision n° 457, 27 November 2002, in *Al-Adel* [Journal of the Beirut Bar], 2003, vol. 2-3, at 261; Beirut Criminal court, decision n°29, 18 December 2007, in *Al-Adel* [Journal of the Beirut Bar], 2008, at 886. Court of cassation 3rd Chamber, decision n° 171, 2 July 2008, in *Cassandre* 7-2008, at 120

to the perpetrator the house of the victim and ascertaining the victim's schedule to assist in the commission of the crime would amount to complicity.[332] Instead, bare knowledge that a crime will be committed or its perpetration is being prepared but without any conduct by way of assistance; or, by contrast, the provision of assistance without awareness that such assistance is designed to help commit a crime, do not amount to complicity.[333]

221. If the crime actually committed is less serious than that for which the accomplice had provided his assistance (for instance, he had provided a weapon to kill the victim, whereas the perpetrator, at the moment of committing the crime, decided to use the weapon not to kill the victim but only the wound him or her), then the accomplice is responsible for the crime actually committed, even if less serious than the one he had intended. If the crime committed is more serious than that for which the accomplice had given his assistance (for instance, the accomplice had intended to provide his assistance for the execution of robbery, whereas the perpetrator killed a person), the accomplice is only guilty for the less serious crime, unless the prosecutor can prove that he had foreseen the possibility of perpetration of the more serious crime and willingly took the risk of its commission (*dolus eventualis*).[334] A third scenario is to be envisaged as well, such as if the intended offence was altered by aggravating circumstances. In this case, the provisions of Article 216 of the Lebanese Criminal Code as explained under paragraph 174 above apply.

222. Article 220 further provides: "An accomplice without whose assistance the offence would not have been committed shall be punished as if he himself were the perpetrator." Whenever the accomplice plays a minor role with respect to that of the principal perpetrator, his penalty will be less heavy. If instead his role is crucial, in that, under Article 220, the perpetration is impossible without his participation, his guilt is equal to that of the principal perpetrator and the penalty is the same.[335]

223. Lebanese case law has specified that (i) complicity may consist of an omission, in which case the accomplice is punished if he was duty bound to prevent commission of the crime and has

[332] Court of cassation, 5th Chamber, decision n° 41, 22 July 1972, in in S. Alia (ed). *majmouat ijtihadat mahkamat al-tamyiz* [Samir Alia's collection of the Court of cassation decisions], vol. 3, at 172).

[333] Court of cassation, criminal Chamber, decision n° 112, 25 March 1974, in S. Alia (ed) *majmouat ijtihadat mahkamat al-tamyiz* [Samir Alia's collection of the Court of cassation decisions], vol. 4, at 188; Court of cassation, criminal Chamber, decision n° 135, 28 June 1995, in *Cassandre* 6-1995, at 97.

[334] Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 330-331.

[335] Court of cassation, 7th Chamber, decision n° 123, 21 June 2004, in *Cassandre* 6-2004, at 1028.

refrained from accomplishing his duty (this for instance applies to police officers), or where the passive conduct of the accomplice amounts to strengthening the resolve of the perpetrator to commit a crime;[336] (ii) complicity is punished even if the primary author of the crime is not punishable (for instance, he is a minor or is mentally incapacitated); (iii) where the perpetrator is guilty of an attempted crime, complicity is punished if the perpetrator has commenced the execution of the crime; (iv) complicity is punished even if the crime was committed abroad and falls under foreign jurisdiction; (v) conversely, if the crime is committed in Lebanon but the action by an accomplice took place abroad, complicity shall nevertheless be punished in Lebanon.

224. A case of complicity in terrorism is *Bombing of the Church of our Lady of Deliverance in Zouk Mikayel* (decision of 13 July 1996, no. 4/1996). The Court of Justice found that a defendant was an accomplice to terrorism where his acts:

> were confined to aiding and abetting the perpetrators in their preparation for the bombing by attending the meetings that were held to plan the operation, by helping to assemble one of the explosive devices, and by providing guidelines for the execution of the bombing operation, in the form of a sketch of the interior and exterior of the church, which enabled the perpetrators to determine the manner in which they should enter the church and the time and place at which they should plant the two explosive devices therein. He did that in full awareness of the perpetrators' intent.[337]

2. International Criminal Law

225. Aiding and abetting an international crime involves participating in the crime by assisting the principal in the commission of the criminal offence in the knowledge that the conduct of the principal perpetrator is criminal, even if the accomplice does not share the precise criminal intent of the principal perpetrator.

226. The *objective element* of accomplice liability is the accomplice's practical assistance, encouragement, or moral support to the principal perpetrator. In addition, such assistance or support

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[336] See Mount-Lebanon Indictment Chamber (*Chambre d'accusation*), decision n° 304/1993, 21 October 1995, in R. Riachi (ed.), *Majmouat ijtihadat al-hay'a al-ittihamiy - tatbikat amaliya lil kaida al-kanouniya* [Collection of the decisions of the indictment Chamber - application of legal concepts], 3rd ed. (Beirut: Sader publishings, 2010), at 217. This would be the case of a husband who drives his wife to rob a bank, and waits for her outside in the car, or the example of a man who accompanies his mistress to the clinic where she is scheduled for an abortion (in the countries where abortion is prohibited), in which case he has provided the doctor, perpetrator of the abortion, with the necessary moral support or moral incentive to proceed with the said abortion. See also Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 320-321, and footnote 130 where the author cites relevant Lebanese cases.

[337] English translation, at p. 101.

must have a *substantial effect* on the perpetration of the crime. This assistance may be provided in the form of positive action or omission, and it may be provided before, during or after perpetration of the crime.[338] Furthermore, the assistance may be physical (or tangible) or moral and psychological.[339]

227. The *subjective element* of aiding and abetting resides in the accessory having *knowledge* that "his actions will assist the perpetrator in the commission of the crime".[340] Thus, this subjective element consists of two requirements: (i) awareness that the principal perpetrator will use the assistance for the purpose of engaging in criminal conduct, and (ii) intent to help or encourage the principal perpetrator to commit a crime. It is not required that the accessory be fully cognizant of the specificities of the crime that will be committed by the perpetrator.[341] Indeed, aiding and abetting does not presuppose that the accomplice shares a common plan or purpose with the principal perpetrator or his criminal intent; as stated by the ICTY Appeals Chamber in *Tadić*, at "the principal may not even know about the accomplice's contribution".[342] Instead, the aider and abettor is required to be aware either of the criminal intent of the perpetrator or at least of the *substantial likelihood* that the perpetrator will commit a crime.[343] In other words, it may suffice for the accomplice to entertain what in certain legal systems is defined as "advertent recklessness" (*dolus eventualis*) with regard to the specific conduct of the principal perpetrator,[344] if there is also an intent to encourage or enable

[338] See, e.g., ICTY, *Aleksovski*, Trial Judgment, 25 June 1999 ("*Aleksovski* TJ"), para. 62; ICTY, *Blaškić*, Appeal Judgment, 29 July 2004 ("*Blaškić* AJ"), para. 48.

[339] See ICTY, *Furundžija*, Trial Judgment, 10 December 1998 ("*Furundžija* TJ"), para. 231.

[340] See *Furundžija* TJ, para. 245; ICTY, *Kunarac et al*, Trial Judgment, 22 February 2001, para. 392; *Vasiljević* TJ, para. 71; ICTY, *Delalić*, Appeal Judgment, 20 February 2001, para. 352; ICTY, *Tadić*, Appeal Judgment, 15 July 1999 ("*Tadić* AJ"), para. 229; *Blaškić* AJ, para. 46; ICTY, *Krnojelac*, Appeal Judgment, 17 September 2003, para. 52; see also ICTR, *Ntakirutimana*, Trial Judgment, 21 February 2003, para. 787; ICTR, *Kajelijeli*, Trial Judgment, 1 December 2003, para. 766; ICTR, *Kamuhanda*, Trial Judgment, 22 January 2004, para. 597. In the ICC Statute aiding and abetting is envisaged in Article 25(3)(c), whereby a person is responsible if he, 'For the purpose of facilitating the commission of such a crime [i.e. a crime within the jurisdiction of the Court], aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.'

[341] *Furundžija* TJ, para 246; *Blaškić* AJ, para. 50

[342] *Tadić* AJ, para. 229.

[343] In *Furundžija* an ICTY Trial Chamber held that 'it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.' *Furundžija* TJ, para. 246. Another ICTY Trial Chamber supported this proposition in *Blaskić* (Trial Judgment, 3 March 2000, para. 287), and the Appeals Chamber concurred in it in its judgment in *Blaškić* AJ, para. 50. However, when the principal crime requires specific intent, such as genocide or persecution, the accused must have known that the person or persons he is aiding or abetting possessed that specific intent—*i e* , the genocidal or discriminatory intent. ICTY, *Popović et al*, Trial Judgment, 10 June 2010, para. 1017.

[344] As an SCSL Trial Chamber put it, "[t]he *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator" *Brima et al*, Trial Judgment, 20 June 2007, para. 776.

the principal's criminal conduct. This accords with fundamental principles of criminal law: if someone provides a gun to a well-known thug with the knowledge that it will be used (or is reasonably likely to be used) to commit a crime, he is liable for aiding and abetting whatever that crime is, regardless of whether he was fully aware of the specific crime the thug intended to perpetrate.[345]

3. Comparison between Lebanese and International Criminal Law

228. It is apparent from the above that to a large extent the Lebanese notion of complicity and the international notion of aiding and abetting overlap, with two important exceptions. First, Lebanese law limits the objective element to the discrete list of means of support included in Article 219: accomplice liability only attaches if support is provided through one of the enumerated means. Second, Lebanese law generally requires an accomplice to *know* of the crime to be committed, to join with the perpetrator in an *understanding*, whether immediate or long-standing, to commit the crime, and to share in the intent to further that particular crime. Thus the Lebanese Criminal Code's concept of complicity should be applied as it is more protective of the rights of the accused..

C. Other Modes of Participation in Criminal Conduct

1. Lebanese Law

229. We shall now examine how Lebanese law and international criminal law regulate other modes of participation in criminality, that is, modes of participation in collective crimes (crimes committed by a multiplicity of persons) other than co-perpetration or complicity.

As stated by the ICC in another context, "[t]he concept of [simple] recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result [which is instead required by *dolus eventualis*]. In so far as recklessness does not require the suspect to reconcile himself or herself with the causation of the objective elements of the crime as a result of his or her actions or omissions, is it not part of the concept of intention." ICC, *Lubanga*, Decision on the Confirmation of Charges, 29 January 2007, fn. 438.

[345] As an example of this general principle of law applied in national courts, consider the *van Anraat* Case before the Hague Court of Appeal (Judgment of 9 May 2007). The accused had provided to Iraq, between 1980 and 1988, the chemical raw material TDG (Thiodiglycol) necessary for the manufacture of the mustard gas that the Iraqi Government had then used against the Kurds in 1987-88. The Court applied Dutch law, which does not require that the assistance provided by the accessory be indispensable or make a "causal contribution" to the main offence; it simply requires that "the assistance offered by the accessory [should] promote the offence or [make] it easier to commit that offence" (at para. 12.4). The Court first found that the accused *knew* that the quantity of TDG he provided could only be used to produce mustard gas (at para. 11.10) and then found that the accused *was aware of the high risk of use of the mustard gas in war*, particularly given the "unscrupulous character of the then Iraqi regime." (at para. 11.16).

230. We have seen above (paragraph 215) that Lebanese law provides not only for crimes committed by two or three persons performing the same act (*co-auteurs*), but also for co-perpetration of collective crimes where each member of a group plays a *different role* in the commission of the crime. In this case all the members of the group are held responsible for the same crime if they had previously agreed upon its perpetration (common intent).

231. Lebanese law also provides for the situation where one of the co-perpetrators commits an act that had not been agreed upon or envisaged by other co-perpetrators. For such situations, Lebanese law relies upon the notion of *dolus eventualis*: the co-perpetrators are responsible for the offence not agreed upon if they had envisaged that the additional crime might be committed and had willingly run the risk that it be committed. If instead they had not been aware of the possibility that the additional crime might be committed, they are responsible only for the agreed upon crime, whereas the perpetrator of the extra crime alone bears responsibility for that crime (in addition of course to shared responsibility for the agreed upon crime).

232. As stated above under the terrorism and other offences sections, *dolus eventualis*, as provided for under Article 189 of the Lebanese Criminal Code, is considered to be equivalent to direct intent (*dol direct*). This was held by the Court of cassation in its decision of 22 February 1995,[346] where the Court asserted that "the predictability of the criminal outcome and its acceptance by the author constitutes *dolus eventualis*, which, in its legal value, can be equated with criminal intent (*dol direct*)."

233. The relevance of *dolus eventualis* is confirmed by Lebanese jurisprudence. A case related to burglary can be mentioned. The common intent of the burglars was simply to steal goods in a house expected to be empty, for the owners were to be elsewhere. But all the offenders who entered the house carried loaded firearms. In fact, some of the owners were at home and forcefully resisted the robbery. As a result, one of the two burglars who had entered the house shot and killed one of the owners. The question arose whether the three robbers who had remained outside the house to act as look-outs were also responsible for the murder. In a decision of 8 February 1994, the *Chambre d'accusation* of Mount Lebanon held that the co-perpetrators (*co-auteurs*) who had remained outside also bore responsibility for the murder, for they should have expected that the other co-perpetrators,

[346] Court of cassation, criminal Chamber, decision n° 52, 22 February 1995, *Cassandre* 2-1995, at 92.

being armed, would use their weapons if need be.[347] Another case illustrating the role of *dolus eventualis* is *Aailan v. Al-Saka*, brought before the 6th Criminal Chamber of the Court of cassation.[348] A person had given a weapon to another person to rob a jeweller. The latter person, during the armed robbery, killed two persons. The Court held that the former person was guilty as an "instigator" for the crime of robbery. He was also guilty as "accomplice" for the crime of armed robbery and murder. According to the Court "the accomplice" "had foreseen the possibility of the perpetration of murder and had accepted its result or risk."

234. Another case of *dolus eventualis* relates to terrorism. In the Karami case, the Court of Justice found that the accused had instigated the assassination of Mr Karami, a former prime minister and a political adversary. The Court found that, in organising the assassination of Mr Karami by blowing up the helicopter in which he was a passenger, there was no evidence that the accused had "also instigated [the perpetrator] to kill the persons who were accompanying Karami on board the helicopter, whether the passengers or the pilot." There was also no evidence "that the executed assassination plan was drawn up by [the accused], or that [the accused] chose the means of execution."[349] The Court concluded that "there is no way to consider [the accused] as an instigator for the killing of the helicopter's passengers and pilots."[350] The Court then underlined that the accused had predicted the crime, had anticipated its consequences and accepted the risk; however, through complex reasoning,[351] the Court concluded that the accused was guilty as an "accomplice" under Article 219 paras 2 and 3 of the Lebanese Criminal Code for the wounding of the persons accompanying Karami, in that he had "hardened the resolve of the perpetrator" and had accepted "for material or moral gain, the perpetrator's proposal that he should commit the offence".[352]

235. As we have already discussed, other provisions of the Lebanese Criminal Code that also deal with crimes perpetrated by a group of persons consider the various forms of participation in collective criminality *not as a mode of criminal liability, but as crimes per se*. This applies not only

[347] Mount Lebanon Indictment Chamber (*Chambre d'accusation*), decision n°37/94, 8 February 1994, unpublished, original on file with the Tribunal, translation on file with the STL.
[348] Court of cassation, 6th Chamber, *Aalıan v Al-Saka*, decision n° 48, 16 May 2000 *Sader fil-tamyız* [Sader in the cassation], 2000, at 541.
[349] The *Rachid Karami* case, English translation, at p. 161.
[350] *Ibid*
[351] *Ibid.*
[352] *Id*, at p. 163.

to "conspiracy" but also to "criminal association", "armed band", and "assistance for evading justice".[353]

2. International Criminal Law

a) Joint Criminal Enterprise

236. This Chamber will now address the notion of joint criminal enterprise (JCE), a mode of criminal responsibility under customary international law. This is relevant to question (xiii) of the Pre-Trial Judge's Order because JCE is a mode of co-perpetration. We only trace the contours of the notion here, and do not take a position as to whether it should be applicable to particular cases before this Tribunal, for this is a determination the Pre-Trial Judge and, in due course, the Trial Chamber will have to make in accordance with the test outlined in paragraph 211.

237. There exist in international criminal law three forms of JCE. The first and more widespread category of liability (also called "JCE I" or JCE in its "basic" form) covers responsibility for acts agreed and acted upon[354] pursuant to a common plan or design where all the participants share the intent to commit the concerted crime, although only some of them physically perpetrate the crime.[355]

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[353] See Lebanese Criminal Code, Articles 335 to 339 and 398 to 400.

[354] It must be emphasised that it is *action* pursuant to a common plan or design that serves to distinguish joint criminal enterprise liability from the common-law based notion of conspiracy. See ICTY, *Milutinović et al*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 23; ICTY, *Krajišnik*, Appeal Judgment – Separate Opinion of Judge Shahabuddeen, 17 March 2009, para. 22.

[355] Individual criminal liability on the basis of a common plan or design finds its origins from World War II era jurisprudence. See United States Military Tribunal – Nuremberg, *Trial of Carl Krauch and Twenty-Two Others* ("The I.G. Farben Trial"), Case No. 57, 14 August 1947 – 29 July 1948, United Nations War Crimes Commission – Law Reports of Trials of War Criminals, Vol. X, at pp. 39-40; Supreme National Tribunal of Poland, *Trial of Dr Joseph Buhler*, Case No. 85, 17 June 1948 – 10 July 1948, United Nations War Crimes Commission – Law Reports of Trials of War Criminals, Vol. XIV, p. 45; Military Tribunal III, *United States of America v Alfried Felix Alwyn Krupp von Bohlen und Halbach et al* ("The Krupp Case"), Case No. 10, 8 December 1947 – 31 July 1948, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. IX, pp. 391-393; Military Tribunal III – *United States of America v Josef Altstotter et al* ("The Justice Case"), Case No. 3, 5 March 1947 – 4 December 1947, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. III, pp. 1195-1199. See also ICTY, *Tadić*, Appeal Judgment, 15 July 1999 ("*Tadić* AJ"), paras. 185-229, with the case law and national/international instruments cited therein. JCE III as a mode of liability in particular finds support from World War II cases and reviews. Military Tribunal I, *United States of America v Ulrich Greifelt et al* ("The *RuSHA* Case"), Case No. 8, 20 October 1947-10 March 1948, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. V, pp. 117-120; Review of Proceedings of General Military Court in the case of *US v Martin Gottfried Weiss and thirty-nine others*, p. 141 of the typescript (on file with the Special Tribunal), p. 141. Individual criminal responsibility for additional foreseeable crimes in the context of group criminality was also considered in various JCE II-type cases, such as . *United States v Hans Ulrich and Otto Merkle*, Case No. 000-50-2-17, Deputy Judge Advocate's Office, 7708 War Crimes Group – European Command, Review and Recommendations, 12 June 1947, Reviews of United States Army War Crimes Trials in Europe 1945-1948, United States National Archive Microfilm Publications No. M1217, Roll 3, p. 3 (on file with the Special Tribunal); *United States v Hans Wuelfert et al*, Case No.

In such instances all the participants are criminally responsible for the agreed upon crime, so long as their contribution in the furtherance of the common criminal plan or design is significant.[356] Where different actors are culpable under this form of liability they can be said to have acted as "cogs in a machine" whose overall object and purpose is to commit criminal offences, personally or through other individuals.[357] The international community must defend itself from such collective criminality by reacting in a repressive manner against those who take part in the criminal enterprise. The differing degrees of guilt will be taken into account at the sentencing stage.[358]

238. The second modality of JCE—which essentially amounts to a different articulation of the first—is that of responsibility for carrying out a criminal design implemented within the context of an institutional framework such as an internment or concentration camp (also known as "JCE II" or JCE in its "systemic" form).[359]

239. The third mode of responsibility arises in the context of JCE I or JCE II, when participants in a criminal enterprise agree and act according to the main goal of the common criminal plan or design (for instance, the forcible expulsion of civilians from an occupied territory), but, as a consequence of such agreement and its execution, incidental crimes are committed by one or more participants (for instance, killing or wounding some of the civilians in the process of their expulsion). It is notable that in this category of JCE the participants other than the authors of the extra crime do not share the intent to *also* commit crimes incidental to the main concerted crime. This mode of liability (so-called

000-50-2-72, Deputy Judge Advocate's Office, 7708 War Crimes Group – European Command, Review and Recommendations, 19 September 1947, Reviews of United States Army War Crimes Trials in Europe 1945-1948, United States National Archive Microfilm Publications No. M1217, Roll 4, p. 8 (on file with the Special Tribunal); *Tashiro Toranosuke et al* Judgment, 14 October 1946, Case No. WO235/905, Hong Kong Military Court for the Trial of War Criminals No. 5 (available through http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/home, on file with the Special Tribunal) (three accused acquitted on the evidence for the killing of prisoners of war as a foreseeable consequence of their concerted action to mistreat them).

[356] ICTY, *Krajišnik*, Appeal Judgment, 17 March 2009 (*Krajišnik* AJ), para 675; ICTY, *Brđanin*, Appeal Judgment, 3 April 2007 ("*Brđanin* AJ"), para 430.

[357] Principal perpetrators of crimes need not be members of the JCE. See *Brđanin* AJ, paras 410-414; *Krajišnik* AJ, paras 225-226.

[358] See ICTY *Brđanin* AJ, para. 432. We do not ascribe with the view that there is no distinction in degree of guilt under JCE III for sentencing purposes as suggested in, for example, ICTY, *Babić*, Judgment on Sentencing Appeal, 18 July 2005, paras 26-28.

[359] However, note ICTY, *Kvočka*, Appeals Judgment, 28 February 2005 ("*Kvočka* AJ"), para. 182: "reference to [...] concentration camps is circumstantial and in no way limits the application of this mode of responsibility to those detention camps similar to concentration camps."

"JCE III", or extended form of JCE)[360] only arises if a participant who did not have the direct intent to commit the 'incidental' offence nevertheless *could and did foresee*[361] *the possibility of its commission and willingly took the risk of its occurrence.*[362]

240. A clear example in domestic criminal law of this mode of liability is that of a gang of thugs who agree to rob a bank without killing anyone, and to this end agree to use fake weapons. In this group, however, one of the members (primary offender) secretly takes real weapons with him to the bank with the intent to kill, if need be. Suppose another participant in the common criminal plan (secondary offender) sees this gang member stealthily carrying those real weapons. If the primary offender then kills a teller during the robbery, the secondary offender may be held liable for robbery and murder, like the killer and unlike the other robbers, who would only be liable for armed robbery. As a result of the information the secondary offender possessed (that the primary offender was carrying real weapons and not a toy weapon) he could and did foresee that they would be used to kill, if something went wrong during the robbery. Although he did not share the mens rea of the murderer, the event was foreseeable and the risk that it might come about was willingly taken. Plainly, he could have told the other robbers that there was a serious danger of a murder being committed, or he might have taken the real weapons away from the primary offender; or he might even have withdrawn from the specific robbing enterprise or dropped out of the gang completely.

241. Thus, for criminal liability under the third category of JCE to arise it is necessary that the un-concerted crime be generally in line with the agreed upon criminal offence. In addition, it is essential that the secondary offender had a chance of predicting the commission of the un-concerted crime by the primary offender. In this context, the *Tadić* Appeal Judgment identified *two* requirements, one

[360] The Appeals Chamber takes notice of the recent decision of the Pre-Trial Chamber of the Extraordinary Chambers of the Courts of Cambodia (ECCC) that the authorities relied upon by the ICTY Appeals Chamber in *Tadić* do not "constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law at the time relevant to Case 002" (ECCC, *Ieng et al*, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 83). Suffice to say that the Tribunal's current jurisdiction *ratione temporis* necessarily entails consideration of jurisprudence and legal developments unavailable to the ECCC, starting from the early 1990s.

[361] What is foreseeable will depend on the circumstances of the case. See for example ICTY, *Milutinović et al*, Trial Judgment, 26 February 2009, Vol. III, paras 472, 1135; ICTY, *Popović et al*, Trial Judgment – Dissenting and Separate Opinion of Judge Kwon, 10 June 2010, vol. I, paras 21-27.

[362] ICTY, *Brđanin and Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("*Brđanin and Talić* Decision"), para. 30.

objective and the other subjective.[363] The objective element is the conduct of the primary offender that was not agreed upon with all the other participants in the joint criminal enterprise. It is to be distinguished from the subjective state of mind to be proved by the Prosecution, namely that the secondary offender (i) was aware that the resulting crime was foreseeable as a *possible*[364] consequence of the execution of the JCE, and nonetheless (ii) willingly took the risk that the incidental crime might be committed and continued to participate in the enterprise with that subjective awareness.

242. For instance, if a paramilitary unit occupies a village with the purpose of detaining all the women and enslaving them, depending on the exact circumstances a rape perpetrated by one of them can be the foreseeable corollary of enslavement, since treating other human beings as objects can easily lead to their rape. It would, however, also be necessary for the secondary offender to have specifically foreseen the possibility of rape (a circumstance that should be proved or at least inferred from the facts of the case) or, at least, to be in a position, under the 'person of reasonable prudence' test, to predict the rape.

243. Let it be emphasised once again that this mode of incidental criminal liability based on foresight and risk is a mode of liability that is contingent on (and incidental to) a common criminal plan, that is, an agreement or plan by a multitude of persons to engage in illegal conduct as described above. The 'additional crime' is the outgrowth of previously agreed or planned criminal conduct for which each participant in the common plan is already responsible. The 'additional crime' is thus rendered possible by the prior joint plan to commit the agreed crime(s) other than the one 'incidentally' or 'additionally' perpetrated.

244. This third category of JCE has been objected to, for fear that it might breach the principle of culpability (*nullum crimen sine culpa*). The contention has been made that under this category of JCE the culpability of the "secondary offender" (who joined the criminal plan or agreement, acted

[363] See ICTY, *Tadić* AJ, paras 204, 220 and the objective and subjective requirements articulated in ICTY, *Brđanin and Talić* Decision, paras 28-30. See also ICTY, *Vasiljević*, Appeal Judgment, 25 February 2004, paras 99-101; ICTY, *Kvočka* AJ, para. 83.

[364] "In many common law national jurisdictions, where the crime charged goes beyond what was agreed in the joint criminal enterprise, the prosecution must establish that the participant who did not himself commit that crime nevertheless participated in that enterprise with the contemplation of the crime charged as a *possible* incident in the execution of that enterprise. This is very similar to the civil law notion of dolus eventualis." ICTY, *Brđanin and Talić* Decision, para. 29. See also ICTY, *Stakić*, Appeal Judgment, 22 March 2006 ("*Stakić* AJ"), paras 100-101; ICTY *Brđanin* AJ, para. 431.

upon it, and foresaw the additional, but un-concerted offence) is wrongly equated with that of the "primary offender" (who commits the agreed upon crime plus the additional, un-concerted offence). In this way, it is argued, one could find guilty of murder somebody (the "secondary offender") who did not have the intent to kill, an intent that was instead entertained by the "primary offender", who perpetrated the murder.

245. In this regard, the Appeals Chamber notes the following: (i) As for the degree of culpability, the "secondary offender", although he did not have the intention (*dolus*) to commit the un-concerted crime, was nonetheless a willing party to an enterprise to commit an agreed upon crime, and the extra crime was rendered possible both by his participation in the criminal enterprise (which must include a significant contribution to the achievements of the enterprise's criminal plan[365]) and by his failure to drop out or stop the extra crime once he was able to foresee it. (ii) With regard to the need to modulate or graduate punishment, admittedly the culpability and blameworthiness of the "secondary offender" is less than that of the "primary offender"; this lesser degree should, however, be taken into account at the sentencing stage. (iii) With regard to the very *raison d'être* of JCE III, this mode of responsibility is founded on considerations of public policy: that is, the need to protect society against persons who band together to take part in criminal enterprises and, whilst not sharing the criminal intent of those participants who intend to commit *more serious crimes* outside the common enterprise, nevertheless are aware that such objectively foreseeable crimes may be committed and do nothing to oppose or prevent them, but rather continue in the pursuit of the enterprise's other criminal goals.[366]

246. Moreover, as the ICTY Appeals Chamber confirmed, the criminal means of achieving the common objective of the JCE can evolve over time. While, originally, the participants in a common enterprise may agree on only a few, 'core' crimes, what were foreseeable crimes in the early stages of a JCE may well become accepted criminal objectives of an increasing number of JCE members. In other words, the JCE is not static or restrained by the criminal objectives envisaged at the time of its creation. It can expand to embrace other criminal offences that were not agreed to at the beginning of the enterprise, as long as the evidence shows that the JCE members agreed on this expansion,

[365] *Brđanin* AJ, paras. 427, 430; *Krajišnik* AJ, para. 675.

[366] These policy considerations were aptly spelled out by the Supreme Court of the United States in *Tison v Arizona* 481 U.S. 137 (1987) as well as the U. K. House of Lords in *Regina v Powell and another, Regina v English* [1999] 1 AC 1, with regard to crimes committed at the domestic level.

whether explicitly or extemporaneously (which can be inferred from circumstantial evidence).[367] Thus, alleged authors of crimes can originally incur individual criminal responsibility via JCE III but, depending on the circumstances and the evidence presented, their liability can instead result in a conviction via JCE I. One of the main differences between JCE I and JCE III, while theoretically important, may not thus be so pivotal when it comes to actual evidence and allowed inferences: often, when a participant in a JCE foresees an additional crime he originally had not subscribed to and nevertheless agrees to continue providing his significant contribution to the JCE, the only reasonable inference might be that he has come to agree to that additional crime, therefore bringing his liability back into the fold of JCE I.

247. In any event, the stringent requirements for a conviction under JCE III help explain why, at the ICTY (the Tribunal that used this mode of responsibility as of its first case), very few individuals have been found responsible under this mode of liability.[368]

248. One final remark is in order. JCE III is predicated, as discussed above, on the foreseeability of crimes, and on the acceptance of such foreseeable crimes by the 'secondary offender'. This is why when other tribunals have discussed it, they have often referred to the notion of *dolus eventualis*. However, this notion does not easily tally with *special intent* crimes, such as terrorism.[369] Under international law, when a crime requires special intent (*dolus specialis*), its constitutive elements can only be met, and the accused consequently be found guilty, if it is shown beyond reasonable doubt that he specifically intended to reach the result in question, that is, he entertained the required *special intent*. A problem arises from the fact that for a conviction under JCE III, the accused need not share the intent of the primary offender. This leads to a serious legal anomaly: if JCE III liability were to apply, a person could be convicted as a (co)perpetrator for a *dolus specialis* crime without possessing the requisite *dolus specialis*.

[367] See, for instance, *Krajišnik* AJ, para. 163.

[368] Contrary to what is generally assumed, for instance, only four JCE III convictions have ever been affirmed on appeal (or entered on appeal) after full trial proceedings at the ICTY to date: *Tadić* AJ, paras 230-234; *Krstić*, Appeal Judgment, 19 April 2004, paras 147-151; *Stakić* AJ, paras 91-98; *Martić* AJ, paras 187, 195, 205-206, 210.

[369] See above paras 59, 68, 111, and 147.

249. Thus, while the case law of the ICTY allows for convictions under JCE III for genocide and persecution as a crime against humanity even though those crimes require special intent,[370] and contrary to what the Prosecution pleads,[371] the better approach under international criminal law is not to allow convictions under JCE III for special intent crimes like terrorism. In other words, it would be insufficient for a finding of guilt for an accused charged as a participant in a JCE (directed, for instance, to the commission of robbery or murder) to have foreseen the possibility that the crimes within the common purpose would eventually give rise to a terrorist act by another participant in the criminal enterprise. He must have the required special intent for terrorism; he must specifically intend to cause panic or to coerce a national or international authority. In such a case, the 'secondary offender' should not be charged with the commission of terrorism, but at the utmost only with a form of accomplice liability, in that he foresaw the possibility that another participant in the criminal enterprise might commit a terrorist act, willingly accepted that risk and did not drop out of the enterprise or prevent the perpetration of the terrorist offence. This person's attitude should therefore be assessed as a form of *assistance* to the terrorist act, not as a form of *perpetration*—and provided of course that all other necessary conditions are met. The difference between the two classifications of the mode of responsibility should be clear. JCE III makes the 'secondary offender' a perpetrator, while aiding and abetting is evidently a lower mode of liability: one can be liable for less than direct intent because the system does not intend to pin on him the stigma of full perpetratorship, but rather that of a less serious participatory modality.

b) Article 3(1)(b) of the STL Statute

250. Article 3(1)(b) of the Statute provides that a person will be individually responsible for crimes within the jurisdiction of the Tribunal if that person "[c]ontributed in any other way to the commission of the crime [...] by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime."

251. The reference to "common purpose" hints at the common purpose doctrine, another name for JCE. This provision is broad enough to incorporate all three forms of JCE (though JCE II will

[370] See ICTY, *Brđanin*, Decision on Interlocutory Appeal, 19 March 2004, paras 5-10; ICTY, *Stakić* AJ , para. 38; ICTY, *Milošević*, Decision on Motion for Judgement of Acquittal, 16 June 2004, para. 291; ICTY, *Popović et al*, Trial Judgment, 10 June 2010, Vol. I, paras 1195, 1332, 1427, 1733-1735.
[371] Hearing of 7 February 2011, T. 68-69.

generally not be applicable to the factual allegations submitted under Article 1). We pause, however, to clarify how the intent requirements of Article 3(1)(b) are reconcilable with JCE, and in particular with JCE III.[372]

252. The provision in question may be construed as requiring that the intent referenced be to further the common criminal plan, which may also embrace acts performed by one of the participants outside that criminal plan, provided that the defendant-participant had a certain degree of awareness and foresight of the commission of such acts. In particular, Article 3(1)(b) speaks of an intentional contribution to the common criminal purpose and states that such contribution may be made "in the knowledge of the intention of the group to commit the crime." The notion of "knowledge" could well cover that of "foresight" and "voluntary taking of the risk" of a criminal action by one or more members of the group. Further, the phrase "general criminal activity or purpose of the group" refers to the criminal activities of the group more broadly than that of the particular crime. That is, the accused may intend to further the "general" criminality of the group, without having an intent to further the specific crime in question. This interpretation also avoids redundancy with the alternative form of mens rea under Article 3(1)(b), "the knowledge of the intention of the group to commit the crime"; otherwise, knowledge of the intent to commit the specific crime would be subsumed within "the aim of furthering" the specific crime. Of course, the specific crime must have been foreseeable in light of the "general criminal activity or purpose" of the group.

c) Perpetration by Means

253. In addition to JCE, the ICC in its early decisions has adopted the notion of "perpetration by means" or indirect perpetration to designate some forms or categories of collective criminality, in particular the criminal liability of high-level participants who are removed from the physical or material perpetration of international crimes. However, we conclude that perpetration by means, as applied by the ICC, is neither a form of liability under customary international law, nor is it recognised by Article 3(1) of the Statute. Hence, it should not be applied before this Tribunal.

254. Article 25(3)(a) of the ICC Statute explicitly includes perpetration by means: "[A] person shall be criminally responsible [...] for a crime within the jurisdiction of the Court if that person

[372] See also Hearing of 7 February 2011, T. 72-73 (Prosecution submissions that JCE could arguably be encompassed by Article 3(1)(b) of the Statute, which is broader). Contra, see Hearing of 7 February 2011, T. 91-96 (Defence objections to the applicability of JCE III).

[c]ommits such a crime [...] through another person, regardless of whether that other person is criminally responsible." It has been deduced from this provision[373] that the notion of 'perpetration by means' covers two different categories of "indirect perpetration". The first category includes the traditional notion of perpetration by means upheld in most countries of Romano-Germanic tradition, as well as the fairly similar doctrine recognised in common law countries and designated as "innocent agency". Under this notion a person, to perpetrate a crime, may use an intermediary who is not himself criminally liable and thus cannot be considered to have any culpable part in the crime (either because he is a minor, or mentally incompetent, or because he acted under coercion). This form of responsibility is also recognised in Lebanese law.[374]

255. The second category of perpetration by means covers those cases in which the intermediary is used by the "person in the background" for the commission of the crime but is also independently criminally responsible for his conduct. In this case the indirect perpetrator is called the "perpetrator behind the perpetrator." This second category of perpetration by means, developed in German legal literature,[375] was relied upon by the ICC Pre-Trial Chamber in *Lubanga*. The Chamber held that Article 25(3)(a) of the ICC Statute applies to the commission of a crime through another person who is himself fully criminally responsible.[376] In its application for an arrest warrant the Prosecutor had initially charged Lubanga as a joint perpetrator. The Pre-Trial Chamber found instead that indirect perpetration was potentially a viable theory of criminal responsibility: "In the Chamber's view, there are reasonable grounds to believe that, given the alleged hierarchical relationship between Mr Thomas Lubanga Dyilo and the other members of the [rebel group], the concept of indirect perpetration [...] could be applicable to Mr Thomas Lubanga Dyilo's alleged role in the commission

[373] See A. Eser, "Individual Criminal Responsibility", in A. Cassese, P. Gaeta and J. Jones (eds) *The Rome Statute of the International Criminal Court A Commentary* vol. 1 (Oxford: Oxford University Press, 2002), at 793; G Werle, "Individual Criminal Responsibility in Article 25 ICC Statute", 5(4) *J Int'l Crim Justice* (2007) 953, at 963; F. Jessberger and J. Geneuss, "On the Application of a Theory of Indirect Perpetration in *Al Bashir*: German Doctrine at The Hague?", 6(5) *J Int'l Crim Justice* (2008) 583, at 855 ff.

[374] Under Lebanese law a distinction is made between the "material" perpetrator and the "intellectual" perpetrator of a crime. The former physically undertakes the prohibited conduct. The latter instead induces a mentally incompetent person to execute a crime (for instance he gives a bomb to a mentally handicapped person to be used against other persons), or uses a person unaware of the perpetrator's criminal intent so that the other person physically commits the crime (for instance, a perpetrator asks another person to administer a medicine to an ailing person, and the second person does so without knowing that in fact the medicine is a poison).

[375] The doctrine was developed by the distinguished German criminal lawyer Claus Roxin. See C. Kress, 'Claus Roxins Lehre von der Organisationsherrschaft und das Völkerstrafrecht' 153 *Goltdammer's Archiv für Strafrecht* (2006), 307 ff.

[376] ICC, *Lubanga,* Decision on the Confirmation of Charges, 29 January 2007, para. 318.

of the crimes".[377] In a decision on *Katanga and Chui*, the ICC Pre-Trial Chamber I restated and expanded its findings in *Lubanga*: it based criminal responsibility on the concept of "joint commission through another person".[378] The Chamber noted the reasoning of the ICTY Appeals Chamber in *Stakić, where that Tribunal* rejected the concept of indirect co-perpetration as falling outside of customary international law, but concluded that the *Stakić* holding was not relevant for the ICC because perpetration by means is expressly provided for in the ICC Statute.[379] However, no final judgment has to date been issued by the ICC to validate this interpretation of the provision in question.

256. The problem with the doctrine of perpetration by means is that it is not recognised in customary international law, as rightly noted by the ICTY Appeals Chamber in *Stakić*,[380] and in addition is not contemplated by this Tribunal's Statute. While Article 25(3)(a) of the ICC Statute provides for the punishment of a co-perpetrator who "[c]ommits [...] a crime, whether as an individual, jointly with another or through another person", the drafters of Article 3(1)(a) of our Statute simply referred to anybody who "[c]ommitted [...] the crime set forth in article 2 of this Statute", a wording akin to that of Article 7 of the ICTY Statute (and Article 6 of the ICTR Statute), which have been interpreted as referring to the notion of JCE, a notion that without any doubt has a firm customary basis. This difference between the wording of the ICC Statute, on the one hand, and that of this Tribunal's Statute, on the other, together with the fact that perpetration by means, as noted above, has not yet reached customary international law status, leads the Appeals Chamber to conclude that perpetration by means may not be resorted to by this Tribunal.

3. Comparison between Lebanese and International Criminal Law

257. The criminalisation of collective participation in crimes, as envisaged in Lebanese criminal law, to a large extent overlaps with that provided for in customary international law and in Article 3(1) of the Tribunal's Statute. However, in some respects it is stricter than that of international criminal law.

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[377] ICC, *Lubanga*, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr Thomas Lubanga Dyilo, 24 February 2006, para. 96.

[378] ICC, *Katanga and Chui*, Decision on Confirmation of Charges, 30 September 2008 ("*Katanga* Confirmation of Charges Decision"), para. 489.

[379] *Katanga* Confirmation of Charges Decision, para. 506-508.

[380] ICTY, *Stakić*, Appeal Judgment, 22 March 2006, para. 62.

258. When a crime is committed by a plurality of persons, under Lebanese law the notion of co-perpetration (*co-action*) or, depending on the circumstances of the case, those of complicity or instigation may apply. Instead, international criminal law only criminalises the specific crime committed (except for genocide, where it also criminalises conspiracy and instigation). However, international criminal law contemplates a mode of participation, joint criminal enterprise, which, as such, is unknown to Lebanese law.

259. However, the two bodies of law largely coincide in application. Under Lebanese law, a person who takes part in a group set up to engage in terrorism and contributes to executing terrorist crime by killing one or more persons, may be charged with participating in a "conspiracy" as well as perpetrating "terrorism" and "murder", if all necessary requirements are met. Under international criminal law, his form of participation in the terrorist crime, including the resulting murders, may be classified as JCE.[381] Thus, Lebanese law and international criminal law overlap in punishing the execution of a criminal agreement, where all the participants share the same criminal intent although each of them may play a different role in the execution of the crime (what under international criminal law falls under JCE I).

260. The two bodies of law also overlap in punishing those participants in a criminal enterprise who, although they had not agreed upon the perpetration of a crime, could be expected to know of the possibility that such a crime would be committed and willingly took the risk that it would be committed (so-called JCE III). This is shown by the reasoning followed in the *Aalian* case,[382] which the Appeals Chamber accepts as being indicative of the application of Lebanese law on the matter.

261. In sum, while the legal label of the mode of liability applied under Lebanese law and under international criminal law may differ, the practical effect is the same: both bodies of law punish participants in group criminality for crimes that were foreseeable, and the gravity of the participant's individual conduct will be evaluated and distinguished at sentencing, which pursuant to Article 24 of the Statute is left to the Tribunal's discretion no matter which set of laws are applied. Where there is

[381] This would generally be JCE I, for the reasons discussed above excluding JCE III for specific intent crimes such as terrorism.

[382] Court of cassation, 6th Chamber, *Aalıan v Al-Saka*, decision n° 48, 16 May 2000 *Sader fil-tamyız* [Sader in the cassation], 2000, at 541. See also Court of Justice, decision n°1, 12 April 1994, *Al-nashra al-kada'iya* [Revue Judiciaire], 1995, vol. 1, at 3.

no conflict between the two sources of law, the Tribunal should apply the Lebanese law of co-perpetration (including through *dolus eventualis*), complicity and, where applicable, instigation.

262. Should there be a conflict, however, the Pre-Trial Judge and (in due course) the Trial Chamber will have to consider which source of law leads to the greatest protection for the rights of the accused. One such situation has already presented itself in the course of our theoretical analysis: under JCE III as applied by the Tribunal, the extra foreseeable (but un-concerted) offence may not be a terrorist act (or other criminal offence that requires special intent), but only another offence requiring general intent such as homicide. On the other hand, under Lebanese law, one could be convicted of a terrorist act for which one harbours only *dolus eventualis* (that is, it was foreseeable that the terrorist act would occur, but the person accused did not specifically intend to spread terror). If such a case were to be presented to the Pre-Trial Judge, depending on the circumstances, the mode of responsibility under international criminal law—JCE III—might be applied as it is more protective of the rights of the accused.

III. Summary

263. The answer to question (xiii) is that either Lebanese law or international criminal law (as contained in Article 3 of the Statute) could apply. The Pre-Trial Judge and Trial Chamber must (i) evaluate on a case-by-case basis whether there is any actual conflict between the application of Lebanese law and that of the international criminal law embodied in Article 3; (ii) if there is no conflict, apply Lebanese law; and (iii) if there is a conflict, apply the law that would lead to a result more favourable to the rights of the accused.

264. As for co-perpetration, if the accused directly participated in the crime, there is no conflict, and Lebanese law should be applied. In more complicated instances of co-perpetration, the Pre-Trial Judge and Trial Chamber will have to consider on a case-by-case basis whether Lebanese law or international criminal law is more protective of the rights of the accused; in particular, an individual should not be charged as a co-perpetrator for an act of terrorism if he did not have the special intent to commit the act of terrorism. Finally, the Lebanese law of complicity should apply as it is more favourable to the rights of the accused.

SECTION III: MULTIPLE OFFENCES AND MULTIPLE CHARGING

265. The Pre-Trial Judge has submitted two questions regarding plurality of offences and cumulative charging:

> xiv) Should cumulative charging and plurality of offences applicable before the Tribunal be regulated by Lebanese criminal law, by international law or by both Lebanese criminal law and international law? In this last case, how, and on the basis of which principles, are these two laws to be reconciled in the event of conflict between them?
>
> xv) Can one and the same act be defined in several different ways, namely, for example, at the same time as terrorist conspiracy, terrorist acts and intentional homicide with premeditation or attempted intentional homicide with premeditation. If so can these classifications be used cumulatively or as alternatives? Under what conditions?

266. While the Pre-Trial Judge has, properly, expressed as questions of law the enquiry as to what combination of charges is permissible, a practical response requires brief mention of the context in which the issues arise. The parties have competing responsibilities:

- That of the Prosecution is to ensure that the charges laid at the onset of the case cover:

  (1) whatever may be the real options as to what the evidence may establish at the conclusion of the trial, depending on how the facts are found by the Trial Chamber;

  (2) the essential types of criminality which should be the subject of ultimate sentence and the denunciation that entails.

- That of the Defence is to ensure that it is not overborne by either an unnecessary number and type of charges or by over-detailed evidence required to establish them.

- That of alleged victims granted leave to present their views and concerns (Rules 86-87) is to ensure that justice is done in relation to their interests.

Crucial to the specific discussion that follows is the judicial obligation to balance wisely and justly the competing responsibilities of the parties as well as the dictates of a trial that is both fair and expeditious.

267. According to the Prosecution, "[c]umulative charging is permissible under both Lebanese criminal law and international criminal law."[383] In the opinion of the Prosecutor, the Tribunal should not adopt the test advanced by the ICC Pre-Trial Chamber II in the *Bemba* case, where the Pre-Trial Chamber held that "the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence, since it places an undue burden on the Defence". The Prosecutor argues that this ICC decision "is not indicative of settled jurisprudence or international practice."[384] As to the question of whether the same act can be defined under different criminal categories (for instance, terrorist conspiracy, terrorist act, intentional homicide and so on), the Prosecutor contends that this is admissible under both Lebanese and international criminal law practice.[385]

268. The Defence Office asserts that there is no rule or general practice regulating cumulative charging in either Lebanese law or international criminal law. One should therefore turn to the practice of international tribunals to find the right solution. Careful consideration of such practice shows, in the contention of the Defence Office, that (i) the "practice of *ad hoc* Tribunals shows an increasing awareness of the potentially prejudicial effect of the 'overloading' of the indictment with multiple layers of cumulative charges. This practice is regarded as having a negative impact on a whole range of fundamental rights of the accused (in particular, his right to adequate time/facilities to prepare [his defence], his right to adequate notice of the charges, his right to equality of arms, his right to a trial without undue delay and his right to a fair trial). This practice may also complicate the task, responsibility and ability of the Tribunal to guarantee a fair and expeditious process as it is required to";[386] (ii) other international courts such as the ICC and the Extraordinary Chambers in the Courts of Cambodia have adopted a restrictive approach to cumulative charging;[387] (iii) "current practice is moving towards a more restrictive approach that excludes any cumulation of charges where each offence (or form of liability) charged does not encompass a definitional or material element not included in the other";[388] (iv) more generally, "[i]nternational practice recognizes and sanctions a prohibition against 'overloading' of the indictment by the Prosecution".[389] The Defence Office concludes that in deciding on these matters the Tribunal should heavily rely on human rights:

[383] Prosecution Submission, para. 109; see also *id*, para. 119.
[384] Prosecution Submission, para. 117. See also War Crimes Research Office Brief, paras 3, 10-15 and 17-18.
[385] Prosecution Submission, paras 121-132.
[386] Defence Office Submission, para. 169.
[387] Defence Office Submission, paras 172-173.
[388] Defence Office Submission, para. 174.
[389] Defence Office Submission, para. 177(iii).

"Regardless of the regime that is adopted by the Tribunal in regard to this matter, it would have to ensure that this regime protects and guarantees the effectiveness of, *inter alia*, the following rights of the defendant: his right to adequate time/facilities to prepare, his right to adequate notice of the charges, his right to equality of arms, his right to a trial without undue delay and his right to a fair trial."[390] In addition, the Defence Office takes the view that there should be a preference for "alternative charging" rather than "cumulative charging."[391]

269. As for the question of whether the same act can be legally classified under several headings of criminal law, the Defence Office is of the view that this is indeed admissible, subject however to a set of safeguards aimed at protecting the rights of the accused and avoiding in particular that the charging be "oppressive" for the accused.[392]

270. Regarding question (xiv), the Appeals Chamber holds the view that Lebanese law and international criminal law regulate these matters along the same lines. We consider below the approaches taken by Lebanese courts and by international criminal courts and conclude there is no need to reconcile conflicts between them.

271. As for question (xv), both Lebanese law and international criminal law allow multiple charging when one act may constitute multiple crimes. However, for an accused to be convicted of two crimes on the basis of a single act or omission, each crime must an element that the other crime does not. For example, the crimes of conspiracy, terrorism, and intentional homicide under Lebanese law—as described above—each aims at achieving a distinct result (such as spreading terror or causing death). In other words, a person could be convicted of all three crimes on the basis of a single course of conduct. We discuss this principle, known in some common law countries as the *Blockburger* test and in civil law countries as the "rule of speciality", in greater detail below before concluding that it should be applied whenever possible at the charging stage, allowing multiple (cumulative) charging—and ultimately conviction, if all elements of each crime are proved—only when each crime requires the proof of distinct elements. Crimes that do *not* meet this test may be charged in the alternative. Care should also be taken to ensure that any accused is provided with detailed and clear notice of charges, both through the indictment itself and through the Pre-Trial

[390] Defence Office Submission, para. 176.
[391] Defence Office Submission, para. 177(v).
[392] Defence Office Submission, para. 182(xv); see also *id*, paras 178-181.

Judge's reasoned decision, as required by Rule 68(I). This approach has the advantage of (i) increasing the expeditiousness of the proceedings and (ii) avoiding unnecessary and heavy burdens on the defence in preparing and presenting its case.

I. Lebanese Law

A. Multiple Offences

272. All criminal legal systems make provision for instances of multiple offences by the same person (for instance, rape followed by murder of the same victim), of offences that simultaneously affect more than one victim (for example, bombing a house with a family inside), or of offences consisting of the simultaneous breach, by the same person, of more than one rule (for example, arson and murder when both are caused by the same fire).

273. Lebanese law, like most civil law systems, draws a distinction between "*concours réel ou matériel d'infractions*" and "*concours idéal d'infractions ou concours de qualification*". The first category embraces the cases where a person by a set of separate actions perpetrates several crimes against one or more victims. In this case the perpetrator is accountable for breaches of different rules of criminal law. Pursuant to Article 205 of the Lebanese Criminal Code:

> [i]f multiple felonies or misdemeanours are found to have been committed, a penalty shall be imposed for each offence and only the severest penalty shall be enforced.
>
> The penalties imposed may, however, be consecutive. However, the sum of fixed-term penalties shall not exceed the maximum penalty prescribed for the most serious offence by more than one half.
>
> If no ruling has been issued on whether the penalties imposed should run concurrently or consecutively, the matter shall be referred to the judge for a decision.

274. No particular problem arises with regard to the charging of the offender and his sentencing by a court: he will be accused of various crimes; if found guilty, he will be sentenced for each of these crimes, with the highest penalty being enforced.

275. A person may instead breach the same rule against various persons: for instance, he murders the members of a whole family. In this case only one rule is breached, that prohibiting unlawful killing, but the offence is committed against several victims. In sum, "*concours réel d'infractions*" does not pose any major problem of charging: the accused will be charged with different crimes, in

the first case, and with as many crimes in the form of murder as there are victims, in the second. The Judges will then be called upon to assess the evidence and decide what the prosecution has been able to prove for each charge.

276. "*Concours idéal d'infractions*" covers instead cases where a person, by a *single* act or transaction, simultaneously violates more than one rule. Article 181 of the Lebanese Criminal Code provides that:

> [i]f an act has several qualifications, they shall all be mentioned in the judgment, and the Judge shall impose the heaviest penalty.
>
> However, if both a general provision of criminal law and a special provision are applicable to the act, the special provision shall be applied.

277. Here, again, one ought to distinguish among various categories of breaches. First, it may happen that the same act in some respects violates one rule and in other respects violates another rule, the two rules covering different matters. In such cases the same criminal conduct simultaneously breaches two different rules and amounts to two different crimes. Clearly, when faced with these cases, the Prosecution must charge the defendant with two different crimes. Similarly, if it is satisfied that the accused is guilty of the breach of both rules, the court ought to sentence him for both breaches. However, this is subject to the "rule of specialty". If both rules are general provisions of law ("*texte général*"), Lebanese law considers that the perpetrator is to be convicted of both crimes, with the most severe penalty to be applied. If however one of the rules is a special provision ("*texte spécial*"), this provision should be applied, and the Judges should enforce the penalty mentioned in the said provision rather than the more general provision. This rule of specialty will be further discussed below, under international law.

278. When one is faced with a single conduct or transaction that successively breaches two different rules vis-à-vis the same victim and may thus amount in theory to two offences, but *one is lesser than (i.e., contained in) the other*, the "principle of consumption" applies: the more serious offence prevails over and "absorbs" (or subsumes), as it were, the other. Thus, for instance, if a person is shot to death, charges will only be brought for homicide and not also for personal injuries. Hence, the charge (and perhaps a conviction) may be issued only for the more serious offence, which encompasses the less serious one.

279. In this respect, we should note that contemporary French decisions, followed by Lebanese case law, have held that a single conduct amounting to different characterisations can be considered as a "*concours matériel*", rather than a "*concours idéal*" when those offences are not incompatible (homicide and personal injuries in the example above) and when the relevant rules aim at prohibiting violations of substantially different values. An example would be in the case of an individual throwing a grenade at a house. He is liable for attempted homicide as well as attempt to destroy a house with the use of an explosive device.[393] If the subjective element is not rigorously identical in the potential characterisations, the Judges may decide to uphold all of them, leading therefore to considering the case as a "*concours matériel d'infractions*".[394] Therefore, since the prohibition of homicide, terrorism, and conspiracy under Lebanese law aims at protecting substantially different values, and since they are not incompatible, Judges might consider them under a "*concours matériel d'infractions*".

B. Multiple Charging

280. As mentioned above, Lebanese law allows for the cumulative charging of one single conduct, when this conduct amounts to two or more different offences. In this respect, the Prosecutor can, for example, charge a person with both terrorism and homicide. However, this does not apply to modes of responsibility. A person cannot be cumulatively charged with two different modes of responsibility for the same offence: one cannot be an accomplice as well as a perpetrator in murdering one single victim. He is either one or the other. Therefore, for modes of responsibility, in the case of a single offence alternative charging is required. This does not, however, impede cumulative charging of modes of responsibility for different offences, even if they stem from the same underlying conduct.[395]

281. Additionally, under Lebanese law, both the investigating Judge and the trial court are empowered to re-classify criminal conduct originally charged by the Prosecution. In other words, they are not bound by the legal characterisation of a crime propounded by the Prosecutor.[396] The

[393] See G. Stefani, G. Levasseur, B. Bouloc, *Droit pénal général*, 16th edn. (Paris, Dalloz), at 490, citing a decision of the French Court of cassation, 3 March 1960, published in the *Bulletin* at n°138. See as well the *Rachid Karami* case.

[394] G. Stefani, G. Levasseur, B. Bouloc, *Droit pénal général*, 16th edn. (Paris, Dalloz), at 490.

[395] Court of cassation, 6th Chamber, *Aalian v Al-Saka*, decision n° 48, 16 May 2000 *Sader fil-tamyiz* [Sader in the cassation], 2000, at 541.

[396] The principle *jura novit curia* (it is for the court to apply the law, whereas it is for the Prosecution to submit the facts in support of its allegations) applies throughout.

relevant provision relating to the powers of all judges can be found in Article 370 of the Code of Civil Procedure, whereby a Judge is not bound by the legal characterisation of the facts propounded by the parties. A Judge is empowered to give the correct legal classification of these facts.[397] The general rule contained in Article 370 is specified in two provisions of the Lebanese Code of Criminal Procedure: Article 176 with regard to the single Judge[398] and Article 233 with regard to the criminal court.[399]

II. International Criminal Law

A. Multiple Offences

282. Under international criminal law, instances of "*concours réel d'infractions*"[400] and "*concours idéal d'infractions*"[401] are treated in the same manner as in Lebanese law.

283. Nevertheless, in the realm of international criminal law, "*concours idéal d'infractions*" poses particular difficulties. This is because numerous "core crimes" in international criminal law can—depending on their requisite elements—be classified as different crimes simultaneously. For example, the rape of a civilian woman by a soldier may—if carried out within the context of an armed conflict and as part of a widespread or systematic attack against the civilian population –be classified both as a war crime and as a crime against humanity. On the basis of which principles or criteria should one decide under which of these two classes a specific rape falls? The answer to this query is important not only for judges, but also for prosecutors, when they decide how to charge a person suspected of international crimes.

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[397] This is also applicable to matters pertaining to criminal procedure, pursuant to Article 6 of the Code of civil procedure which provides that the provisions contained in the Code may be applied whenever other Codes of Procedure lack such provisions.

[398] Article 176(2) of the Lebanese Code of Criminal procedure provides that "[t]he single Judge is not bound by the legal definition of the offence charged".

[399] Article 233(2) of the Lebanese Code of Criminal procedure provides that "It [the Criminal Court] may amend the legal definition of the act described in the indictment."

[400] As an ICTY Trial Chamber stated in *Kupreškić et al*, there is a "real concurrence" of offences when there is "an accumulation of separate acts, each violative of a different provision" *Kupreškić et al*, Trial Judgment, 14 January 2000 ("*Kupreškić* TJ"), para. 678c. As Judge Dolenc of the ICTR described a "real concurrence" of offences, "the accused commits more than one crime, either by violating the same criminalisation a number of times, or by violating a number of different criminalisations by separate acts." ICTR, *Semanza*, Trial Judgment – Separate and Dissenting Opinion of Judge Pavel Dolenc, 15 May 2003, para. 4.

[401] The ICTY Trial Chamber in *Kupreškić et al* provided the example of "the shelling of a religious group of enemy civilians by means of prohibited weapons (e.g. chemical weapons) in an international armed conflict, with the intent to destroy in whole or in part the group to which those civilians belong". Here this "single act contains an element particular to [genocide] to the extent that it intends to destroy a religious group, while the element particular to Article 3 [of the ICTY Statute on war crimes] lies in the use of unlawful weapons". *Kupreškić* TJ, para. 679a.

284. Criteria for settling these last issues can be deduced from the principles of criminal law common to the major legal systems of the world as well as international case law. The test which commends itself to us is known in common law countries as the *Blockburger* test (based on a famous decision by the US Supreme Court delivered in 1932 in *Blockburger* and confirmed by the US Supreme Court in *Rutledge* (1996)). This test requires a comparison of the crimes' respective constitutive elements as described by the statute or other applicable law, to determine whether each crime contains an element that is distinct from the elements required by the other crimes. It substantially coincides with the "principle of reciprocal speciality" upheld in civil law countries, namely that a defendant can only be convicted of two crimes for the same conduct if each crime requires an element that the other does not.

285. When such a comparison is undertaken, there are two possibilities. First, it may happen that each of the two crimes contains different elements relative to *each other*. Where this is the case, then reciprocal speciality between the two offences exists.[402] Provided that the act of the accused satisfy *all* the elements of both crimes, then the conduct can be said to amount to two different offences.[403] Secondly, it may happen that only one of the two crimes covering the same conduct requires a different element that the other crime does not. In such instances, reciprocal speciality cannot be said to exist and thus it is irrelevant if the acts of the accused satisfies all the elements of both crimes—he can be found guilty only of one crime: the crime with the additional element.[404] In other words, the more specific crime (the crime with the different/additional element) prevails over a more general

[402] As the ICTY Appeals Chamber pithily put it in *Delalić et al*: "[R]easons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other." *Delalić et al*, Appeals Judgment, 20 February 2001 ("*Delalić* AJ"), para. 412. See also ICTY, *Kupreškić* TJ, para. 685; ICTY, *Jelisić*, Appeals Judgment, 5 July 2001, para. 82.

[403] For instance, the rule on rape of civilians as a crime against humanity requires an objective element (the act must be part of a widespread or systematic practice) that the rule on rape as a war crime does not require. This last rule, in its turn, requires an objective element (that the rape be connected with an international or an internal armed conflict) that the other rule does not require (at least under customary international law). Hence, if the rape has been perpetrated within an internal armed conflict as part of a systematic practice, the offence may be regarded as both a war crime and a crime against humanity.

[404] As was stated in *Kupreškić et al*, "The rationale behind the principle of speciality is that if an action is legally regulated both by a general provision and by a specific one, the latter prevails as most appropriate, being more specifically directed towards that action. Particularly in case of discrepancy between the two provisions, it would be logical to assume that the law-making body intended to give pride of place to the provision governing the action more directly and in greater detail." ICTY, *Kupreškić* TJ, para. 684. This principle has been at times interpreted differently in practice (see ICTY, *Kordić and Čerkez*, Appeals Judgment, 17 December 2004, paras 1039-1044) but has always been followed in principle by international criminal tribunals.

crime (the crime that does not have a different/additional element). An illustration of this principle can be found in *Delalić et al.*[405]

B. Multiple Charging

286. In the light of the above, international criminal jurisprudence provides prosecutors with two options in instances of multiple offences: cumulative charging and alternative charging. The former refers to the practice of charging an accused with several crimes based on the same factual matrix, whilst the latter refers to charging an accused with several crimes which are relied upon "in the alternative", so that in the event that the primary charge is unsuccessful, prosecutors can then rely on secondary (alternate) charges.

287. In the earlier years of the international criminal tribunals there was a lack of uniformity in the law with respect to cumulative charging: the practice was permissible and it could be challenged, with a number of Chambers taking seemingly different approaches[406] and failing to provide a comprehensive analysis. The first developed decision on charging practice was that in *Kupreškić* by

[405] The Prosecutor had charged, for the same facts, some defendants with both murder as a war crime (covered by Article 3 of the ICTY Statute) and wilful killing as a grave breach of the Geneva Conventions (pursuant to Article 2 of the same Statute). The Appeals Chamber held that since only the provision on grave breaches provided for an element not envisaged in the provision on war crimes, the defendants could only be convicted of a grave breach. ICTY, *Delalić* AJ, 20 February 2001, paras 422-423. ("The definition of willful killing under Article 2 contains a materially distinct element not present in the definition of murder under Article 3: the requirement that the victim be a protected person. This requirement necessitates proof of a fact not required by the elements of murder, because the definition of a protected person includes, yet goes beyond what is meant by an individual taking no active part in the hostilities. However, the definition of murder under Article 3 does not contain an element requiring proof of a fact not required by the elements of willful killing under Article 2 [...] Because willful killing under Article 2 contains an additional element and therefore more specifically applies to the situation at hand, the Article 2 conviction must be upheld, and the Article 3 conviction dismissed.")

[406] For example: In ICTY, *Tadić*, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995, para. 17, the Chamber determined that cumulative charges issues are "best dealt with if and when matter of penalty fall for consideration"; in ICTR, *Akayesu*, Trial Judgment, 2 September 1998, para. 468, the Chamber held that accumulation was acceptable where (1) offences had different elements, (2) where the crimes protect different interests and (3) where more than one conviction was necessary to fully describe the accused's conduct; in ICTY, *Krstić*, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Count 7-8, 28 January 2000, at 5-7, the Chamber favoured cumulative charging except for "clear cut" cases of unduly cumulative charging; in ICTR, *Ntyitegeka*, Decision on Defence Motion on Matters Arising from Trial Chamber Decisions and Preliminary Motion Based on Defects in the Form of the Indictment and Lack of Jurisdiction, 20 November 2000, para. 43, the Chamber determined that challenges to cumulative charges can only be raised at trial and not in earlier phases of the proceedings; in ICTY, *Naletilić and Martinović*, Decision on Defendant Vinko Martinović's Objection to the Indictment, 15 February 2000, para. 12, the Chamber determined that an accused would not be prejudiced if issues of cumulative charges were decided after the evidence had been presented.

an ICTY Trial Chamber.[407] After reviewing national and international jurisprudence, the Trial Chamber stated that:

> the issue must be settled in the light of two basic but seemingly conflicting requirements. There is first the requirement that the rights of the accused be fully safeguarded. The other requirement is that the Prosecutor be granted all the powers consistent with the Statute to enable her to fulfil her mission efficiently and in the interests of justice.[408]

288. One of the underlying rights of the accused to which the Chamber referred is the fundamental *non bis in idem* (double jeopardy) principle and its compatibility with cumulative charging. An accused may make the argument that he or she is being charged and will potentially be punished twice for the same acts. The *non bis in idem* principle is triggered not at the *charging* stage, but rather when *guilt* is determined. In order to avoid injustice, the Chamber outlined the following principle:

> [i]f [...] a Trial Chamber finds that by a single act or omission the accused has perpetrated two offences under two distinct provisions of the Statute, and that the offences contain elements uniquely required by each provision, the Trial Chamber shall find the accused guilty on two separate counts. [...] On the other hand, if a Trial Chamber finds [...] that by a single act or omission the accused has not perpetrated two offences under two distinct provisions of the Statute but only one offence, then the Trial Chamber will have to decide on the appropriate conviction for that offence only.[409]

In other words, it is the existence of an additional, unique element between one charge and another for the same underlying facts that eliminates any breach of the *non bis in idem* principle. This proposition has become accepted as the correct statement of the law, as noted above.

289. The Chamber in *Kupreškić* then went on to provide guidance on when cumulative or alternative charges are to be laid. In essence, the Chamber took the view that the Prosecutor could include cumulative charges in the indictment when the facts charged violate two or more provisions of the relevant Statute and when (i) the offence requires proof of an element that the other does not and (ii) each offence substantially protects different values.[410] On the other hand, alternative charges are to be preferred when an offence appears to be in breach of more than one provision but where

[407] ICTY, *Kupreškić* TJ, paras 668-699; 720-727.
[408] ICTY, *Kupreškić* TJ, para. 724.
[409] ICTY, *Kupreškić* TJ, paras 718-719. See also, ICTY, *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 ("*Krnojelac* Indictment Decision"), para. 10.
[410] ICTY, *Kupreškić* TJ, para. 727(a).

multiple convictions would not be possible due to the principle of speciality.[411] In addition, the Chamber opined that restraint should be exercised when seeking to charge individuals based on the same facts but under excessive multiple criminal heads when those facts cannot sustain multiple convictions under the relevant Statute.[412]

290. These holdings were however persuasively disapproved, in as much as they restrict the Prosecutor's ability to bring cumulative charges, in one sweeping paragraph of the Appeals Chamber's judgment in *Delalić*. The basis for this conclusion was that (i) before the presentation of all the evidence it was impossible for the Prosecutor to evaluate and determine which of the charges will be proved and that (ii) the Chamber was better positioned to evaluate the sufficiency of the evidence and decide which charges would be retained.[413] Cumulative charging has been subsequently endorsed by the ICTR,[414] the SCSL[415] and, more recently, by the ECCC.[416]

291. This jurisprudence is to be contrasted with what may appear to be a different emerging practice at the ICC. In its decision on the confirmation of charges in the *Bemba* case, the Pre-Trial Chamber held that:

> the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other. [...] [t]he Chamber further recalls that the ICC legal framework differs from that of the *ad hoc* tribunals, since under regulation 55 of the Regulations, the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation. Therefore, before the ICC, there is no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber.[417]

[411] ICTY, *Kupreškić* TJ, para. 727(b).

[412] ICTY, *Kupreškić* TJ, para. 727(c).

[413] ICTY, *Delalić* AJ, para. 400; *id*, Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna, para. 12. See also ICTY, *Brđanin and Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, paras 29-43.

[414] ICTR, *Musema*, Appeals Judgment, 16 November 2001, para. 369.

[415] SCSL, *Brima et al*, Appeals Judgment, 22 February 2008, para. 212, n. 327.

[416] ECCC, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias "Duch", 5 December 2008, para. 87.

[417] ICC, *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009 ("*Bemba* Confirmation of Charges Decision"), paras 202-203.

292. Leave to appeal this decision was rejected.[418] It must be noted at this juncture that none of the *ad hoc* tribunals has a comparable regulation as that referred to by the ICC Chamber.[419] At present, it would appear that in one case at the ICC cumulative charging has been frowned upon, whilst at the *ad hoc* tribunals the practice has found more favour.[420]

293. As for alternative charging, the ICTY Appeals Chamber's reasoning in *Delalić*, although very brief and yet simultaneously sweeping, does nothing to prevent alternative charging by prosecutors. Indeed, such practice has been explicitly approved.[421] Furthermore, nothing prevents prosecutors from pleading alternative modes of liability.[422]

III. Comparison between Lebanese and International Criminal Law

294. Cumulative charging and the plurality of offences are regulated largely along the same lines by Lebanese law and international criminal law. Thus, as foreshadowed above, the answer to question (xiv) is straightforward: there is no cause—at least as can be foreseen before the presentation of any particular facts—to envisage, let alone reconcile, any conflict between the two bodies of law.

295. In relation to question (xv), as the Defence Office has correctly summarised,[423] there is no clear, general rule under either Lebanese or international criminal law as to whether cumulative or alternative charges are to be preferred. Both forms of charges have their strengths and weaknesses. On the one hand, cumulative charges can ensure that the full scope of the accused's conduct is properly punished, and in this sense, provide victims with the full justice they deserve. As the ICTY in *Delalić* pointed out, at the early stages of a case the Prosecutor may not be in the position to offer

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[418] ICC, *Bemba*, Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 18 September 2009 ("*Bemba* Leave to Appeal Decision").

[419] Notwithstanding, findings of guilt have been entered for the first time at the appellate stage but only in instances where the relevant charges have been included in the indictment. For one of the most recent examples of this practice see ICTY, *Mrškić and Šljivančanin*, Appeals Judgment, 5 May 2009, paras 61-63, 76-103; but see Partially Dissenting Opinion of Judge Pocar, paras 2-13.

[420] See, generally, War Crimes Research Office Brief.

[421] ICTY, *Naletilić and Martinović*, Trial Judgment, 31 March 2003, para. 510; ICTY, *Naletilić and Martinović*, Appeals Judgment, 3 May 2006, para. 102. See also ICTY, *Kvočka et al*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 25; ICTR, *Mpambara*, Decision on the Defence Motion Challenging the Amended Indictment, 30 May 2005, para. 4. See also the reasoning offered in War Crimes Research Office Brief, especially paras 19-22.

[422] ICTY, *Stanišić*, Decision on Defence Preliminary Motion in the Form of the Indictment, 19 July 2005, para. 6.

[423] Defence Office Submission, paras 167 and 175.

the clarity and narrowness that would be advantageous for expeditious proceedings.[424] Yet on the other hand, as one author correctly observed, "[c]umulative charging has certainly lengthened [...] trials considerably."[425] Indeed, this was one on the main concerns that motivated the decision of the ICC in *Bemba*,[426] perhaps being conscious of the constant criticisms directed at the length of trials at international tribunals. Clarifying and narrowing charges at the beginning "may help in making the proceedings, which have heretofore lasted months and even years, more focused and efficient. In addition, it may aid the defendant in the preparation of his case to know which charges will ultimately be considered to cover the same 'offence' for purposes of conviction and sentencing."[427]

296. Not surprisingly, in the light of these policy considerations, the Prosecution has emphasised the permissibility of cumulative charges and the difficulty faced by the Prosecution at the start of a trial as to which facts will ultimately be proved to the satisfaction of the Trial Chamber.[428] Also not surprisingly, the Defence Office asserts that international criminal tribunals have increasingly frowned upon unnecessary cumulative charging;[429] it has also emphasised the difficulties that excessively cumulative charges impose on defendants.[430]

297. To provide the Pre-Trial Judge with guidance, we draw the following conclusions based on the underlying purpose of the Statute to ensure fair and efficient trials in accordance with the highest standards of justice.

298. First, the Pre-Trial Judge, in confirming the indictment, should be particularly careful to allow cumulative charging only when separate elements of the charged offences make these offences truly distinct. In particular, when one offence encompasses another, the Judge should always choose the former and reject pleading of the latter. Likewise, if the offences are provided for under a general provision and a special provision, the Judge should always favour the special provisions. Additionally, modes of liability for the *same* offence should always be charged in the alternative.

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[424] ICTY, *Delalić* AJ, para. 400. See also the (more convincing) reasoning by Judges Hunt and Bennouna, in their Separate and Dissenting Opinion, in which they concurred with the majority on this point (para. 12).

[425] W. Schabas, *The UN International Criminal Tribunals The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006), at 368.

[426] ICC, *Bemba* Leave to Appeal Decision, para. 60.

[427] ICTY, *Krstić*, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Count 7-8, 28 January 2000, at 5.

[428] Prosecution Submission, paras 133-135.

[429] Defence Office Submission, paras 172-174 and 177.

[430] Defence Office Submission, paras 179-181.

299. Second, the Pre-Trial Judge should be guided by the goal of providing the greatest clarity possible to the defence. For example, Rule 68(I) requires the Pre-Trial Judge to provide a reasoned decision for confirming or rejecting charges in the indictment. The Defence Office has suggested that if the Pre-Trial Judge confirms the indictment in whole or in part, he could use this reasoned decision as an opportunity to set out his understanding of the charges and to clarify any ambiguities that might remain in the indictment.[431] The Pre-Trial Judge may also request that the Prosecutor reconsider the submission of formally distinct offences which nonetheless do not in practical terms further the achievement of truth and justice through the criminal process. That is, additional charges should be discouraged unless the rules contemplating the offences are aimed at protecting substantially different values. This general approach should enable more efficient proceedings while avoiding unnecessary burdens on the defence, thus furthering the overall purpose of the Tribunal to achieve justice in a fair and efficient manner.

300. Third, we emphasise the evaluative role of the judiciary.

301. Finally, we turn to the specific hypothetical posed in question (xv). We do so with hesitation, however, as we are wary of addressing specific situations before the presentation of facts, which would better inform and clarify our analysis. Nonetheless, the following observation can be made based purely on the law. Under Lebanese law, the crimes of terrorist conspiracy, terrorism, and intentional homicide can be charged cumulatively even if based on the same underlying conduct, because they do not entail incompatible legal characterisations, and because the purpose behind criminalising such conduct is the protection of substantially different values (preventing extremely dangerous but inchoate offences, widespread fear in the population, and death, respectively). Therefore, in most circumstances it would be more appropriate to charge those crimes cumulatively rather than alternatively.

[431] Hearing of 7 February 2011, T. 139.

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

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

PURSUANT TO Article 21(1) of the Statute and Rules 68(G) and 176 *bis* of the Rules;

NOTING the Pre-Trial Judge's preliminary questions contained in his order dated 21 January 2011;

NOTING the respective written submissions of the Prosecutor and the Defence Office dated 31 January 2011 and the arguments they presented at the public hearing on 7 February 2011 as well as the other filings in this case;

DETERMINES that;

With regard to the notion of **terrorist acts**:

1) The Tribunal shall apply domestic Lebanese law on terrorism and not the relevant rules of international treaty or customary law (see above paragraph 43);

2) Since the Tribunal shall apply Lebanese law on terrorism, there is no need to reconcile Article 2 of the Statute with international law (see above paragraph 44);

3) 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 (see above paras 47-60, 124-30):

   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;[432] and

c. with the special intent to cause a state of terror;

4) 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) (see above paragraphs 59 and 183);

With regard to the notion of conspiracy:

5) The Tribunal must apply domestic Lebanese law on conspiracy, not the rules of international treaty or customary law (see above paragraph 192);

6) Since the Tribunal must apply Lebanese law on conspiracy there is no need to reconcile Article 2 of the Statute with international law (see above paragraph 192);

7) 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 (see above paragraphs 193-201):

a. two or more individuals;

b. who conclude or join an agreement of the type described in paragraph 196;

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); and

e. criminal intent relating to the object of the conspiracy;

[432] In particular, 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.

8) Conspiracy and joint criminal enterprise can be distinguished in that Lebanese criminal law treats conspiracy as a substantive crime and not as a mode of liability, whereas the doctrine of joint criminal enterprise relates to modes of criminal responsibility for participating in a group with a common criminal purpose (see above paragraph 191);

With regard to intentional homicide and attempted homicide:

9) The Tribunal must apply domestic Lebanese law on intentional homicide and attempted homicide, not the rules of international treaty or customary law (see above paragraph 150);

10) Since the Tribunal must apply Lebanese law on intentional homicide and attempted homicide, there is no need to reconcile Article 2 of the Statute with international law (see above paragraph 150);

11) Articles 547-549 of the Lebanese Criminal Code require the following elements for the crime of intentional homicide (see above paragraphs 151-166):

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*;

Articles 200-203 of the Lebanese Criminal Code require the following elements for the crime of attempted homicide (see above paragraphs 176-181):

(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;

12) An individual can be prosecuted by the Tribunal for intentional homicide for an act perpetrated against persons not directly targeted if that individual had foreseen the possibility of those deaths but nonetheless took the risk of their occurrence (*dolus eventualis*) (see above paragraphs 169-175);

With regard to modes of responsibility:

13) 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 (see above paragraphs 210-211);

With regard to cumulative charging and plurality of offences:

14) Cumulative charging and plurality of offences applicable before the Tribunal are regulated in largely the same manner by both international law and domestic Lebanese law. Lebanese law should be applied, and care should be taken to provide utmost clarity to the accused in respect to the content of the charges against them (see above paragraphs 270-301);

15) 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 (see above paragraphs 277-301);

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

Dated this sixteenth day of February 2011,
Leidschendam, The Netherlands

Judge Antonio Cassese
President

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