

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

# **STL CASEBOOK**

## **2011**

**Major rulings issued by the  
Special Tribunal for Lebanon**



**STL**

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Special Tribunal for Lebanon**

Special Tribunal for Lebanon  
Leidschendam

Special Tribunal for Lebanon  
Leidschendam  
Netherlands

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## PREFACE

This casebook is part of a collection of volumes that the Special Tribunal for Lebanon plans to publish throughout its life, containing the most significant rulings delivered by its Judges each year. It is part of the outreach efforts of the Tribunal. Its purpose is to improve access to the jurisprudence of the Tribunal in Lebanon and beyond.

This volume contains eight major decisions issued by the Tribunal in 2011 and the Indictment in the *Ayyash et al.* case which was confirmed that year. These decisions are also accessible on the Tribunal's website ([www.stl-tsl.org](http://www.stl-tsl.org)). The volume also contains an analytical index aimed at facilitating research by students and scholars.

As the first tribunal of international character with jurisdiction over terrorism, the significance of the STL jurisprudence goes well beyond our courtroom. I hope that this publication will assist students, professors, academics, scholars, judges, lawyers, other members of the legal profession and even the general public – both in Lebanon and elsewhere – in accessing, studying, and commenting on the Tribunal's case law.

David Baragwanath  
President





Case name: *The Prosecutor v. Ayyash et al.*

Before: Pre-Trial Judge

Title: **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**

Short title: **“Preliminary Questions PTJ”**





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

## THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/I**  
Filed before: **The Pre-Trial Judge**  
**Mr Daniel Fransen**  
Registrar: **Mr Herman von Hebel**  
Date: **21 January 2011**  
Original language: **French**  
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[Case Name: ***The Prosecutor v. Ayyash et al.***]

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### 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

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**Office of the Prosecutor:**

Mr Daniel Bellemare, MSM, QC

**Defence Office:**

Mr François Roux

1. Pursuant to Rule 68, paragraph (G) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon (“Rules” and “Tribunal” respectively), the Pre-Trial Judge of the Tribunal (“Pre-Trial Judge”) hereby has the honour to submit respectfully to the Appeals Chamber of the Tribunal (“Appeals Chamber”) some preliminary questions relating to the interpretation of the Statute. These questions are intended to clarify the applicable law in order to examine the indictment submitted by the Prosecutor of the Tribunal (“Prosecutor”) on 17 January 2011 and issue, with full knowledge of the facts, a decision on whether or not to confirm the indictment.

### **Preliminary observations**

2. On reading the counts in the indictment, the Pre-Trial Judge considers that, in the interest of justice, several questions with regard to the interpretation of the applicable law should be determined in *limine litis* by the Appeals Chamber. These questions relate to the offences, modes of responsibility and cumulative charging and plurality of offences covered in the indictment. Indeed, as will be examined subsequently in detail, the provisions of the Statute relating to these questions are open to differing interpretations. Should all or part of the indictment be confirmed without having clarified these provisions at this stage of the proceedings, the proceedings might commence on incorrect legal bases which would not be rectified until the end of the proceedings when the appeals ruling is issued. This method of proceeding, in addition to being time-consuming and costly, would not assist the proceedings in terms of coherency and transparency, nor would it be in the interest of the accused. A specific definition of the applicable law from the outset would allow the accused to gain a better understanding of the scope of the counts against them and prepare their defence accordingly. Likewise, to invalidate all or part of the indictment without having clarified *ab initio* the aforementioned provisions of the Statute might unjustifiably compromise the future proceedings.

#### **1. The offences**

3. Amongst the offences covered in the indictment are terrorist acts, conspiracy with a view to committing a terrorist act (“conspiracy”), intentional homicide

with premeditation and attempted intentional homicide with premeditation. In the interests of clarity, the Pre-Trial Judge will examine the aforementioned questions individually using the definition of each of these offences.

4. It should be noted that the counts mentioned in the indictment are founded on both Articles 1 and 3 of the Statute, Articles 188, 200, 212, 213, 270, 314, 547, 549 (1) and (7) of the Lebanese Criminal Code and Articles 6 and 7 of the Lebanese Law enacted on 11 January 1958.

#### ***A. Terrorist acts***

5. Although it does not give a specific definition of the notion of terrorist acts, Article 2 of the Statute refers to Article 314 of the Lebanese Criminal Code relating to the prosecution and punishment of these acts. The Pre-Trial Judge questions whether it is necessary for the Tribunal to take into account conventional and customary international law in order to understand fully this notion. If it should be taken into account, he likewise questions the way in which any conflict which might arise between the definition given by the Lebanese Criminal Code and that given by international law can be resolved.

6. The first question raised by the definition of the notion of terrorist acts could therefore be set out as follows: taking into account the fact that Article 2 of the Statute refers exclusively to the relevant provisions of the Lebanese Criminal Code to define the notion of terrorism, should the Tribunal likewise take into account applicable international law in this regard? In particular, should it rely on the general definition of terrorism as set out in Article 1, paragraph 2 of the Arab Convention on the Suppression of Terrorism,<sup>1</sup> or indeed those definitions mentioned in other international conventions or, if appropriate, those which could be drawn from customary international law?

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<sup>1</sup> Article 1, paragraph 2 of the Arab Convention on the Suppression of Terrorism (which entered into force 22 April 1998 and was ratified by Lebanon on 31 March 1999) defines terrorism 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 jeopardize a national resource[s]” [unofficial translation].

7. In order to support these questions, the Pre-Trial Judge submits the following considerations to the Appeals Chamber:

- a. *The text of Article 2 of the Statute.* As mentioned above, Article 2 of the Statute does not provide a definition of terrorist acts but refers in this respect to the Lebanese criminal provisions in force. As such, Article 314 of the Lebanese Criminal Code defines this notion in the following manner: “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”.<sup>2</sup> Article 2 of the Statute appears consequently to refer solely to national Lebanese law with the exception of conventional and customary international law.
- b. *The international character of the Tribunal.* Although clearly influenced by Lebanese law, the Tribunal has an international character which results principally from the way in which it was established, its composition and the rules relating to the way in which it functions. It is therefore legitimate to question whether it is necessary for the Tribunal to refer to conventional and customary international law, in order to specify – indeed supplement – the provisions of substantive law that the Tribunal should apply. It is appropriate to note in this respect that the other *ad hoc* international criminal tribunals were quite prepared to go beyond the rigid frameworks of their Statutes and to refer to international conventions and customary principles in force in order to specify the offences which were mentioned therein.<sup>3</sup>
- c. *The evolution of the notion of terrorism.* As mentioned above, Article 2 of the Statute refers to the Lebanese Criminal Code which was adopted on 1 March 1943. Since that date, numerous conventions have entered into force worldwide (internationally and regionally) in order to create specific terrorist offences

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2 It should be noted that the term corresponding to “*état d’alarme*” in the Arabic version of the Lebanese Criminal Code is “*حالة ذعر*” and that in the Tribunal official Arabic to English translation, this term is translated by “state of terror”.

3 International Criminal Tribunal for the former Yugoslavia (ICTY), Case No. 94-1-AR72, *The Prosecutor v. Tadić*, IT-94-1-AR72, Decision of 2 October 1995, paras 94-95.

– some of which have been ratified by Lebanon<sup>4</sup> – or to combat the crime of terrorism generally as envisaged by the aforementioned Arab Convention. In extending these conventions, the United Nations General Assembly, the Security Council and the Commission on Human Rights have also adopted several resolutions on this issue.<sup>5</sup> Furthermore, faced with the upsurge in terrorist acts during the last four decades, numerous States, in order to respond to the specific characteristics of this offence, have created a specific legislative arsenal which itself has been influenced by the case law of their courts and tribunals.<sup>6</sup> Taken together, these texts – conventions, resolutions, laws and

- 4 Conventions relating to this issue which have been ratified by Lebanon include: the Convention on Offences and Certain Other Acts Committed On Board Aircraft (date of ratification: 11 June 1974); the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (date of ratification: 23 December 1977); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (date of accession: 16 December 1994); the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (date of ratification: 27 May 1996); the International Convention against the Taking of Hostages (date of accession: 4 December 1997); and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (date of accession: 3 June 1997). These conventions recognise as offences certain specific acts or provide for specific legal rules to be applied to these offences without necessarily referring to the concept of “terrorism”.
- 5 Cf. Security Council resolutions 1269 (1999), preamble para. 1; 1373 (2001), para. 4; 1377 (2001), para. 6; 1456 (2002), preamble paras 3 and 6; 1540 (2004), preamble para. 8 and 1566 (2004). Paragraph 3 of this last resolution is particularly informative as – without providing in the strictest sense a definition of terrorism – it recalls 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 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” (italics added). Cf. Likewise, General Assembly resolutions 3034 (XXVII) (1972), para. 1; 31/102 (1976), para. 1; 32/147 (1977), para. 1; 34/145 (1979), para. 1; 36/109 (1981), para. 1; 48/122 (1993), preamble para. 7; 49/185 (1994), preamble para. 9; 50/186 (1995), preamble para. 12; 52/133 (1998), preamble para. 11; 54/164 (2000), preamble para. 13; 56/160 (2002), preamble para. 18; 58/136 (2003), preamble para. 8; 58/174 (2004), preamble para. 12; 59/153 (2004), preamble para. 10; and 59/194 (2004), preamble para. 3 and paras 2, 4 and 14. Cf. The Commission on Human Rights, resolutions 2001/37, preamble para. 16 and para. 2; and 2004/44, preamble para. 7.
- 6 Cf. Article 83.01(1) of the Criminal Code of Canada which defines terrorist activity as follows: “an act or omission that is committed in or outside Canada [...] committed both: (A) in whole or in part for a political, religious or ideological purpose, objective or cause; (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada [...]”. The Supreme Court of Canada also recognised that the definition of terrorism set out in Article 2 (1) (b) of the International Convention for the Suppression of the Financing of Terrorism “... catches the essence of what the world understands as ‘terrorism’”. (*Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 R.C.S. 3, 2002 SCC 1, para. 98). This Convention, which entered into force on 10 April 2002, defines terrorism in the



case law – could provide information as to the evolution, at international level, of the notion of terrorism and its constituent elements. In this context, the question arises of whether the Tribunal, given its specific character, should interpret Article 314 of the Lebanese Criminal Code and relevant Lebanese case law by taking into account this evolution in so far as: firstly, this would be effectively established by one or more international conventions ratified by Lebanon or would reflect a customary law resulting from a practice of States which is accepted by law; and secondly, this or these conventions or this customary law would be applicable in the national Lebanese criminal justice system.

- d. *The rule of criminal law.* If it should be supplemented in the light of international law, the notion of terrorism should be applied in accordance with the fundamental rule of criminal law.<sup>7</sup> In this respect, it is worth recalling that Article 15 of the International Covenant on Civil and Political Rights, which was ratified by Lebanon on 3 November 1972 and entered into force on 23 March 1976, provides that a person can be held guilty of an act or omission which constituted a criminal offence at the time it was committed, not only under the relevant national law, but also under the international law in force.<sup>8</sup>
- e. *The clarification of the constituent elements of terrorism.* Article 314 of

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following manner: “Any [other] 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”. Cf. Also the United Kingdom legislation on this matter (UK Terrorism Act 2000, Section 1) drawn up as follows: “Terrorism means the use or threat of action where [...] (b) the use or threat is designed to influence the government 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 or ideological cause”.

- 7 The principle of *nullum crimen sine lege* is established by most national legal systems – including Lebanese law (cf. Article 1 of the Lebanese Criminal Code) – as well as by numerous instruments for the protection of human rights, in particular by Article 11, paragraph 2 of the Universal Declaration of Human Rights of 1948, Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, Article 15 of the International Covenant on Civil and Political Rights of 1966, Article 9 of the American Convention on Human Rights of 1969 and Article 7, paragraph (2) of the African Charter on Human and Peoples’ Rights of 1981.
- 8 Article 15, paragraph 2 of the International Covenant on Civil and Political Rights is drawn up as follows: “Nothing in this article shall prejudice the trial and punishment of any person for any act of omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”.

the Lebanese Criminal Code and relevant case law place the emphasis on the means by way of which the terrorist offence is committed (explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents).<sup>9</sup> On the other hand, they are less forthcoming with regard to the special intent<sup>10</sup> as a requisite on the part of the perpetrator of the offence, except for a reference to “state of terror”.<sup>11</sup> Yet the aforementioned international conventions, resolutions, laws and case law generally refer to special intent as the distinguishing feature of an act of terrorism in comparison to common law offences and define it in reference to two principle factors: the intention to exert pressure on a State or an international organisation and the intimidation of all or part of the public. Consequently, should the Tribunal rely on international law in order to specify the constituent elements of this offence and, in particular, the intent, in order notably to ensure better certainty of the law and strengthen the rights of the accused?

- f. *Harmonisation of Articles 2 and 3 of the Statute.* For a definition of the modes of responsibility falling within the jurisdiction of the Tribunal, Article 3 of the Statute relies directly on international law by drawing up this Article in a similar fashion to Articles 25 and 28 of the International Criminal Court (“ICC”). In the interests of aligning the provisions of the Statute relating to the offences and to the modes of responsibility, this reference to international law would justify the judge making use of these articles as a basis for clarifying the definition of the offence.

8. Should there be a positive response to the questions raised in paragraph 6, it would be appropriate to consider, and in accordance with which principles, how to reconcile the notion of terrorism as set out in Article 2 of the Statute (which places the emphasis above all on the material element of the offence) with that drawn

9 The Judicial Council of Lebanon, *Case Nizar Al-Halabi*, 17 January 1997 and *Case Michel Al-Murr*, cited in Nidal Nabil Jurdi, “The Subject Matter Jurisdiction of the Special Tribunal for Lebanon”, *Journal of International Criminal Justice*, 5 (2007), 1125-1138, p.1134, nos 49-50.

10 The intentional element of a terrorist offence is often deduced from the means used to commit the offence (*cf.* The Judicial Council of Lebanon, *Case Michel Al-Murr*).

11 *Cf.* footnote 2.

from international law (which gives predominance to the intentional aspect). After considering this, it would be appropriate to determine the constituent elements, material and intentional, of this notion to be applied by the Tribunal. In this respect, the Pre-Trial Judge notes that Article 2 of the Statute must indeed be interpreted in the light of the customary principles established by Articles 31 to 33 of the Vienna Convention on the Law of Treaties which entered into force on 27 January 1980, the statements made by representatives of Member States of the Security Council at the time of the adoption of Council resolution 1757 (2007) or of other resolutions dealing with the same issue in addition to recent practices of the United Nations and States that affect the resolutions in question.<sup>12</sup> However, with regard to a criminal offence, the principle according to which the interpretation of the Statute texts cannot be made to the detriment of the rights of the accused must be fully respected.

9. Should there be a negative response to the questions raised in paragraph 6, it would be advisable to determine precisely the constituent elements, material and intentional, of the terrorist acts that should be taken into consideration by the Tribunal in light of Lebanese law and case law pertaining thereto.

10. Furthermore, in addition to the questions of a general nature relating to the definition of the notion of terrorism, in light of the charges contained in the indictment, the Pre-Trial Judge respectfully submits to the Appeals Chamber the following question. If the perpetrator of acts of terrorism aimed at creating a state of terror<sup>13</sup> through the use of explosive devices intended to commit this act by killing a specific individual, how can his or her criminal responsibility be defined in the case where death and injury are caused to persons who might be considered not to have been the personal or direct object of such acts?

### ***B. Conspiracy***

11. As for the notion of terrorist acts, Article 2 of the Statute refers to the Lebanese Criminal Code with regard to conspiracy. Article 270 of this Code defines it in the

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<sup>12</sup> International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, 22 July 2010, para. 94.

<sup>13</sup> *Cf.* footnote 2.

following terms: “Any agreement concluded between two or more persons to commit a felony by specific means shall be qualified as a conspiracy.” In this regard, the application of Article 315 of this Code, which specifically recognises “a conspiracy aimed at the commission of one or more acts of terrorism”, was suspended by Article 1 of the Law enacted on 11 January 1958. Article 7 of this same law states, without specifying further, that “[e]very 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”, which includes acts of terrorism.

12. In the light of considerations similar to those mentioned in paragraph 7 of this Order, the Pre-Trial Judge questions whether the Tribunal must rely, not only on Lebanese law, but also on conventional and customary international law, in order to interpret the constituent elements of the notion of conspiracy. For this reason, the Pre-Trial Judge notes that, in international law, conspiracy is recognised as a specific offence where genocide<sup>14</sup> is concerned and, in national law, sometimes as a specific offence,<sup>15</sup> sometimes as a mode of responsibility.<sup>16</sup>

13. Should there be a positive response to the question raised in the preceding paragraph, it would be appropriate to examine whether there is any conflict between the definition of conspiracy as recognised in Lebanese law (mentioned in Article 7 of the Law enacted on 11 January 1958 and substantiated by the relevant applicable case law) and that arising out of international law and, where necessary, how to resolve it in accordance with the relevant applicable international norms, in the interests of certainty of the law and respect for the rights of the accused.

14 International Criminal Tribunal for Rwanda (ICTR), Case No. ICTR-96-13-T, *The Prosecutor v. Musema*, Judgement of 27 January 2000, paras 185-191; ICTR, Case No. ICTR-99-52-T, *The Prosecutor v. Nahimana*, Judgement of 3 December 2003, para. 1043.

15 Cf. concerning conspiracy as a specific offence: G. Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, p.166, para. 489 ; G. Fletcher, *Rethinking Criminal Law*, Oxford University Press, Berlin, 2000, pp. 646 *et seq.*; Article 465 of the Criminal Code of Canada; Section 120-A, Indian Penal Code (1860); Case *R. v. Lam*, [2005] ABQB 849.

16 Cf. G. Boas, J. L. Bischoff and N. L. Reid, *International Criminal Law Practitioner Library: Forms of Responsibility in International Criminal Law*, Vol. I, p. 283, n.13 referring to A. M. Danner and J. S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law”, *California Law Review* 93 (2005), 75-169, p.119.

14. Should there be a negative response to this question, it would be advisable to precisely determine the constituent elements of this notion that must be taken into consideration by the Tribunal from the point of view of Lebanese law and the case law pertaining thereto.

15. In addition, in so far as the notion of conspiracy and that of joint criminal enterprise – referred to in paragraph b) of Article 3 of the Statute and constituting a mode of responsibility in international law – share points in common initially, it would be advisable to specify their respective distinguishing features.

***C. Intentional homicide with premeditation and attempted intentional homicide with premeditation***

16. Homicide counts among the “crimes and offences against life and personal integrity” referred to in Article 2 of the Statute. It is made an offence under Article 547 of the Lebanese Criminal Code in the following terms: “[a]nyone who intentionally kills another person shall be punishable by hard labour for a term of between 15 and 20 years.” Premeditation is referred to in Article 549 of the Lebanese Criminal Code and the element of intent specifically set out in Articles 188 and 189 of this same Code. Article 188 provides that “[i]ntent consists of the will to commit an offence as defined by law” and Article 189 that “[a]n 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 occurrence and thus accepted the risk.” As regards the attempt to commit a criminal offence, this is made an offence under Article 200 of the Lebanese Criminal Code, which specifies that: “[a]ny 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.”

17. In the light of similar considerations to those mentioned in paragraph 7 of this Order, the Pre-Trial Judge questions whether the Tribunal must rely, not only on Lebanese law, but also on conventional and customary international law, in order to interpret the constituent elements of the notions of intentional homicide with premeditation and attempted intentional homicide with premeditation.

18. Should there be a positive response to the question raised in the preceding paragraph, it should be examined whether there is 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 that arise out of international law and, where necessary, how to resolve them in accordance with the relevant applicable international norms, in the interests of certainty of the law and respect for the rights of the accused.

19. Should there be a negative response to this question, it would be advisable to determine precisely the constituent elements of these notions that must be taken into consideration by the Tribunal in the light of Lebanese law and the case law pertaining thereto.

20. In addition, it would be appropriate if the Appeals Chamber were to indicate whether an individual may be prosecuted for intentional homicide with premeditation for offences committed against persons who were not specifically targeted in the alleged criminal act.

## **2. Modes of responsibility**

21. From a general viewpoint, the Pre-Trial Judge notes that the Statute says nothing about the issue of whether the provisions relating to modes of responsibility are to be interpreted in the light of Lebanese criminal law or international law. Indeed, with regard to complicity in a criminal offence, Article 2, paragraph a) of the Statute refers to the Lebanese Criminal Code. However, Article 3 of this same Statute entitled “Individual criminal responsibility” draws heavily on international law as shown in particular by paragraph 2, which relates to responsibility of the superior and draws on Articles 25 and 28 of the Statute of the ICC. However, the Statute provides no information on how to resolve any conflict that this situation might bring about.

22. In this context, the Pre-Trial Judge respectfully requests the Appeals Chamber to reply to the following questions. In order to apply criminal modes of responsibility before the Tribunal, should reference be made to Lebanese law, international law or

both Lebanese and international law? In this last case, how, and on the basis of which principles, should any conflict between these laws, with specific reference to commission and co-perpetration, be resolved?

### 3. Cumulative charging and plurality of offences

23. The Statute is silent on the issue of cumulative charging and plurality of offences. The question that then arises is whether cumulative charging and plurality of offences should 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, should these two laws be reconciled in the event of conflict between them?

24. It should be noted in this regard that the international criminal tribunals have, generally, allowed cumulative charging and plurality of offences in indictments in so far as the charges laid against the accused are only confirmed at the end of the proceedings, if appropriate.<sup>17</sup> However, the ICC, like some national jurisdictions, has dismissed, under some circumstances, such charging, in that it can be detrimental to the rights of the accused<sup>18</sup> and lead to lengthy and weighty proceedings.<sup>19</sup> Additionally, according to the ICC, the responsibility for legally defining the allegations made against the accused falls to the judges.<sup>20</sup>

25. In the light of the responses provided to these questions, it would be appropriate to determine whether – and under what conditions – the Prosecutor may define one and the same act 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 this is indeed possible, may

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17 ICTY, Case No. IT-95-16-A, *The Prosecutor v. Kupreškić*, Appeal Judgement of 23 October 2001, para. 385 recalling Case No. IT-96-21-A, *The Prosecutor v. Delalić et al. [Čelebići]*, Appeal Judgement of 20 February 2001, para. 400.

18 ICC, Case No. ICC-01/05-01/08-14 ENG, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo” of 8 June 2008, para. 25.

19 *Ibid.*

20 *Ibid.*

he use these classifications cumulatively or as alternatives? Where applicable, under what conditions?

**FOR THESE REASONS,**

**PURSUANT TO** Rule 68, paragraph (G) of the Rules,

**THE PRE-TRIAL JUDGE** has the honour to respectfully submit to the Appeals Chamber the following preliminary questions:

**With regard to the notion of terrorist acts:**

- 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<sup>21</sup> 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?

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21 *Cf.* note 2.



**With regard to the notion of conspiracy:**

- 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?

**With regard to intentional homicide with premeditation and attempted intentional homicide with premeditation:**

- 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?

**With regard to modes of responsibility:**

- 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?

**With regard to cumulative charging and plurality of offences:**

- 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?

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

Leidschendam, 21 January 2011.

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Daniel Fransen  
Pre-Trial Judge

Case name:	<b><i>The Prosecutor v. Ayyash et al.</i></b>
Before:	<b>Appeals Chamber</b>
Title:	<b>Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging</b>
Short title	<b>“Applicable Law”</b>





المحكمة الخاصة بلبنان  
SPECIAL TRIBUNAL FOR LEBANON  
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  
Date: 16 February 2011  
Original language: English  
Type of document: Public  
[Case Name: *The Prosecutor v. Ayyash et al.*]

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### INTERLOCUTORY DECISION ON THE APPLICABLE LAW: TERRORISM, CONSPIRACY, HOMICIDE, PERPETRATION, CUMULATIVE CHARGING

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#### Counsel:

##### Office of the Prosecutor:

Mr Daniel A. Bellemare, MSM, QC  
Mr Daryl A. Mundis  
Mr Iain Morley, QC  
Mr Ekkehard Withopf  
Mr Kwai Hong Ip  
Mr Jean-Philippe Duchesneau  
Ms Marie-Sophie Poulin

##### Defence Office:

Mr François Roux  
Ms Alia Aoun

##### For the Defence Office:

Mr Raymond Chedid  
Mr Guenael Mettraux

## HEADNOTE<sup>1</sup>

### 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 (conplot) 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*

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<sup>1</sup> 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.

*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.*

## **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 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”).<sup>2</sup> 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.<sup>3</sup> On the basis of the President’s Scheduling Order of the same day,<sup>4</sup> 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<sup>5</sup> and 4 February 2011<sup>6</sup> 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.<sup>7</sup> The parties did not object to this in principle, simply announcing that they might wish to respond to such briefs, should

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 176bis)”, STL-11-01/I, 31 January 2011 (“Prosecution Submission”); “Defence Office’s Submissions Pursuant to Rule 176bis(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 176bis(B)’ and Corrigendum to Prosecutor’s Brief STL-11-01/I/AC-R176bis 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.

they be presented.<sup>8</sup> 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 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

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8 Hearing of 7 February 2011, T. 159.

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 176bis(A)<sup>9</sup> 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."<sup>10</sup>

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

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.)

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 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).<sup>11</sup>

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11 "The accused has the right to request the reconsideration of the interlocutory decision under paragraph A,

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.”<sup>12</sup> 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. 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

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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.

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<sup>13</sup>). 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.”<sup>14</sup> 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 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

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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.

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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> The

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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 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



Tribunal, being international in character, is fully 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.<sup>18</sup>

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,<sup>19</sup> it must abide by “the highest international standards of criminal justice”,<sup>20</sup> 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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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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

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

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

<sup>21</sup> Hearing of 7 February 2011, T. 11.

<sup>22</sup> Prosecution Submission, paras 5-12.

<sup>23</sup> Prosecution Submission, para. 13.

<sup>24</sup> Prosecution Submission, para. 15.

by analogy.”<sup>25</sup> 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 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”.<sup>26</sup> 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.”<sup>27</sup> 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.”<sup>28</sup> 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”.<sup>29</sup> 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,<sup>30</sup> 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

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25 Defence Office Submission, para. 30. See also Hearing of 7 February 2011, T. 48.

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.

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.<sup>31</sup> It overlooks the spectrum of meanings that words, and especially a collection of words, 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.<sup>32</sup> 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.<sup>33</sup>

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 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.

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.<sup>34</sup>

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.<sup>35</sup>

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.<sup>36</sup> 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

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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’ [...]”).

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

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’,<sup>37</sup> 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).<sup>38</sup>

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.

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.<sup>39</sup>

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

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.”

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

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.<sup>40</sup> 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.<sup>41</sup>

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:

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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 Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports (1994), at 21, para. 41, for the customary status of Article 31 of the Vienna Convention).

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.<sup>42</sup>

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),<sup>43</sup> 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,

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”.



which 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,<sup>44</sup> 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 paramouncy 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”.<sup>45</sup> One must assume that the lawmaker intended to pursue an objective

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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.

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.

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,<sup>46</sup> 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.<sup>47</sup>

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[...] Longstanding 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.

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.<sup>48</sup> 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, 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<sup>49</sup> 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

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 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.

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.<sup>50</sup> 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.<sup>51</sup> 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 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.<sup>52</sup> 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*),<sup>53</sup> 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

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).

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).

State which has engaged in his judicial protection).<sup>54</sup> 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 proceedings),<sup>55</sup> and as urged by both the Prosecutor and the Defence Office,<sup>56</sup> generally speaking the Tribunal will apply Lebanese law as interpreted and applied by Lebanese courts.<sup>57</sup> In doing so, we have the distinct

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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; *Flengenheimer Claim*, 25 I.L.R. 92 (It.-U.S. Concil. Comm’n 1958).

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 internationale: 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

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 *unreasonable*,<sup>58</sup> or may result in a *manifest injustice*,<sup>59</sup>

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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.

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."

or is *not consonant with international principles and rules* binding upon Lebanon.<sup>60</sup> 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.<sup>61</sup> An obvious example of 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

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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, *Krnjelac*, 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 Office 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.



legislation the interpretation which it deems to be more appropriate and consistent with international legal standards.<sup>62</sup>

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.<sup>63</sup>

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”.<sup>64</sup> 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; 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<sup>65</sup>). The conclusion is therefore inescapable that Article 2 imposes application of the specified provisions of Lebanese law.<sup>66</sup> 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.<sup>67</sup>

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.

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.

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.

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 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.<sup>68</sup>

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, 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*)”.<sup>69</sup>

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

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<sup>68</sup> 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.

<sup>69</sup> 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).

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,<sup>70</sup> 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 Justice in the *Assassination of Sheikh Nizar Al-Halabi* case<sup>71</sup>, 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

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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.)

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

the verse of the Quran.<sup>72</sup> 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.<sup>73</sup>

53. In the *Homicide of Engineer Dany Chamoun and others case*<sup>74</sup>, 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*.<sup>75</sup>

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

<sup>72</sup> *Id.* at 26-27 of the English translation available on the STL website.

<sup>73</sup> *Id.* at 55-56 of the English translation available on the STL website.

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

<sup>75</sup> *Id.* at 70 of the English translation available on the STL website (emphasis added).

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 [...]”).<sup>76</sup> 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

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<sup>76</sup> 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.

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 actually materialise—it is in other terms a *crime of danger* (as opposed to a “crime of harm”).<sup>77</sup> 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<sup>78</sup>) 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.<sup>79</sup>

77 According to E.S. Binavine (“Crimes of Danger”, 15 *Wayne L. Rev.* (1969) 683, at 683), “European criminal law literature makes a distinction between ‘crimes of danger’ (*Gefährdungsdelikte*) 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: Schulthess 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 (*Gefährdungsdelikte*). 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.



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 or injury caused to persons who may be considered not to have been personally or 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 January 1958.<sup>80</sup> 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.<sup>81</sup> (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<sup>82</sup>) 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.<sup>83</sup>

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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.

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.<sup>84</sup> 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 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”.<sup>85</sup> In general, this determination will have to be made on a case-by-case basis.<sup>86</sup>

### ***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

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.

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.

when national legislation contains gaps; however, in the case at issue no such gaps exist.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup>

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.

## 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").<sup>90</sup> 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,

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<sup>87</sup> Prosecution Submission, paras 4-5.

<sup>88</sup> Defence Office Submission, paras 58, 70, 88-89.

<sup>89</sup> Defence Office Submission, paras 68 and 74.

<sup>90</sup> 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](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).

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.<sup>91</sup> 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.

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,<sup>92</sup> to the extent that the

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.)

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

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;
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

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of the Sea of 1982, relating to piracy on the high seas.

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 than only potentially) violent in nature.<sup>93</sup> 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”.<sup>94</sup>

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 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).

**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).<sup>95</sup> 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<sup>96</sup> and frequently proclaimed by international courts.<sup>97</sup> 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,<sup>98</sup> 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*

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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.

*specific and concrete will therefore be immediately applied.* Provisions which call for legislative or statutory measures are binding on the State of Lebanon, which must then introduce such measures.<sup>99</sup>

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.<sup>100</sup>

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

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 no. 818, 2 June 1950 in *Al-nashra al-kada’iya* [Revue Judiciaire], 1950, at 650-654.



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 Convention to the extent that such interpretation revolves around state sovereignty and governmental acts.<sup>101</sup>

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.<sup>102</sup> 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*.<sup>103</sup> Recent case law, notably in countries of Romano-Germanic tradition, bears out this proposition.<sup>104</sup> This holds

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101 Court of Appeals of Beirut, Civil Section, decision no. 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

true in particular in countries such as Lebanon that attach to treaties duly ratified a rank higher than that of the domestic law,<sup>105</sup> thereby signifying that they intend to set greater store by treaties than by 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."<sup>106</sup>

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

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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.

Court of cassation, 1st Civil Chamber, decision no 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 no 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 no 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.

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,<sup>107</sup> 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.<sup>108</sup> Although this position held by the single Judge in Beirut is inconsistent with a decision from the Court of Appeal of Mount Lebanon,<sup>109</sup> both of those cases relate to circumstances in which 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

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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 no 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 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.

implementation requires national legislation defining the crime and the relevant penalty. In this regard, we do agree with the Defence Office.<sup>110</sup> 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<sup>111</sup> and so frequently upheld by international criminal courts with regard to international prosecution of crimes,<sup>112</sup> 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 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.<sup>113</sup> 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*

<sup>110</sup> See Defence Office Submission, para. 65.

<sup>111</sup> 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.

<sup>112</sup> 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).

<sup>113</sup> 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.

*sine lege principle*, enshrined in Article 1 of the Lebanese Criminal Code,<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup> The Lebanese authorities having failed to enact that legislation, domestic courts were 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

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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:

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.

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 Convention's definition of terrorism is to enable prosecution, not to change domestic criminal codes.<sup>117</sup>

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

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<sup>117</sup> See Defence Office Submission, paras 114, 118-119.

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*,<sup>118</sup> as the Defence Office noted,<sup>119</sup> since the initial reference to the Arab Convention was deleted in the course of the drafting process of the Statute,<sup>120</sup> 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,<sup>121</sup> 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.<sup>122</sup> Further, we disagree that the Arab Convention's definition lacks clarity,<sup>123</sup> or that such an absolute distinction can be drawn between the realm of judicial cooperation and that of criminal prohibitions<sup>124</sup>: 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 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.<sup>125</sup>

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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.

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.



## 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.<sup>126</sup> 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,<sup>127</sup> 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 directly or indirectly coerce a national or international

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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.



authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.<sup>128</sup>

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*”.<sup>129</sup> 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)*;<sup>130</sup> 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*”;<sup>131</sup> and the First “Judge of Amparo” on Criminal Matters in the Federal District of Mexico, who noted that “the multiple conventions

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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, Décarý 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).

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 community the obligation to prevent, prosecute and punish those culpable of their commission".<sup>132</sup> 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*),<sup>133</sup> as well as by a U.S. federal court in *Almog v. Arab Bank*.<sup>134</sup>

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

<sup>132</sup> 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.

<sup>133</sup> 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).

<sup>134</sup> 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)).

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.

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*.<sup>135</sup> 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*

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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/convention/terrorism\\_convention.htm](http://www.oic-oci.org/english/convention/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](https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf)); **Communauté Economique et Monétaire de l’Afrique Centrale**, Convention relative à la lutte contre le terrorisme en Afrique Centrale (“*CEMAC Convention*”), 5 February 2005, Règlement No 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](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](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.sectscsco.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 destabilise 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. 1 (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](https://www.unodc.org/tldb/pdf/SAARC_ADDITIONAL_PROTOCOL_2004.pdf)).

in any circumstance unjustifiable[.]”<sup>136</sup> 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 constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are *under no circumstances* justifiable[...]<sup>137</sup>

A similar definition has found a large measure of approval in the Ad Hoc Committee tasked to draft a Comprehensive Convention on Terrorism.<sup>138</sup> 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

<sup>136</sup> 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.

<sup>137</sup> 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).

<sup>138</sup> 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).

compel an authority, and is limited to those crimes containing (iii) a transnational aspect.<sup>139</sup>

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.<sup>140</sup> Among the terrorist offences so criminalised are the taking of hostages,<sup>141</sup> the hijacking of planes,<sup>142</sup> and the harming of diplomatic representatives.<sup>143</sup> For political

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-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/xxiiiga/english/docs\\_en/docs\\_items/AGres1840\\_02.htm](http://www.oas.org/xxiiiga/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

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).<sup>144</sup> Such an intent element, however, has been specified in the most recent conventions.<sup>145</sup> 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.<sup>146</sup> 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 the territory of that State and no other State has a basis [under subsequent articles of the Convention] to exercise jurisdiction [...]<sup>147</sup>

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

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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.

<sup>144</sup> 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).

<sup>145</sup> *Nuclear Terrorism Convention*, art. 2; *Financing Convention*, art. 2(b).

<sup>146</sup> 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.

<sup>147</sup> *Terrorist Bombing Convention*, art. 3; see also *Nuclear Terrorism Convention*, art. 3; *Financing Convention*, art 3.

will threaten international peace and security, at least for neighbouring countries.<sup>148</sup> 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.<sup>149</sup> 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, with all due caution, from national laws."<sup>150</sup> 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<sup>151</sup>—although the distillation of a shared norm does not require a comprehensive survey of all legal systems of the world.<sup>152</sup> It is important to avoid "mechanical importation or transposition" from

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<sup>148</sup> 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".

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

<sup>150</sup> ICTY, *Furundžija*, Trial Judgment, 10 December 1998 ("Furundžija TJ"), para. 177.

<sup>151</sup> ICTY, *Furundžija* TJ, para. 178; ICTY, *Kunarac et al.*, Trial Judgment, 22 February 2001, para. 439.

<sup>152</sup> 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



national law into international criminal proceedings.<sup>153</sup> 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”.<sup>154</sup> 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 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.<sup>155</sup> In the

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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.

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



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.<sup>156</sup> 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 infrastructure in

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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.

<sup>156</sup> **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.

a way that endangers society. These countries include Jordan,<sup>157</sup> Iraq,<sup>158</sup> the United

<sup>157</sup> **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](https://www.unodc.org/tldb/laws_legislative_database.html) (“UNODC Database”).)

<sup>158</sup> **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.

Arab Emirates,<sup>159</sup> Egypt,<sup>160</sup> and Tunisia.<sup>161</sup> Members of the European Union have incorporated the 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

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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 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.

Institute for Criminal Law and Justice Brief, Sweden,<sup>162</sup> Belgium,<sup>163</sup> Germany,<sup>164</sup> Austria,<sup>165</sup> and the Netherlands,<sup>166</sup> 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.<sup>167</sup> Similarly, Finland added in 1993 the criminalisation of certain listed criminal acts when 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".<sup>168</sup>

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.<sup>169</sup> The national laws of Australia,<sup>170</sup>

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 intentionnellement 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.

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.

New Zealand,<sup>171</sup> Canada,<sup>172</sup> and Pakistan<sup>173</sup> 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.<sup>174</sup>

95. Latin American countries such as Colombia,<sup>175</sup> Peru,<sup>176</sup> Chile,<sup>177</sup> and Panama<sup>178</sup> 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 pressure government authorities.<sup>179</sup> 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.<sup>180</sup> Ecuador requires the purpose of creating public alarm and a motivation based on patriotic, social, economic, political, religious, revolutionary, racial, or local vindication.<sup>181</sup>

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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](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.

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. 213ter.

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

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,<sup>182</sup> the Russian Federation,<sup>183</sup> India,<sup>184</sup> the

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 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

Philippines,<sup>185</sup> Uzbekistan,<sup>186</sup> and the Seychelles.<sup>187</sup> Mention must also be made of the prohibition against terrorism under *Chari'a* law, for example as incorporated into the laws of Saudi Arabia.<sup>188</sup>

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

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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](http://www.interpol.int/public/bioterrorism/nationallaws/SaudiArabia)).

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.<sup>189</sup>

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.<sup>190</sup> 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.”<sup>191</sup>

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<sup>192</sup>, as noted above, or have advanced or

<sup>189</sup> For further discussion, see para. 106.

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

<sup>191</sup> 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.

<sup>192</sup> 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



upheld a general definition of terrorism that is broadly accepted.<sup>193</sup> Judicial decisions stating instead that no generally accepted definition of terrorism exists are far and few between, and their number diminishes each year.<sup>194</sup> 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,<sup>195</sup> but that practice instead “should, in general, be consistent with such rules”.<sup>196</sup> 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

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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) (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.

legal controversies (the *auctoritas rerum perpetuo similiter iudictarum*, to cite the well-known tag from Justinian's *Digest*<sup>197</sup>). 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"<sup>198</sup> or simply to meet transient 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.<sup>199</sup>

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197 Digest, I.3.38.

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

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. »

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,<sup>200</sup> 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 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.<sup>201</sup>

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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."

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

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.<sup>202</sup> 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.<sup>203</sup>

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

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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.

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,<sup>204</sup> in judicial and commission analyses,<sup>205</sup> and in national legislation.<sup>206</sup> 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 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.<sup>207</sup>

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

<sup>204</sup> See resolutions cited in footnote 136, above.

<sup>205</sup> 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).

<sup>206</sup> See, for example, the laws of the United Kingdom, Australia, New Zealand, Pakistan, Canada, South Africa, Argentina, and Ecuador, cited above.

<sup>207</sup> A/57/273 (2002), Annex, at para. 13 (emphasis added).

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,<sup>208</sup> 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,<sup>209</sup> 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”.<sup>210</sup>

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

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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.



(these States currently number 170).<sup>211</sup> 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,<sup>212</sup> 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, as well as, in consequence, the perpetration of such attacks, may be categorised as “terrorism”.<sup>213</sup>

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.

213 The countries are: Algeria, Bahrain, Libya, Mauritania, Morocco, Qatar, Saudi Arabia, Sudan, Tunisia, United



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<sup>214</sup> as well as case-law<sup>215</sup> 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*

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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.

*Republic of Germany v. Denmark*) on the possibility for the provisions of a treaty to turn into customary law. He noted that:

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.<sup>216</sup>

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,<sup>217</sup> 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,<sup>218</sup> as well as national legislation and case law have increasingly coalesced

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<sup>216</sup> *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).

<sup>217</sup> See above, para. 88.

<sup>218</sup> 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*

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 and security”.<sup>219</sup> 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”.<sup>220</sup>

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 (*Bundesgerichtshof*) 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

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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).

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.*

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,<sup>221</sup> 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.<sup>222</sup> The Appeals Chamber holds that the 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,<sup>223</sup> and (iii) it involves a transnational element.

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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 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.

***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.<sup>224</sup>

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,<sup>225</sup> 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

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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.”

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.

Court of cassation.<sup>226</sup> This decision is however contradicted by others, appropriately applying international customary law directly in relation to immunity.<sup>227</sup>

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 by the right to asylum only with regard to the first country of asylum.<sup>228</sup> The Lebanese Court of cassation (Civil Chamber) allowed lower judges to refer to international customary law in

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].

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."

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”.<sup>229</sup> The Council of State also referred to international customary law in two rulings regarding displaced children.<sup>230</sup>

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.<sup>231</sup> 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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<sup>229</sup> 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].

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

<sup>231</sup> “[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.<sup>232</sup>

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*<sup>233</sup> and which therefore possess constitutional rank, at least the

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 no 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



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 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.<sup>234</sup>

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.

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review [2001-2005]], at 150.

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.

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 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;<sup>235</sup> 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

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<sup>235</sup> This was the inference made in the *Michel Murr* case, as discussed above in paragraph 60 and footnote 84.

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:

#### **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”.<sup>236</sup>

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

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<sup>236</sup> ICCPR, Article 15 (emphasis added).

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.<sup>237</sup>

134. The import of Article 15 as set out here has been upheld by the UN Human Rights Committee<sup>238</sup> and various national courts.<sup>239</sup> More recently, it has been

<sup>237</sup> 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.

<sup>238</sup> 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.

<sup>239</sup> 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 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*,

restated by the Court of Justice of the Economic Community of the West African States in the *Habré v. Republic of Senegal* case.<sup>240</sup> 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.<sup>241</sup> 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).<sup>242</sup> The same applies to crimes punished at the international level by way of bilateral or multilateral treaties.

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(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 où 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.

135. Furthermore, the principle of legality does not preclude “the progressive development of the law by the court”.<sup>243</sup> Such “progressive development” is necessary because, as Jeremy Bentham 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”.<sup>244</sup> 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.<sup>245</sup> 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”<sup>246</sup>—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.

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, 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.



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”.<sup>247</sup> 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”.<sup>248</sup>

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.<sup>249</sup>

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.<sup>250</sup> Furthermore, Lebanon’s legislature has gradually authorised or approved ratification of or accession to a number of international treaties against terrorist

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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).

249 *Vasiljević* TJ, para. 193.

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

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 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 citizen 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.<sup>251</sup>

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

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<sup>251</sup> 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.

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 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,<sup>252</sup> thus enshrining the following elements:**

- a. the volitional commission of an act;
- b. through means that are liable to create a public danger;<sup>253</sup> 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.

## **II. Crimes and Offences Against Life and Personal Integrity**

### **A. *Intentional Homicide***

149. The Pre-Trial Judge has asked:

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<sup>252</sup> On the international customary definition of terrorism, see paragraph 85; on the definition of terrorism contained in the Arab Convention, see paragraphs 65-67.

<sup>253</sup> 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.

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,<sup>254</sup> 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.

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<sup>254</sup> See Prosecution Submission, para. 53; Defence Office Submission, para. 142.

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

**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*<sup>255</sup> 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

<sup>255</sup> 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).



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.<sup>256</sup>

### **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.<sup>257</sup> 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 rely on facts such as the timing when the victim was last seen, the person he or she was seen with (the accused), etc.<sup>258</sup>

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).<sup>259</sup> 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

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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.

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.

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,<sup>260</sup> 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.

159. Indeed, and as the Defence Office notes,<sup>261</sup> 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

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.

261 Defence Office Submission, para. 146.

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.<sup>262</sup>

## 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 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<sup>263</sup> or 189<sup>264</sup> of the Lebanese Criminal Code, vis-à-vis the death of the victim as a result

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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'ia lil dirassat wal nasher wal tawzi'), 1998, at 214-215.

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 occurrence 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 foreseeability, whereas the original French and official Arabic versions

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.<sup>265</sup> 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.<sup>266</sup> 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.<sup>267</sup>

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*.<sup>268</sup> 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 intentional homicide, even though the victim dies because he or she hit the stones

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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 November 2002, 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.

beneath the bridge and not because of drowning). We return to a more extended discussion of *dolus eventualis* below.<sup>269</sup>

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.<sup>270</sup> 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.<sup>271</sup> 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.<sup>272</sup> 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.<sup>273</sup> Premeditation is based on two elements: (i) a

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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 June 1999, 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

calm and clear mind while planning and executing the crime,<sup>274</sup> so that the perpetrator is shown to be emotionally detached, not acting upon rage or anger,<sup>275</sup> 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.<sup>276</sup> However, this second element is not predetermined. Instead, it is to be evaluated by the Judge according to the circumstances of each case.<sup>277</sup>

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.<sup>278</sup> 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,<sup>279</sup> this has been held in the *Karami* case, where the perpetrators were convicted of the murder of the passengers of the helicopter in

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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".

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.

which the intended victim was flying when the explosion occurred, on the basis of *dolus eventualis*.<sup>280</sup>

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 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 than the intended victim. Therefore, giving two legal characterisations to a single intentional act based merely on its result is wrong.<sup>281</sup> 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*.<sup>282</sup> 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

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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.

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.

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”.<sup>283</sup>

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 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.<sup>284</sup>

174. Moreover, pursuant to Article 216 of the Lebanese Criminal Code,<sup>285</sup> 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

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

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

<sup>285</sup> 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”.



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.<sup>286</sup>

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 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:

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<sup>286</sup> 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.

**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<sup>287</sup>; (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.<sup>288</sup> 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.<sup>289</sup> In that respect, Lebanese law requires the preliminary action to reveal both the *actus reus* and the *mens rea* in order

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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".

to criminalise the attempt.<sup>290</sup> 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 the division of roles among the perpetrators” as acts that were aimed directly at the commission of the crime, as required by Article 200.<sup>291</sup>

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.<sup>292</sup> 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.<sup>293</sup> 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.

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.

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.

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 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,<sup>294</sup> 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

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294 See above, para. 59.

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.

### 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.<sup>295</sup> 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.<sup>296</sup>

192. Turning to question (v), we agree with the Prosecution<sup>297</sup> and the Defence Office<sup>298</sup> that the Tribunal must apply Lebanese law, pursuant to Article 2 of the Statute. As with intentional homicide, and also in accord with the positions of the Prosecution and Defence Office,<sup>299</sup> 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.<sup>300</sup> 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.<sup>301</sup> 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

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<sup>295</sup> See below, paras 236-262.

<sup>296</sup> Prosecution Submission, para. 45; Defence Office Submission, paras 136 and 139.

<sup>297</sup> Prosecution Submission, para. 37.

<sup>298</sup> Defence Office Submission, para. 126.

<sup>299</sup> Prosecution Submission, para. 38; Defence Office Submission, para. 129.

<sup>300</sup> 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.

<sup>301</sup> See para. 198.



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<sup>302</sup>: (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.<sup>303</sup>

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 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.<sup>304</sup>

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

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302 Court of Justice, *Ballamand Monastery* 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.

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

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, 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.<sup>305</sup>

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

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<sup>305</sup> See Article 2 STLSt.

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.<sup>306</sup> 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.<sup>307</sup> 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 against state security.”<sup>308</sup> Thus there can be no “attempted conspiracy”. All conduct preceding this merger is but a mere preparatory act.<sup>309</sup>

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,

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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'iyah lil dirassat wal nasher wal tawzi'), 1999, at 88.

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

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

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,<sup>310</sup> 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.<sup>311</sup>

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.

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.

<sup>310</sup> We discuss Article 219 further below, see paras 218-224.

<sup>311</sup> 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-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 80-81.

## 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.<sup>312</sup> It thus implicitly incorporates into the Tribunal's Statute the body

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<sup>312</sup> 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

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, Article 3(1)(a) also “reflect[s]” the Lebanese Criminal Code,<sup>313</sup> 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”.<sup>314</sup> 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”,<sup>315</sup> with the consequence that “there exists no actual conflict between Articles 2 and 3” of the Statute.<sup>316</sup> 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”.<sup>317</sup> Insisting on the practical side of the application of the two provisions

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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.

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.

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”.<sup>318</sup> 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”.<sup>319</sup>

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 *Stakić*, 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.<sup>320</sup>

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318 Prosecution Submission, para. 107.

319 Prosecution Submission, para. 107.

320 Defence Office Submission, para. 153.

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”.<sup>321</sup> 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.”<sup>322</sup>

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, 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;

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<sup>321</sup> Defence Office Submission, para. 163.

<sup>322</sup> Defence Office Submission, para. 165.



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.<sup>323</sup>

## 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.<sup>324</sup>

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<sup>323</sup> We do not, for example, consider “instigation”, a significant mode of criminal responsibility under Lebanese law.

<sup>324</sup> Court of Cassation, decision n° 170, 24 May 2000, in *Cassandra* 2002. See also Samir Alia, *Shareh kanoun*

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).<sup>325</sup> 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 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 the Lebanese Criminal Code.<sup>326</sup> 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

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*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.

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

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.<sup>327</sup>

### **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:

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

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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.

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),<sup>328</sup> (ii) assistance in a form specified in Article 219,<sup>329</sup> 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.<sup>330</sup> 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.<sup>331</sup> Thus, the fact of indicating 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.<sup>332</sup> Instead, bare knowledge that a crime will be committed or its perpetration is being prepared but without any conduct by way of assistance; or,

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 ijthadat 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

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

by contrast, the provision of assistance without awareness that such assistance is designed to help commit a crime, do not amount to complicity.<sup>333</sup>

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 to 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*).<sup>334</sup> 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.<sup>335</sup>

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 refrained from accomplishing his duty (this for instance applies to police officers), or where the passive conduct of the accomplice amounts to

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333 Court of cassation, criminal Chamber, decision n° 112, 25 March 1974, in S. Alia (ed). *majmouat ijtiadat 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.

strengthening the resolve of the perpetrator to commit a crime;<sup>336</sup> (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.<sup>337</sup>

## 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

336 See Mount-Lebanon Indictment Chamber (*Chambre d'accusation*), decision n° 304/1993, 21 October 1995, in R. Riachi (ed.), *Majmouat ijti'adat al-hay'a al-itihamiy - tatbikat amaliya lil kaida al-kanouniyya* [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.

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 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.<sup>338</sup> Furthermore, the assistance may be physical (or tangible) or moral and psychological.<sup>339</sup>

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".<sup>340</sup> 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.<sup>341</sup> 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".<sup>342</sup> Instead, the aider and abettor is required to be aware either of the criminal intent of the perpetrator or at least of the *substantial*

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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, *Krnjelac*, 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.

*likelihood* that the perpetrator will commit a crime.<sup>343</sup> 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,<sup>344</sup> if there is also an intent to encourage or enable 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.<sup>345</sup>

### 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

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 *Blaskić* 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. 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).



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.

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,<sup>346</sup> 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, being armed, would use their weapons if need be.<sup>347</sup> Another case illustrating the role of *dolus eventualis* is *Aailan v. Al-Saka*, brought before the 6th Criminal Chamber of the Court of cassation.<sup>348</sup> 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.”

346 Court of cassation, criminal Chamber, decision n° 52, 22 February 1995, *Cassandre 2-1995*, at 92.

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, *Aailan v. Al-Saka*, decision n° 48, 16 May 2000 *Sader fil-tamyiz* [Sader in the cassation], 2000, at 541.

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.”<sup>349</sup> 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.”<sup>350</sup> The Court then underlined that the accused had predicted the crime, had anticipated its consequences and accepted the risk; however, through complex reasoning,<sup>351</sup> 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”.<sup>352</sup>

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 to “conspiracy” but also to “criminal association”, “armed band”, and “assistance for evading justice”.<sup>353</sup>

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349 The *Rachid Karami* case, English translation, at p. 161.

350 *Ibid.*

351 *Ibid.*

352 *Id.*, at p. 163.

353 See Lebanese Criminal Code, Articles 335 to 339 and 398 to 400.

## 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<sup>354</sup> 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.<sup>355</sup> In such instances

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. Alfred 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 Altstötter 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-

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.<sup>356</sup> 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.<sup>357</sup> 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.<sup>358</sup>

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).<sup>359</sup>

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

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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. 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://hkwtc.lib.hku.hk/exhibits/show/hkwetc/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.”

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 “JCE III”, or extended form of JCE)<sup>360</sup> only arises if a participant who did not have the direct intent to commit the ‘incidental’ offence nevertheless *could and did foresee*<sup>361</sup> *the possibility of its commission and willingly took the risk of its occurrence*.<sup>362</sup>

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

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, *Jeng 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.

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 objective and the other subjective.<sup>363</sup> 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*<sup>364</sup> 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

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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.

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 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<sup>365</sup>) 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

<sup>365</sup> *Brđanin* AJ, paras. 427, 430; *Krajišnik* AJ, para. 675.



may be committed and do nothing to oppose or prevent them, but rather continue in the pursuit of the enterprise's other criminal goals.<sup>366</sup>

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, whether explicitly or extemporaneously (which can be inferred from circumstantial evidence).<sup>367</sup> 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.<sup>368</sup>

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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.

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.

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.<sup>369</sup> 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*.

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,<sup>370</sup> and contrary to what the Prosecution pleads,<sup>371</sup> 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

<sup>369</sup> See above paras 59, 68, 111, and 147.

<sup>370</sup> 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.

<sup>371</sup> Hearing of 7 February 2011, T. 68-69.

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 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.<sup>372</sup>

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

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<sup>372</sup> 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).

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 [c]ommits such a crime [...] through another person, regardless of whether that other person is criminally responsible.” It has been deduced from this provision<sup>373</sup> 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

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.

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.<sup>374</sup>

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,<sup>375</sup> 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.<sup>376</sup> 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 of the crimes”.<sup>377</sup> 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”.<sup>378</sup>

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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.

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.

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.<sup>379</sup> 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*,<sup>380</sup> 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.

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

<sup>379</sup> *Katanga* Confirmation of Charges Decision, para. 506-508.

<sup>380</sup> ICTY, *Stakić*, Appeal Judgment, 22 March 2006, para. 62.

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.<sup>381</sup> 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,<sup>382</sup> 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 no conflict between the two sources of law, the Tribunal should apply the Lebanese

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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, *Aalian v. Al-Saka*, decision n° 48, 16 May 2000 *Sader fil-tamyiz* [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.

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.”<sup>383</sup> 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.”<sup>384</sup> 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.<sup>385</sup>

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,

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.

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”;<sup>386</sup> (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;<sup>387</sup> (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”;<sup>388</sup> (iv) more generally, “[i]nternational practice recognizes and sanctions a prohibition against ‘overloading’ of the indictment by the Prosecution”.<sup>389</sup> The Defence Office concludes that in deciding on these matters the Tribunal should heavily rely on human rights: “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.”<sup>390</sup> In addition, the Defence Office takes the view that there should be a preference for “alternative charging” rather than “cumulative charging.”<sup>391</sup>

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.<sup>392</sup>

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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).

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.

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 have 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 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.<sup>393</sup> 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*”.<sup>394</sup> 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.<sup>395</sup>

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393 See G. Stefani, G. Levasseur, B. Bouloc, *Droit pénal général*, 16<sup>th</sup> 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*, 16<sup>th</sup> edn. (Paris, Dalloz), at 490.

395 Court of cassation, 6<sup>th</sup> Chamber, *Aalian v. Al-Saka*, decision n° 48, 16 May 2000 *Sader fil-tamyiz* [Sader in the cassation], 2000, at 541.

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.<sup>396</sup> The 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.<sup>397</sup> 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<sup>398</sup> and Article 233 with regard to the criminal court.<sup>399</sup>

## II. International Criminal Law

### A. Multiple Offences

282. Under international criminal law, instances of “*concours réel d’infractions*”<sup>400</sup> and “*concours idéal d’infractions*”<sup>401</sup> are treated in the same manner as in Lebanese law.

<sup>396</sup> 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.

<sup>397</sup> 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.

<sup>398</sup> 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”.

<sup>399</sup> 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.”

<sup>400</sup> 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.

<sup>401</sup> 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.



283. Nevertheless, in the realm of international criminal law, “*concoure 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.

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.<sup>402</sup> Provided that the act of the accused satisfy *all* the elements of both crimes,

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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.

then the conduct can be said to amount to two different offences.<sup>403</sup> 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.<sup>404</sup> In other words, the more specific crime (the crime with the different/additional element) prevails over a more general crime (the crime that does not have a different/additional element). An illustration of this principle can be found in *Delalić et al.*<sup>405</sup>

### **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

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.

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 wilful 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 wilful killing under Article 2. [...] Because wilful 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.”)

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<sup>406</sup> and failing to provide a comprehensive analysis. The first developed decision on charging practice was that in *Kupreškić* by an ICTY Trial Chamber.<sup>407</sup> 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.<sup>408</sup>

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*

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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, *Niyitegeka*, 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.

407 ICTY, *Kupreškić* TJ, paras 668-699; 720-727.

408 ICTY, *Kupreškić* TJ, para. 724.

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.<sup>409</sup>

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.<sup>410</sup> 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 multiple convictions would not be possible due to the principle of speciality.<sup>411</sup> 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.<sup>412</sup>

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).

411 ICTY, *Kupreškić* TJ, para. 727(b).

412 ICTY, *Kupreškić* TJ, para. 727(c).

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.<sup>413</sup> Cumulative charging has been subsequently endorsed by the ICTR,<sup>414</sup> the SCSL<sup>415</sup> and, more recently, by the ECCC.<sup>416</sup>

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.<sup>417</sup>

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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.<sup>418</sup> 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.<sup>419</sup> 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.<sup>420</sup>

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.<sup>421</sup> Furthermore, nothing prevents prosecutors from pleading alternative modes of liability.<sup>422</sup>

### 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,<sup>423</sup> there is no clear, general rule under either Lebanese or international criminal law

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.

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 the clarity and narrowness that would be advantageous for expeditious proceedings.<sup>424</sup> Yet on the other hand, as one author correctly observed, “[c]umulative charging has certainly lengthened [...] trials considerably.”<sup>425</sup> Indeed, this was one of the main concerns that motivated the decision of the ICC in *Bemba*,<sup>426</sup> 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.”<sup>427</sup>

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.<sup>428</sup> Also not surprisingly, the Defence Office asserts that international criminal tribunals have increasingly frowned upon unnecessary cumulative charging;<sup>429</sup> it has also emphasised the difficulties that excessively cumulative charges impose on defendants.<sup>430</sup>

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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.

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.

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.<sup>431</sup> 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.

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<sup>431</sup> Hearing of 7 February 2011, T. 139.



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.

## **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;<sup>432</sup> 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);

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<sup>432</sup> 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.

- 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;
- 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);

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

Dated this sixteenth day of February 2011,

Leidschendam, The Netherlands

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Judge Antonio Cassese  
President

Case name: *In the matter of El Sayed*

Before: **Pre-Trial Judge**

Title: **Decision on the Disclosure of Materials from  
the Criminal File of Mr El Sayed**

Short title: **“El Sayed Decision PTJ”**





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

## THE PRE-TRIAL JUDGE

Case No.:	<b>CH/PTJ/2011/08</b>
The Pre-Trial Judge:	<b>Mr Daniel Fransen</b>
The Registrar:	<b>Mr Herman von Hebel</b>
Date:	<b>12 May 2011</b>
Original:	<b>French</b>
Type of document:	<b>Public</b>
[Case Name:	<b><i>In the matter of El Sayed</i></b>

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## DECISION ON THE DISCLOSURE OF MATERIALS FROM THE CRIMINAL FILE OF MR EL SAYED

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**Counsel:**

Mr Akram Azoury

**Office of the Prosecutor:**

Mr Daniel Bellemare, QC

**Defence Office:**

Mr François Roux



## **I. Procedural background:**

1. On 17 March 2010, Mr Jamil El Sayed (the “Applicant” or “Mr El Sayed”), represented by his counsel, attorney Akram Azoury, filed an application with the Special Tribunal for Lebanon (the “Tribunal”), the subject of which was the “request for release of evidentiary materials related to the crimes of libellous denunciations and arbitrary detention” (“the Application”).<sup>1</sup>

2. On 17 September 2010, the Pre-Trial Judge of the Tribunal (the “Pre-Trial Judge”) issued an order pronouncing that the Tribunal had jurisdiction to rule on the Application of 17 March 2010 and recognising the right of the Applicant to have, in principle, access to the materials relating to him in his criminal file, as well recognising his standing to bring proceedings before the Tribunal in order to exercise this right, whilst pointing out that this right was not absolute and that restrictions and limitations might be applied (“Order of 17 September 2010”).<sup>2</sup> Consequently, the Pre-Trial Judge also invited the Prosecutor of the Tribunal (the “Prosecutor”) and the Applicant to put forward their observations and submissions with regard to the possible application of restrictions and limitations in exercising this right at this stage of the investigation.<sup>3</sup>

3. On 28 September 2010, the Prosecutor lodged an appeal of the Order of 17 September 2010.

4. On 10 November 2010, the Appeals Chamber of the Tribunal dismissed the Prosecutor’s appeal.<sup>4</sup> It likewise confirmed the jurisdiction of the Tribunal to rule on the Application of 17 March 2010 as well as on the standing of the Applicant

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1 Public redacted version of Memo No. 112. The Application: Request for Release of Evidentiary Materials Related to the Crimes of Libellous Denunciations and Arbitrary Detention, CH/PTJ/2010/01, 17 March 2010.

2 Order relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed Dated 17 March 2010 and Whether Mr El Sayed Has Standing Before the Tribunal, CH/PTJ/2010/005, 17 September 2010, paras 36, 42 and 53.

3 *Ibid.*, para. 57

4 Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010, paras 57 and 65.

to request the materials relating to him contained in his criminal file. It did not, however, rule on the issue of the right of the Applicant to obtain these materials.<sup>5</sup>

5. On 7 January 2011, the Pre-Trial Judge issued an order convening a public hearing on 14 January 2011 and inviting the Applicant and the Prosecutor to reply to a number of questions relating in particular to the limitations and restrictions that might be applied to the disclosure of materials from the file at this stage of the proceedings.<sup>6</sup> The Pre-Trial Judge also invited the Applicant and the Prosecutor to submit their views with regard to the holding of an *ex parte* hearing in closed session during the course of which the Prosecutor would be asked to provide grounds that would justify non-disclosure of one or other of the documents.

6. On 14 January 2011, the Applicant and the Prosecutor presented their respective submissions at a public hearing during which the Head of Defence Office was also heard.

7. Further to this hearing, the Pre-Trial Judge ordered the Prosecutor to submit to him a confidential and *ex parte* written application before 11 March 2011:

- i) comprising the materials in his possession, together with an inventory thereof, including materials on electronic files, relating to the detention of the Applicant in connection with the Hariri case;
- ii) indicating the specific grounds for each of the materials or category of similar materials, that would justify non-disclosure to the Applicant at this stage of the proceedings, or disclosure in redacted form; and
- iii) specifying in relation to all the materials to which, in his opinion, these restrictions would not apply, whether he maintains that a copy could be given to the Applicant or otherwise solely consulted by him or his counsel.<sup>7</sup>

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5 The Appeals Chamber noted in this respect that it was for the Pre-Trial Judge “to consider and decide on the merits of the Application, namely the existence and scope of the Applicant’s right of access to documents from his criminal file that are in the possession of the Prosecutor. It is for the Pre-Trial Judge to consider this question in the first instance” (*ibid.*, para. 66).

6 Order on Mr El Sayed’s Requests for Authorisation to File a Rejoinder to the Prosecution’s Reply and for the Convening of a Hearing, CH/PTJ/2011/01, 7 January 2011, pp. 5-6.

7 Order Inviting the Prosecutor to File an Application Containing Grounds Relating to the Non-disclosure of Materials in his Possession Concerning the Detention of Mr El Sayed, CH/PTJ/2011/03, 7 February 2011, pp. 6

8. On 10 March 2011, the Prosecutor filed an application relating to the non-disclosure of materials in his possession concerning the detention of Mr El Sayed (the “Prosecutor’s Application”).<sup>8</sup> However, due to an imprecision involving the English translation of part of the disposition of the Order of 7 February 2011, the Prosecutor did not file the materials relating to the detention of the Applicant, but solely an inventory of those materials in the form of a spreadsheet.<sup>9</sup>

9. On 14 March 2011, an amended version of the English translation of the Order of 7 February 2011 was filed clarifying that the Prosecutor was required to file the materials in his possession, together with an inventory.

10. On 17 March 2011, the Prosecutor filed 459 documents together with a request to set a new deadline for the filing of suggested redactions relating to 186 of those documents.<sup>10</sup> The same day, the Prosecutor filed an Annex containing the summaries in English of 125 documents in Arabic and of one 991-page document in Arabic.<sup>11</sup>

11. Further to the Prosecutor’s Request relating to the extension of the deadline for the filing, the Pre-Trial Judge invited the Prosecutor to file the materials from the Applicant’s criminal file that were in his possession and which the Prosecutor considered could only be disclosed to the Applicant in redacted form, by 1 April 2011 at the latest.<sup>12</sup>

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to 7 (“Order of 7 February 2011”).

8 Prosecutor’s Application on the Grounds Relating to the Non-disclosure of Materials in his Possession Concerning the Detention of Mr El Sayed, CH/PTJ/2011/03, 10 March 2011, para. 37.

9 The official translation provided by the Language Section filed on 10 February 2011 contained the expression “an inventory of the materials” whereas the original version in French specified that the Prosecutor should file the “inventoried materials”. An amended version of the Order in English was filed on 14 March 2011 by the Language Section of the Registry and was notified to the parties on 16 March 2011.

10 Prosecutor’s Materials Concerning the Detention of Mr El Sayed and Request to Set a 1 April 2011 Deadline for the Filing of the Materials with Suggested Redactions, CH/PTJ/2011/03, 17 March 2011, para. 8 (“Prosecutor’s Submissions of 17 March 2011”).

11 *Ibid.*, para. 12 and Annexes B and C.

12 Scheduling Order for the Prosecutor to File Redacted Materials, CH/PTJ/2011/06, 21 March 2011.

12. On 1 April 2011, the Prosecutor filed the documents with the suggested redactions as well as a spreadsheet containing the inventory of these materials.<sup>13</sup>

13. On 12 April 2011, the Pre-Trial Judge decided that an *ex parte* hearing in closed session should be held in order to clarify and examine in detail some of the documents presented by the Prosecutor in his applications of 10 and 17 March as well as that of 1 April 2011.<sup>14</sup>

14. This *ex parte* and confidential hearing was held at the Tribunal on 19 April 2011.

15. On 21 April 2011, the Prosecutor provided clarification relating to some of the inventoried documents that were discussed during the hearing of 19 April 2011.

16. On 26 April 2011, counsel for the Applicant filed an Addendum to his Non-exhaustive Inventory of 3 December 2010 in order to add two documents which apparently came to his attention on or about 17 January 2011.<sup>15</sup>

17. On 28 April 2011, the Prosecutor filed additional documents that he had identified shortly before the hearing of 19 April 2011 and clarified his position with regard to other documents contained in the spreadsheet of 1 April 2011.<sup>16</sup>

18. On 5 May 2011, the Prosecutor filed a new series of additional documents as well as a spreadsheet summarising all of the documents under review.<sup>17</sup> The same day, he submitted that the Addendum filed by the Applicant on 26 April 2011 should be rejected by the Pre-Trial Judge as it is irrelevant and does not comply with Rule 8

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13 Prosecutor's Submission of Documents that can only be Disclosed to the Applicant in Redacted or Summarised Form, CH/PTJ/2011/06, 1 April 2011 ("Prosecutor's Submissions of 1 April 2011").

14 Scheduling Order for a Confidential and *Ex Parte* Hearing in Connection with the Request for Release of Evidentiary Materials Related to the Crimes of Libellous Denunciations and Arbitrary Detention Filed by Mr El Sayed on 17 March 2010, CH/PTJ/2011/07, 12 April 2011.

15 Addendum to the Non-exhaustive Inventory of the Documents and Materials General El Sayed Requests from the Prosecutor, CH/PTJ/2010/01, 26 April 2011.

16 Prosecutor's Submissions Concerning Additional Documents for Disclosure or Inspection by the Applicant, CH/PTJ/2011/07, 28 April 2011.

17 Prosecution's Further Submissions Concerning Additional Documents for Disclosure or Inspection by the Applicant, CH/PTJ/2011/07, 5 May 2011.

of the Rules of Procedure and Evidence of the Tribunal (the “Rules”) with regard to time limits for filing responses to motions.

19. On 10 May 2011, counsel for the Applicant filed a Reply to the Prosecution’s response in connection to the Addendum to the inventory.<sup>18</sup>

## **II. The Applicant’s request:**

20. In the initial Application,<sup>19</sup> the Applicant requested that he obtain the following documents:

a certified copy of the original records of the complaints of the Applicant that were transferred to the Tribunal by the Lebanese authorities on 1 March 2009;

a certified copy of the original records of the statements of witnesses who implicated him, either directly or indirectly, in the assassination of Rafiq Hariri ;

the reports provided to the Lebanese Prosecutor regarding the assessment of the above-mentioned statements and in particular the report by Mr Brammertz provided on 8 December 2006;

the views of Mr Bellemare in regard to the detention of the Applicant and the other detained persons which were forwarded to the Lebanese Prosecutor General; and

any other evidence that is in the possession of the President which is “necessary for the prosecution of the offences”.

21. Further to the Scheduling Order of 16 November 2010, the Applicant set out in an inventory, which was filed on 3 December 2010, the documents that he was requesting from the Prosecutor, specifying in particular that he wished to obtain the official records of the statements made before the International Independent Investigation Commission (the “Investigation Commission”) and the assessment reports of the witnesses heard before the Investigation Commission.<sup>20</sup>

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18 *Réplique à [reply to]* “Prosecution’s response to the applicant’s 26 avril [sic] 2011, motion”, 10 May 2011.

19 Application, 17 March 2010, pp. 7 and 8.

20 Non-exhaustive Inventory of the Documents and Materials General El Sayed Requests from the Prosecutor,

### **III. The Prosecutor's Submissions:**

22. On 10 March 2011, the Prosecutor identified 885 documents of which, in his opinion, 459 were relevant to the Applicant's request and of which 426 were not relevant.<sup>21</sup> During the hearing of 19 April 2011, the Prosecutor explained that 885 documents had been identified on the basis of pages 7 and 8 of the Application of 17 March 2010 and the Non-exhaustive Inventory of 3 December 2010 of the Applicant. The Prosecutor conducted an electronic review of his database which contains documents originating from the Investigation Commission, the Lebanese authorities and his own investigations. The review encompassed all the documents which might have referred to the Applicant or to the witnesses he mentioned. Among the documents that he considered to be relevant, the Prosecutor stated that 273 documents could be disclosed to the Applicant, 67 documents could be inspected by counsel for the Applicant and 119 documents could not be disclosed to the Applicant.<sup>22</sup> The Prosecutor further stated that the inspection could take place at the headquarters of the Tribunal or at its Beirut Office.<sup>23</sup>

23. On 1 April 2011, following a more detailed assessment of the documents under review, the Prosecutor stated that 64 documents that he deemed relevant on 10 March 2011 were in fact irrelevant in that they did not, directly or indirectly, involve Mr El Sayed, nor did they provide for an assessment of the credibility of the witnesses who had implicated the Applicant in the assassination of Mr Hariri.<sup>24</sup>

24. With regard to most of the documents in Arabic, the Prosecutor pointed out that, at this stage, only a summary had been prepared and that he would only be able to determine whether they should be disclosed to the Applicant or whether they should be inspected by his counsel once he was in possession of a full translation, should the Judge decide it necessary.<sup>25</sup>

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CH/PTJ/2010/01, 3 December 2010.

21 The Prosecutor's Application, paras 11 and 34.

22 *Ibid.*, para. 37.

23 *Ibid.*, para. 36.

24 Prosecutor's Submissions of 1 April 2011, para. 4.

25 Prosecutor's Application, para. 16.

#### **IV. Statement of reasons:**

25. Firstly, the Pre-Trial Judge considers that there is no reason that would justify the late filing of the Addendum by the Applicant on 26 April 2011 and which, consequently, is out of time. Furthermore, he notes that in accordance with Rule 8 of the Rules, a reply, if any, to a response can only be filed after obtaining leave of the Pre-Trial Judge. That being the case, the reply filed by the Applicant on 10 May 2011 is inadmissible. The Pre-Trial Judge wishes to note, however, that if the documents mentioned in the Addendum are included in part of the Applicant's criminal file which is in possession of the Prosecutor, they must have been reviewed in order to determine whether or not they can be disclosed to the Applicant and to his counsel.

26. The Pre-Trial Judge notes that the jurisdiction of the Tribunal and the standing of the Applicant to exercise his right to access materials which justified his detention were recognised in the Order of 17 September 2010.<sup>26</sup> In particular, the Order stated that the Applicant "must be entitled to the basic rights of defence similar to those conferred on an indictee, such as the right to have access to his criminal file".<sup>27</sup>

27. Given that this right is not absolute, however, the Pre-Trial Judge mentions in the same Order that it follows from legislation and case law, both national and international, that some restrictions on the disclosure of materials from the criminal file may be applied, in particular, to avoid compromising an ongoing or future investigation or undermining fundamental interests, such as the physical well-being of persons concerned by these documents, or affecting national or international security. The Pre-Trial Judge likewise noted in this Order that, in some circumstances, the right of access to the file may be limited to counsel for the Applicant.<sup>28</sup>

28. In the case at hand, it is appropriate first of all to recall that the Prosecutor, as the person responsible for the investigations and prosecutions,<sup>29</sup> is the only one

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26 Order of 17 September 2010; Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010.

27 *Ibid.*, para. 52.

28 *Ibid.*, para. 53.

29 Article 11 of the Statute.

who has in-depth knowledge of the file relating to Mr El Sayed, which allows him to assess, with full knowledge of the facts, from amongst all the materials in his possession, those which have a bearing on the proceedings against the Applicant and which must be disclosed to him. For his part, the Pre-Trial Judge has the role of ensuring that the Prosecutor conducts a most rigorous assessment, consistent with the spirit of the texts of the Statute and the Rules, which render the Prosecutor not only a party to the proceedings but also an organ of Justice, and guarantor of the public interest that he represents.<sup>30</sup> In this respect, the Pre-Trial Judge notes that, in view of the various submissions that he has filed and the explanations he has provided, the Prosecutor has effectively and faithfully fulfilled this task whilst respecting the above-mentioned principles.

29. Taking into consideration these requirements, the Prosecutor classified the materials under review into seven categories: (1) correspondence between the Investigation Commission and the Lebanese authorities, (2) internal memoranda, (3) investigators' notes, (4) witness statements and transcripts of witness and suspect interviews, (5) documents originating from the Applicant or his counsel, (6) the Applicant's own statements and transcripts, and (7) other documents. Among the reasons put forward in order to refuse to disclose to the Applicant, all or in part, some of the materials, the Prosecutor mentions the need to safeguard the ongoing investigation, the safety of witnesses and the interests of national and international security. Furthermore, he added that some of the documents were internal documents from his Office and thus covered by Rule 111 of the Rules, whereas others were not relevant in relation to Mr El Sayed's request.

30. On the basis of the criteria mentioned in the Order of 17 September 2010 and noted in paragraphs 25 to 28 above, the Pre-Trial Judge has made an assessment of the documents released to him by the Prosecutor, in accordance with the categories he established, in order to determine, at the current stage of the proceedings, whether the reasons put forward would justify the non-disclosure of some of the documents or the measures limiting access to them.

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<sup>30</sup> Rule 55 of the Rules.



31. The Pre-Trial Judge notes that the Prosecutor considers that for reasons of security in particular, some documents may not be disclosed or even consulted in their entirety by the Applicant and his counsel. According to the Prosecutor, these documents may only be inspected by the Applicant's counsel after some information has been redacted since the Code of Professional Conduct requires that counsel shall not disclose any confidential information, on pain of penalty. However, the Pre-Trial Judge finds that this dual precaution is not justified. In point of fact, where suggested redactions are, in particular, aimed at protecting witnesses and third persons, once redacted a document must, in principle, be disclosed to the Applicant and to his counsel. On the other hand, when the Prosecutor states that a document cannot be disclosed but simply consulted, it must be in its entirety, whether it is consulted by the Applicant and his counsel or by his counsel alone.

32. Furthermore, the Pre-Trial Judge underlines that the documents which will be disclosed by the Prosecutor to the Applicant and to his counsel, and the documents submitted for inspection, may only be used for legitimate grounds and provided that the presumption of innocence, the rights of the defence and the privacy of third persons are respected.

i) Categories 1 and 2: Correspondence between the Investigation Commission and the Lebanese Authorities and Internal Memoranda

33. In the opinion of the Prosecutor, correspondence between the Commission and the Lebanese authorities, and internal memoranda from the Commission, are protected under Rule 111 of the Rules and exempt from disclosure at the risk of jeopardising the ongoing investigation.<sup>31</sup> The Pre-Trial Judge considers that the Prosecutor claims with good reason that, by their very nature, these documents are confidential. In addition, they do not strictly speaking form part of the Applicant's criminal file. Consequently, they cannot be made the subject of an obligation to disclose.

34. However, the Pre-Trial Judge notes that the Prosecutor has suggested that some materials from the Investigation Commission mentioned in the spreadsheet of

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<sup>31</sup> Prosecutor's Application, paras 25 to 29.

5 May 2011 could be disclosed to the Applicant and to his counsel. The materials referred to here are documents 59, 61, 65 (redacted version) and 66.

35. In so far as the Prosecutor is prepared to disclose these documents, which appear to be judicial documents, the Pre-Trial Judge considers that there is nothing preventing them being released to the Applicant and to his counsel.

ii) Category 3: Investigators' Notes

36. According to the Prosecutor, notes made by the investigators are in principle not disclosable as some are covered by Rule 111 of the Rules, while others might jeopardise the ongoing investigation.<sup>32</sup> The Pre-Trial Judge deems these notes to be confidential by definition and that they are not part of the Applicant's criminal file. They cannot be made the subject of an obligation to disclose.

37. Nevertheless, the Pre-Trial Judge notes that the Prosecutor considers that documents 151 and 173 from the Investigation Commission mentioned in the spreadsheet of 5 May 2011 could be disclosed to the Applicant and to his counsel, and that documents 145 and 159 from the Investigation Commission mentioned in the same spreadsheet could be inspected by his counsel after they have been redacted.

38. In so far as the Prosecutor is prepared to make available the documents mentioned above, and given that after they have been redacted the documents must in principle be disclosed, there is nothing to prevent documents 145 and 159 being released to the Applicant and to his counsel.

iii) Category 4: Witness Statements and Transcripts of Witness and Suspect Interviews

39. According to the position taken on principle by the Prosecutor, to disclose witness statements and transcripts of witness and suspect interviews to the Applicant could compromise the safety of these witnesses or of third parties. However, the

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<sup>32</sup> Prosecutor's Application, paras 30 and 36.

Prosecutor suggests that some statements made by witnesses known to Mr El Sayed can be inspected by his counsel.<sup>33</sup>

40. At the present stage of the case, the Pre-Trial Judge considers that, as suggested by the Prosecutor, the statements of the witnesses or suspects identified by numbers 18 and 23 in the spreadsheet of 5 May 2011 can be disclosed to the Applicant and to his counsel. With regard to documents 37 and 48, the Pre-Trial Judge notes that on 1 April 2011 the Prosecutor deemed that these documents could be disclosed or inspected, while on 28 April 2011 he affirmed that these documents were no longer relevant and for that reason could not be disclosed or inspected. In so far as the Pre-Trial Judge considers that these documents might be relevant, the Prosecutor should examine whether they might be prevented from being disclosed for reasons other than that they are not relevant.

41. The Pre-Trial Judge recalls that the issue of applying a relevance criterion was debated during the hearing of 19 April 2011. In order to ensure that the Applicant's right to have access to his criminal file is respected, as recognised in the Order of 17 September 2010, the Pre-Trial Judge considers, based on the examples put forward during that hearing, that according to that criterion, the Applicant should, in principle, have access to all the witness statements which were produced in the context of the examination of his file and on which his detention was based. Consequently, among the witness statements the Prosecutor has in his possession, the documents relating to Mr El Sayed's request cannot be limited to the statements made by witnesses or suspects which it would appear directly implicate him in the Hariri case. The result is therefore, first and foremost, that the statements from all the witnesses or suspects which were taken in the context of the examination of Mr El Sayed's file might be relevant and, therefore, could be disclosed to him, subject to the exceptions and conditions set out in paragraph 27 above.

42. As regards the suggested redaction of information contained in the witness statements mentioned in the spreadsheets filed by the Prosecutor, the Pre-Trial Judge wishes to recall that, as for any other restriction of access to the file, it must be reasoned, in particular by the need to safeguard the ongoing investigation, the safety

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<sup>33</sup> Prosecutor's Application, para. 31.

of the witnesses and the interests of national and international security. Consequently, the Pre-Trial Judge invites the Prosecutor to indicate clearly in his suggested redactions the reasons behind them, except for that of their alleged relevance.

43. The Pre-Trial Judge notes that the Prosecutor proposes to disclose document 38 in its entirety; to allow inspection of documents 20, 40 and 53 in their entirety; to allow inspection of the following documents after they have been redacted: 1, 7, 10, 11, 16, 17, 19, 29, 36, 39, 41, 42, 49, 50, 52, 55; and to allow inspection of the following documents after they have been translated and, where necessary, redacted: 4, 5, 6, 8, 9, 12, 13, 21, 22, 24, 26, 27, 28, 30, 31, 34, 35, 43, 44, 45, 56 and 57. According to the principle whereby the redacted documents must be able to be disclosed to the Applicant and to his counsel, the Pre-Trial Judge considers that all the documents mentioned above must be disclosed to the Applicant and to his counsel after they have been redacted, with the exception of documents 20, 40 and 53 which can be consulted in their entirety by counsel for the Applicant.

44. Moreover, the Pre-Trial Judge invites the Prosecutor to re-examine the list of witness statements relating to the Applicant among the 885 documents that he originally identified on 10 March 2011, or other materials and documents that might have come to his attention since then, as well as the relevant suggested redactions in light of, in particular, the criteria for the safeguarding of the ongoing investigation, the safety of the witnesses and the interests of national and international security mentioned in the Order of 17 September 2010.

45. Finally, the Pre-Trial Judge also invites the Prosecutor to examine in the future whether some documents which cannot be disclosed at present might be at a later date, once the reasons for their non-disclosure no longer exist. The same applies in respect of documents which might come to his attention later.

iv) Categories 5 and 6: The Applicant's Own Statements and Documents Originating from the Applicant or his Counsel

46. The Prosecutor indicates that the documents originating from the Applicant or his counsel as well as his own statements should be disclosed to him,<sup>34</sup> with the exception of some documents which can only be inspected by his counsel after they have been redacted, as they also relate to other persons.

47. The Pre-Trial Judge deems that all the Applicant's own statements and the documents that he or his counsel have filed should be disclosed to him. Consequently, the following documents, contained in the spreadsheet of 5 May 2011, should be disclosed to the Applicant and to his counsel: 174 to 177 inclusive, 179 to 182 inclusive, 184 to 205 inclusive and 207.

48. With regard to documents 178 and 183 which fall in this category and which the Prosecutor considers should be redacted before being disclosed, the Pre-Trial Judge notes that during the hearing of 19 April 2011 and in his Submissions of 21 April 2011, the Prosecutor explained that these documents contained not only the Applicant's own statements, but also those of other persons, or information which was not relevant and which should therefore be redacted.

49. With regard to document 206 from this category which only exists in Arabic, the Pre-Trial Judge notes that the Prosecutor envisages that it can only be inspected by the Applicant's counsel as it would appear to contain information which does not concern Mr El Sayed and which should therefore be redacted. In this regard, the Pre-Trial Judge notes that the Prosecutor cannot redact this document until it has been translated and deems that after it has been translated and redacted, as appropriate, the document should be disclosed to the Applicant and to his counsel.

50. The Pre-Trial Judge also considers that all the documents originating from the Applicant or his counsel, i.e. documents 208 to 263 inclusive and 265 to 436 inclusive, must be disclosed.

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<sup>34</sup> Prosecutor's Application, paras 32, 33 and 35.

51. He notes moreover that, according to the explanations provided by the Prosecutor on 19 April 2011, document 264 is an investigator's note and not a document originating from the Applicant or his counsel, as indicated initially. Consequently, this document falls into category 3 (Investigators' Notes) and should not be disclosed.

v) Other Documents

52. To the aforementioned categories explained in his Application of 10 March 2011, the Prosecutor added, in his spreadsheet of 1 April 2011, a new category entitled "other documents", which should now be examined.

53. With regard to document 437,<sup>35</sup> the Pre-Trial Judge has considered the explanation provided by the Prosecutor on 19 April 2011 according to which this document was placed by error in the category of documents originating from the Applicant. From the summary of this document which exists only in Arabic, the Pre-Trial Judge deems, at first sight, that it is relevant and therefore that it should be translated before the Prosecutor is able to say whether it should be disclosed, if necessary, after being redacted.

54. According to the information provided by the Prosecutor, documents 438 to 442 inclusive, 454 and 457 to 459 inclusive can be disclosed to the Applicant and to his counsel. However, documents 451 and 456 can only be inspected by the Applicant's counsel after they have been translated. As regards documents 443 and 444, after they have been translated, and documents 447, 449 and 450, they can likewise only be inspected, but only after some information has been redacted. In the opinion of the Pre-Trial Judge, documents 438 to 442 inclusive, 454 and 457 to 459 inclusive can be disclosed to the Applicant and to his counsel, while documents 451 and 456 should be translated before any decision is made regarding access to them by the Applicant or his counsel. Finally, there is nothing that would justify non-disclosure of the following documents to the Applicant after sensitive information has been redacted from them: 443 and 444 after they have been translated, 447, 449 and 450.

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<sup>35</sup> Annex C to the Prosecutor's Submissions of 17 March 2011.

55. According to the Prosecutor's Submissions of 28 April and of 5 May 2011, the following additional documents can be inspected by the Applicant's counsel after they have been redacted: 460, 461, 462, 463, 464, 465, 467, 468, 471 and 472. He further considers that document 469 can be disclosed to the Applicant and to his counsel.

56. In accordance with the principles set out in paragraph 31, the Pre-Trial Judge considers that, in addition to document 469 which can be disclosed directly, documents 460, 461, 462, 463, 464, 465, 467, 468, 471 and 472 should be disclosed to the Applicant after sensitive information has been redacted from them.

## **V. Final Remarks:**

57. The Pre-Trial Judge wishes to make the following three final remarks.

58. First, he notes that the Prosecutor consulted the United Nations with regard to the disclosure or inspection of the aforementioned documents and that that Organisation is not against such disclosure or inspection.

59. Second, he recalls that Mr El Sayed requested certified copies of the inventoried documents. He deems this request to be justified.

60. Third, the Pre-Trial Judge considers that there is no justification to issue this present decision as confidential, with the exception of the Annex containing the list of documents to be disclosed to the Applicant, to be inspected by his counsel or to be translated, as well as the list of documents for which the Prosecutor proposes redactions, drawn up based on the numbering of the documents contained in the spreadsheet filed on 5 May 2011 by the Prosecutor ("the Confidential Annex").

## **DISPOSITION**

**FOR THESE REASONS,**

**THE PRE-TRIAL JUDGE,**

**REJECTS** the Addendum to the inventory of 17 April 2011 and the Reply of 10 May 2011 filed by the Applicant;

**ORDERS** the Prosecutor to disclose to the Applicant on 20 May 2011 at the latest, through the Registry of the Tribunal, a certified copy of the following documents listed in the Confidential Annex: 18, 23, 38, 59, 61, 66, 151, 173 to 177 inclusive, 179 to 182 inclusive, 184 to 205 inclusive, 207, 208 to 263 inclusive, 265 to 436 inclusive, 438 to 442 inclusive, 454, 457 to 459 inclusive, 469;

**ORDERS** the Prosecutor to arrange for 27 May 2011 at the latest the inspection by the Applicant's counsel of the following documents listed in the Confidential Annex: 20, 40 and 53;

**ORDERS** the Prosecutor to submit to the Pre-Trial Judge on 27 May 2011 at the latest the following documents listed in the Confidential Annex: 1, 7, 10, 11, 16, 17, 19, 29, 36, 39, 41, 42, 49, 50, 52, 55, 65, 145, 159, 178, 183, 447, 449, 450, 460 to 465 inclusive, 467, 468, 471, 472 containing the suggested redactions based on the criteria for the safeguarding of the investigation, the witnesses or third parties, or national or international security, with a view to their being disclosed to the Applicant and to his counsel;

**ORDERS** the translation by the offices of the Registry of the following documents listed in the Confidential Annex: 4, 5, 6, 8, 9, 12, 13, 21, 22, 24, 26 to 28 inclusive, 30, 31, 34, 35, 43 to 45 inclusive, 56, 57, 206, 437, 443, 444, 451 and 456, and orders the Prosecutor, within 15 days of their being translated, to disclose them in their current state to the Applicant and to his counsel, or if appropriate, to seize the Pre-



Trial Judge with any reasoned proposal for them to be inspected in their entirety or to be redacted with a view to their being disclosed to the Applicant and to his counsel;

**ORDERS** the Prosecutor to re-examine, in the light of the criteria for the safeguarding of the interests of the investigation, the witnesses and third parties, and national and international security, the witness statements among the 885 documents that he had identified initially, or other documents that he might have identified since then, including the handwritten documents in Arabic that are in his possession and to submit on 3 June 2011 at the latest a revised spreadsheet of these documents containing the relevant suggested redactions, as appropriate;

**ORDERS** the Prosecutor to examine, on the basis of the principles and criteria set out in the Order of 17 September 2010 and in the present decision, any document from the criminal file relating to the Applicant that may come to his attention later and to disclose those which he considers can be disclosed in their current state and, if necessary, to submit to the Pre-Trial Judge any document the access to which he wishes to restrict, accompanied by his reasons for doing so and suggestions regarding such restriction;

**ORDERS** the Prosecutor to draw up a report for the attention of the Pre-Trial Judge relating to the fulfilment of his obligations by 13 June 2011 at the latest;

**REMINDS** the Applicant and his counsel that the documents disclosed or submitted for inspection can only be used for legitimate grounds, provided that the presumption of innocence, the rights of the defence and the privacy of third parties are respected.

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

Leidschendam, 12 May 2011.

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Daniel Fransen  
Pre-Trial Judge

Case name: *The Prosecutor v. Ayyash et al.*

Before: **Pre-Trial Judge**

Title: **Decision Relating to the Examination of the Indictment of 10 June 2011 Issued against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra**

Short title: **“Confirmation of Indictment”**





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

## BEFORE THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/I**  
The Pre-Trial Judge: **Mr Daniel Fransen**  
The Registrar: **Mr Herman von Hebel**  
Date: **28 June 2011**  
Original: **French**  
Type of document: **Public redacted**  
[Case Name: ***The Prosecutor v. Ayyash et al.***]

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### **DECISION RELATING TO THE EXAMINATION OF THE INDICTMENT OF 10 JUNE 2011 ISSUED AGAINST MR SALIM JAMIL AYYASH, MR MUSTAFA AMINE BADREDDINE, MR HUSSEIN HASSAN ONEISSI & MR ASSAD HASSAN SABRA**

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**Office of the Prosecutor:**  
Mr Daniel A. Bellemare, QC

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## **I. Preamble**

1. By way of this decision, the Pre-Trial Judge of the Special Tribunal for Lebanon (the “Pre-Trial Judge” and the “Tribunal” respectively) will rule on the merits of the indictment of 10 June 2011 (the “Indictment”), relating to the case concerning the attack against Mr Rafiq Hariri<sup>1</sup> (the “Hariri Case”), issued by the Prosecutor of the Tribunal (the “Prosecutor”) against Mr Salim Jamil Ayyash (“Mr Ayyash”), Mr Mustafa Amine Badreddine (“Mr Badreddine”), Mr Hussein Hassan Oneissi (“Mr Oneissi”) and Mr Assad Hassan Sabra (“Mr Sabra”). He will likewise rule on the Prosecutor’s request for non-disclosure of the Indictment to the public.

2. After having recalled the provisions that establish his jurisdiction (II), the principle stages of the procedure (III) and the counts selected by the Prosecutor (IV), the Pre-Trial Judge will define the criteria used for the examination of the Indictment (V) and will specify the legal elements to be applied to the case at hand (VI). Subsequently he will determine whether the offences referred to in the Indictment fall within the jurisdiction of the Tribunal (VII) and whether, in light of the material and the information provided by the Prosecutor, there is reason to confirm each count with regard to the suspects concerned. At that point, the Pre-Trial Judge will rule on the question of whether the Indictment meets the requirements with regard to the specific facts and grounds as required by the law in force and whether the cumulative charges contained in the Indictment are in accordance with this law (VIII). Lastly, the Pre-Trial Judge will rule on the request for non-disclosure of the Indictment (IX).

## **II. Jurisdiction of the Pre-Trial Judge**

3. In accordance with Article 18 of the Statute of the Tribunal (the “Statute”) and Rule 68 of the Rules of Procedure and Evidence of the Tribunal (the “Rules”), the Pre-Trial Judge shall review the indictment submitted to him by the Prosecutor in order to confirm it, as appropriate. Furthermore, in accordance with Rule 74 of the Rules, upon request of the Prosecutor, the Pre-Trial Judge may, in the interests

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<sup>1</sup> The term “attack” comes from Article 1 of the Statute. It has no legal bearing with regard to the present decision.

of justice and in exceptional circumstances, order the non-disclosure to the public of an indictment.

4. Consequently, the Pre-Trial Judge has jurisdiction to rule on the Prosecutor's submissions.

### III. Procedural background

5. By way of the submission of 17 January 2011, in accordance with Rule 68 of the Rules, the Prosecutor submitted to the Pre-Trial Judge for confirmation an indictment relating to the Hariri Case<sup>2</sup> together with supporting material. This indictment was issued against Mr Ayyash. In the order of 19 January 2011 (the "Order of 19 January 2011"), the Pre-Trial Judge recalled that, in accordance with Rule 96, paragraph (B) of the Rules, this indictment and this material should remain confidential for as long as is necessary.<sup>3</sup>

6. By way of the submission of 11 March 2011, in accordance with Rule 71, paragraph (A), point (i) of the Rules, the Prosecutor submitted for confirmation a first amended version of this indictment which mentioned two further suspects: Mr Oneissi and Mr Sabra.<sup>4</sup>

7. By way of the motion of 6 May 2011, the Prosecutor filed a second amended version of the indictment, charging not only the three above-mentioned suspects, but also Mr Badreddine. In addition to the confirmation of this indictment, the Prosecutor requested that the application of the Order of 19 January 2011 be continued and that arrest warrants and orders for transfer and detention be issued (the "Motion").<sup>5</sup>

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2 Case No. STL-11-01/I, Submission of an Indictment for Confirmation (Rule 68); (1) Motion for an Arrest Warrant and Order for Transfer (Rule 79); (2) Urgent Motion for Non-Disclosure of the Indictment (Rule 74); and (3) Urgent Motion for an Order for *Interim* Non-Disclosure of the Identities of Witnesses Pending the Implementation of Appropriate Witness Protection Measures (Rules 77 and 115) (confidential and *ex parte*), 17 January 2011.

3 Case No. STL-11-01/I, Order on the Prosecutor's Urgent Motions for Non-disclosure, 19 January 2011.

4 Case No. STL-11-01/I, Submission of an Amended Indictment for Confirmation (Rule 68 and 71) and Motion for Arrest Warrants and Orders for Transfer (Rule 79) (confidential and *ex parte*), 11 March 2011.

5 Case No. STL-11-01/I, Combined Motion of the Prosecutor; (1) Submission of an Indictment for Confirmation (Rule 68), (2) Motion for Continuation of Pre-Trial Judge's Order Dated 19 January 2011 Pursuant to Rule 96 (B), and (3) Motions in the Event of Confirmation of the Indictment Pursuant to Rules 74, 77 and 79 (confidential



8. By way of letters dated 19 and 20 May 2011, in accordance with Rule 68, paragraph (I) of the Rules, read in the light of paragraph (F) of this same provision, the Pre-Trial Judge requested from the Prosecutor specific telephone data which forms the basis of the material submitted in support of the second amended indictment. On 20 May 2011, in response to this request, the Prosecutor forwarded this data to him.<sup>6</sup>

9. By way of the order of 9 June 2011, the Pre-Trial Judge requested the Prosecutor to amend the second amended version of the indictment in order to divide the sixth and seventh counts, containing respectively two offences, into separate counts.<sup>7</sup> On 10 June 2011, in response to this order, the Prosecutor submitted a new version of the indictment, replacing the previous ones, which reflected the changes requested by the Pre-Trial Judge and included some minor modifications.<sup>8</sup> In this decision, reference will be made exclusively to this third amended version, using the term “Indictment”.

10. In accordance with Rule 68, paragraph (B) of the Rules, the Prosecutor filed each indictment with supporting material. Furthermore, in the Motion of 6 May 2011, he stated that he wished to withdraw all the material forwarded to the Registry of the Tribunal in support of the previous versions of the Indictment and file all the material anew at the time of the submission of the second amended version of the Indictment.<sup>9</sup> It is only this material that henceforth forms part of the file.

11. At the time of submitting the Indictment on 10 June 2011, the Prosecutor attached additional supporting material. By way of the Order of 14 June 2011, the Pre-Trial Judge rejected this material on the ground that its filing had not been authorised pursuant to Rule 68, paragraph (I) of the Rules.<sup>10</sup> He invited the Prosecutor,

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and *ex parte*), 6 May 2011.

6 Case No. STL-11-01/I, Submission of Additional Indictment Supporting Material as Requested by the Pre-Trial Judge under Rule 68(I) (i) (confidential and *ex parte*) », 20 May 2011.

7 Case No. STL-11-01/I, Order for Clarification of the Indictment (confidential and *ex parte*), 9 June 2011.

8 Case No. STL-11-01/I, Submission of Amended Indictment for Confirmation under Rule 71 and in Response to the Order of the Pre-Trial Judge Dated 9 June 2011 (confidential and *ex parte*), 10 June 2011.

9 Motion, paras 9-10.

10 Case No. STL-11-01/I, Order for Dismissal of the Additional Material Filed by the Prosecutor on 10 June 2011 (confidential and *ex parte*), 14 June 2011.

if he so wished, to submit them according to the authorised procedure. To date, the Prosecutor has not deemed it necessary to do so.

12. By virtue of the authority deriving from the above-mentioned provisions, and most specifically from Rule 68, paragraphs (E) and (F) of the Rules, the Pre-Trial Judge held meetings with representatives from the Office of the Prosecutor on 7 March, 7 April, 28 April, 7 June and 15 June 2011, in order to put forward observations and obtain clarification as well as information with regard to the different versions of the indictment and the evidentiary material which was submitted in support of them.

#### **IV. The Counts**

13. Pursuant to Articles 2, 3 and 11 of the Statute together with the relevant provisions of the Lebanese Criminal Code<sup>11</sup> and the Lebanese Law of 11 January 1958 on “Increasing the penalties for sedition, civil war and interfaith struggle” (the “Law of 11 January 1958”),<sup>12</sup> the Prosecutor has charged:

- i) Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra, individually and collectively, as co-perpetrators, of conspiracy aimed at committing a terrorist act (Count 1);
- ii) Mr Ayyash and Mr Badreddine, individually and collectively, as co-perpetrators, of committing a terrorist act by means of an explosive device (Count 2);
- iii) Mr Ayyash and Mr Badreddine, individually and collectively, as co-perpetrators, of intentional homicide of Rafiq Hariri with premeditation by using explosive materials (Count 3);
- iv) Mr Ayyash and Mr Badreddine, individually and collectively, as co-perpetrators, of intentional homicide with premeditation, by using explosive materials, of 21 persons listed in Annex A of the Indictment (Count 4);
- v) Mr Ayyash and Mr Badreddine, individually and collectively, as co-perpetrators, of attempted intentional homicide with premeditation, by using

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

12 Arts 1, 6 and 7 of the Lebanese Law of 11 January 1958.

explosive materials, of 231 persons listed in Annex B of the Indictment (Count 5);

- vi) Mr Oneissi and Mr Sabra, individually and collectively, as being accomplices to committing a terrorist act by means of an explosive device, against Rafiq Hariri (Count 6);
- vii) Mr Oneissi and Mr Sabra, individually and collectively, as being accomplices to intentional homicide with premeditation, by using explosive materials, against Rafiq Hariri (Count 7);
- viii) Mr Oneissi and Mr Sabra, individually and collectively, as being accomplices to intentional homicide with premeditation, by using explosive materials, of the 21 persons listed in Annex A of the Indictment (Count 8); and
- ix) Mr Oneissi and Mr Sabra, individually and collectively, as being accomplices to attempted intentional homicide with premeditation, by using explosive materials, of 231 persons listed in Annex B of the Indictment (Count 9).

## V. Criteria for reviewing the indictment

14. In the context of reviewing an indictment, the Pre-Trial Judge must in the first instance verify whether the offences referred to therein fall within the jurisdiction of the Tribunal.<sup>13</sup> He must then determine whether, on the basis of the material provided in support of the indictment, a *prima facie* case exists against the suspects.<sup>14</sup>

15. In this respect, the Statute and the Rules lay down, in a general manner, the criteria that the Pre-Trial Judge must take into account in order to conduct this review and decide whether or not the counts contained in the Indictment shall be confirmed. Article 18, paragraph 1 of the Statute is worded as follows:

If satisfied that a *prima facie* case has been established by the Prosecutor, [the Pre-Trial Judge] shall confirm the indictment. If [the Pre-Trial Judge] is not so satisfied, the indictment shall be dismissed. (Italics added)

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13 Cf. in particular, ICTY, *The Prosecutor v. Kordić et al.*, Case No. IT-95-14-I, Decision on the Review of the Indictment, 10 November 1995, p. 4 (*Kordić* Decision).

14 Rule 68 (F) of the Rules.

16. Rule 68, paragraph (F) of the Rules mentions that:

The Pre-Trial Judge shall examine each of the counts in the indictment and any supporting materials provided by the Prosecutor to determine whether a *prima facie case* exists against the suspect. (Italics added)

17. Rule 68, paragraph (B) of the Rules specifies that, in order to issue an indictment, the duties of the Prosecutor are as follows:

The Prosecutor shall, if satisfied in the course of an investigation that there is sufficient evidence that a suspect has committed a crime that may fall within the jurisdiction of the Tribunal, file an indictment for confirmation by the Pre-Trial Judge, together with supporting material.

18. The Statute and the Rules thus employ the expression “prima facie case”, (in French respectively either *au vu des présomptions* or *de prime abord*) to set forth the criteria to be adopted by the Pre-Trial Judge at the time of reviewing the indictment. They do not, however, offer any clarity with regard to the meaning to be attributed to this term. In this context, the meaning must be determined in the light of the general principles of interpretation of the texts of the Statute and the Rules.

19. For this reason, in order to interpret the provisions of the Statute, consideration should be given, in addition to the customary principles established by Articles 31 to 33 of the Vienna Convention on the Law of Treaties (the “Vienna Convention”),<sup>15</sup> to statements made by representatives of the Member States of the Security Council of the United Nations (“Security Council” and “UN” respectively) at the time of the adoption of Security Council resolution 1757 (2007).<sup>16</sup> It is also important to take into account other resolutions on the same issue as well as the subsequent practice of the UN and of States affected by those given resolutions.<sup>17</sup>

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15 The Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969 and which entered into force on 27 January 1980 (United Nations Treaty Collection, vol. 1155, p. 331).

16 Resolution 1757 (2007) of the Security Council to which is attached in the Annexes the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon and the Statute, 30 May 2007.

17 The International Court of Justice (the “ICJ”), Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, 22 July 2010, para. 94.

20. With regard to the interpretation of the provisions of the Rules, Rule 3 sets forth that:

A. The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.

B. Any ambiguity that has not been resolved in the manner provided for in paragraph (A) shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstances then under consideration.

21. It follows that the meaning of the above-mentioned expression “prima facie case” should be determined from the perspective of the principles set out in the Vienna Convention and, more specifically, by taking into account the ordinary meaning of this term interpreted in the context of the provisions of the Statute and the Rules, its object and its purpose.<sup>18</sup> The case law of other international criminal courts is, in this respect, particularly informative insofar as these tribunals were also established by Security Council resolutions.

### **1. Ordinary meaning**

22. The French version of the provisions of the Statute and the Rules refers indiscriminately to either the term *au vu des présomptions* or the term *de prime abord* when setting forth the criteria to be adopted for the review of an indictment. The English version instead uses the Latin expression “prima facie”. According to conventional legal dictionaries, these expressions all have one and the same meaning, namely “at first sight”.<sup>19</sup>

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18 Art. 31 of the Vienna Convention on the Law of Treaties.

19 Cf. “prima facie” in B. Garner (ed.), *Black’s Law Dictionary*, 9th ed., St. Paul, United States, 2009, p. 1310: “at first sight” or “on first appearance but subject to further evidence or information”. Cf. also “prima facie” in L. Beaudoin (ed.), *Les mots du droit*, 2nd ed., Cowansville, Canada, 2004, p. 166: “*de prime abord*” or “*à première vue*”.

## 2. Context

23. Article 18 of the Statute is worded similarly to Article 18 of the Statute of the International Criminal Tribunal for Rwanda (“ICTR”) and Article 19 of the Statute of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) whose procedures, in particular those prior to trial, have influenced those in force at the Tribunal.<sup>20</sup> In this context, the interpretation given by the ICTR and the ICTY to the texts of the statutes governing their jurisdiction and operation can be used as a reference point to determine the exact meaning of the expression “prima facie case” and to define the criteria to be applied by the Pre-Trial Judge for the review of the indictment, at this stage of the proceedings. As such, according to prevailing case law of the ICTY, after having verified whether the acts of which the suspect is accused can be considered offences that fall within the jurisdiction of the Tribunal, the judge must determine whether the evidence submitted by the Prosecutor in support of the counts is sufficient to prosecute this suspect. In this respect, the ICTY specifies that:

It is sufficient that from an overall view of the evidence which he has collected and which covers all the ingredients of the offence, including the necessary legal implications which he seeks can be drawn therefrom, a clear suspicion of the accused being guilty of the crime arises. The evidence, therefore, need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime.<sup>21</sup>

24. Similarly, the ICTR points out that:

[...] the reviewing judge must be satisfied that the material facts pleaded in the indictment establish a prima facie case and that there is evidence available which supports these material facts.<sup>22</sup>

20 Neither the confirmation procedure followed by the International Criminal Court (the “ICC”) (*cf.* Arts 53, 58 and 61 of the Statute and Rules 121-130 of the Rules of Procedure and Evidence of that court) nor that followed by the Extraordinary Chambers in the Courts of Cambodia (*cf.* Arts 16 and 23 of the law of 10 August 2001 establishing these Chambers) is similar to that of the Tribunal. Indeed, the first relies on an adversarial debate between the Prosecutor and defence attorneys, which does not exist with regard to the Tribunal’s procedure. As for the second, this is based on the Cambodian procedural system, which is fundamentally different from that in force at the Tribunal.

21 ICTY, *The Prosecutor v. Rajić*, Case No. IT-95-12-I, Review of the Indictment, 29 August 1995, p. 7.

22 ICTR, *The Prosecutor v. Bikindi*, Case No. ICTR-2001-72-I, Confirmation of the Indictment, 5 July 2001, p. 2.

### 3. Object and purpose

25. It would be helpful to look briefly at the basis of the procedure for confirmation of the indictment. The procedure sets out to guarantee, first of all, that no person can be prosecuted or tried unless an impartial and independent judge has first been able to ensure that the indictment relating to them is based on credible and sufficient evidence in order to bring criminal proceedings against him. As the ICTY noted:

[...] the Judge is then discharging a function akin to that of an examining magistrate (*juge d'instruction*) or of a grand jury helping to ensure that the prosecution will not be frivolous or wilful.<sup>23</sup>

26. From this viewpoint, the powers of the Pre-Trial Judge are limited. He cannot under any circumstance act as a substitute for the trial and appeal court judges, who alone bear the responsibility of determining whether, at the end of the adversarial proceedings, the evidence against the accused has been established and whether he is guilty beyond reasonable doubt of the offences of which he is charged.<sup>24</sup> At this initial stage of the proceedings, the Pre-Trial Judge's only task is to review the indictment from the perspective of the evidence gathered and submitted by the Prosecutor in order to determine whether a *prima facie* case exists against the suspect.

27. The procedure for confirmation of an indictment is also intended to best protect the fundamental rights of any accused, guaranteed under Article 16, paragraph 4 point (a) of the Statute, "to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her".<sup>25</sup> This right rests on the notion that a person, at the time of being charged, must be in full possession of the necessary facts to allow him to understand the charges laid against him in order to prepare his defence and, if need be, challenge the legality of

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23 ICTY, *Kordić* Decision, p. 4.

24 Art. 16, para. 3 (c) of the Statute and Rule 148 (A) of the Rules.

25 This provision is modelled on Art. 14 (3) of the International Covenant on Civil and Political Rights and on Art. 5 (2) of the European Convention on Human Rights ("ECHR"). As is specified by the European Court of Human Rights with regard to this provision, any person must be told "in simple non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4 [of Art. 5]". (ECHR, *Fox, Campbell and Hartley v. The United Kingdom*, Judgment, 30 August 1990, Series A no.182, para. 40).

his detention. In this perspective, when reviewing the Indictment within the context of the confirmation procedure, the Pre-Trial Judge must ascertain that the Indictment effectively meets the requirements that it be specific and contain precise grounds.

#### 4. Conclusion

28. It follows from the above that, in accordance with the ordinary meaning of the terms of Article 18 of the Statute and Rule 68 of the Rules, the context within which the provisions fall and their object and their purpose, the Pre-Trial Judge should, for the purposes of reviewing the Indictment, determine whether:

- i) the offences referred to in the Indictment fall within the jurisdiction of the Tribunal, as defined by Articles 1 to 3 of the Statute;
- ii) on reviewing the material included in support of the Indictment, a *prima facie* case based on sufficient and credible evidence exists to institute proceedings against the suspects; and
- iii) the Indictment is sufficiently specific and contains grounds which allow each suspect to understand the charges laid against him.

#### VI. Applicable law

29. On reading the counts in the indictment of 17 January 2011, the Pre-Trial Judge considered that, in the interests of justice, several questions with regard to the interpretation of the applicable law would have to be determined *in limine litis* by the Appeals Chamber of the Tribunal (the “Appeals Chamber”), pursuant to Rule 68, paragraph (G) of the Rules.<sup>26</sup> These questions related to the offences, modes of responsibility, and cumulative charging and plurality of offences. Indeed, the provisions of the Statute relating to these questions were open to differing interpretations. Should all or part of the Indictment have been confirmed without having clarified these provisions at this stage of the proceedings, the proceedings might have commenced on incorrect legal bases which would not have been rectified until the end of the proceedings, when the ruling was issued by the Appeals Chamber.

<sup>26</sup> Case No. STL-11-01/I/AC/R176bis, Order on Preliminary Questions addressed to the Judges of the Appeals Chamber pursuant to Rule 68, paragraph (G) of the Rules of Procedure and Evidence, 21 January 2011, para. 1.



This method of proceeding, in addition to being time-consuming and costly, would not have assisted the proceedings in terms of coherency and transparency, nor would it have been in the interest of the suspects. Indeed, a specific definition of the applicable law prior to instituting proceedings would have allowed the suspects to gain a better understanding of the scope of the counts against them and prepare their defence accordingly.<sup>27</sup>

30. In this context, on 21 January 2011, the Pre-Trial Judge asked the Appeals Chamber a number of preliminary questions relating to the offences and modes of responsibility referred to in the indictment of 17 January 2011 with a view to issuing, in full knowledge of the facts, a decision relating to its confirmation. He did not deem it necessary to ask further questions when the amended versions of the Indictment were filed.

31. On 16 February 2011, in light of the written and oral observations submitted by the Prosecutor and by the members of the Defence Office, by way of an interlocutory decision, the Appeals Chamber replied to the questions referred to above (the “Interlocutory Decision”).<sup>28</sup> For the purposes of the present decision, it should be recalled that the Appeals Chamber concluded as follows:

i) With regard to the notion of terrorist act:

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

- a. the volitional commission of an act or the credible threat of an act;
- b. through means that are likely to pose a public danger;<sup>29</sup> and

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<sup>27</sup> *Ibid.*, para. 2.

<sup>28</sup> The Pre-Trial Judge recalls that the Appeals Chamber made “legal findings *in abstracto* (in the abstract), without any reference to facts” (case no. STL-11-01/I/AC/R176*bis*, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 8).

<sup>29</sup> 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.” (*Ibid.*

- c. with the special intent to cause a state of terror.

If the perpetrator of a terrorist act uses for example explosives intending to kill a particular person but in the process kills or injures persons not directly targeted, then that perpetrator may be liable for terrorism *and* intentional homicide (or attempted homicide) if he had foreseen the possibility of those additional deaths and injuries but nonetheless willingly took the risk of their occurrence (*dolus eventualis*, namely advertent recklessness or constructive intent) [...].<sup>30</sup>

ii) With regard to the notion of conspiracy:

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

- a. two or more individuals;
- b. who conclude or join an agreement of the type described in paragraph 196 [of the Interlocutory Decision];
- c. aiming at committing crimes against State security (for purposes of this Tribunal, the aim of the conspiracy must be a terrorist act);
- d. with an agreement on the means to be used to commit the crime (which for conspiracy to commit terrorism must satisfy the “means” element of Article 314) [of the Lebanese Criminal Code]); and
- e. criminal intent relating to the object of the conspiracy.<sup>31</sup>

iii) With regard to intentional homicide:

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

- a. an act or culpable omission aimed at impairing the life of a person;
- b. the result of the death of a person;

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Disposition, para. 3).

30 *Ibid.*, paras 3-4.

31 *Ibid.*, para. 8.

- 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*.<sup>32</sup>

iv) With regard to attempted homicide:

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

- a. a preliminary action aimed at committing the crime (beginning the execution of the crime);
- b. the subjective intent required to commit the crime; and
- c. the absence of a voluntary abandonment of the offence before it is committed<sup>33</sup>

v) With regard to modes of responsibility:

An evaluation is to be made between international criminal law and domestic Lebanese law when the Tribunal applies modes of criminal responsibility. Should no conflicts arise, Lebanese law should be applied. However, if conflicts do arise, then, taking account of the circumstances of the case, the legal regime that most favours the accused shall be applied [...].<sup>34</sup>

vi) With regard to cumulative charging:

Cumulative charging should only be allowed when separate elements of the charged offences make those offences truly distinct and where the rules envisaging each offence relate to substantially different values. The Tribunal should prefer alternative charging where a conduct would not permit multiple convictions. Modes of liability for the same offence should always be charged in the alternative [...].<sup>35</sup>

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<sup>32</sup> *Ibid.*, para. 11.

<sup>33</sup> *Idem.*

<sup>34</sup> *Ibid.*, para. 13.

<sup>35</sup> *Ibid.*, para. 15.

vii) With regard to aggravating circumstances:

Taking into account that the intended result in the crime of terrorism is to spread terror, and not necessarily to cause death or injury, deaths caused by terrorism become aggravating circumstances, pursuant to Article 6 of the Law of 11 January 1958.<sup>36</sup>

[...] 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) [...].<sup>37</sup>

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.<sup>38</sup>

To sum up, intentional homicide based on a direct intent leading to the death of the targeted victim falls under Articles 547 and 188 of the Lebanese Criminal Code. Intentional homicide based on *dolus eventualis* leading to the death of unintended victims falls under Articles 547 and 189 of the Code. Premeditation as an aggravating circumstance is applicable to both forms of the crime (with direct intent or *dolus eventualis*) and to all perpetrators and accomplices who share the premeditation.<sup>39</sup>

## VII. Evaluating the jurisdiction of the Tribunal

32. The Indictment concerns the facts surrounding the attack carried out against Rafiq Hariri on 14 February 2005 which, pursuant to Article 1 of the Statute, fall under the jurisdiction of the Tribunal. In addition, as mentioned in section IV above, this Indictment charges the suspects with conspiracy aimed at committing a terrorist act, as co-perpetrators (Count 1), of committing a terrorist act, as co-perpetrators

<sup>36</sup> Interlocutory Decision, para. 59.

<sup>37</sup> *Ibid.*, para. 145.

<sup>38</sup> *Ibid.*, para. 170.

<sup>39</sup> *Ibid.*, para. 175.

(Count 2), of intentional homicide, as co-perpetrators (Counts 3 and 4), of attempted intentional homicide, as co-perpetrators (Count 5), of being an accomplice in committing a terrorist act (Count 6), being an accomplice in intentional homicide (Counts 7 and 8) and of being an accomplice in attempted intentional homicide (Count 9). These offences are all referred to in Article 2, paragraph (a) of the Statute and Article 3, paragraph (3), point 1 of the Statute, in Articles 188, 189, 200, 212, 213, 219, paragraphs (4) and (5), 270, 314, 547, 549, paragraphs (1) and (7) of the Lebanese Criminal Code and in Articles 1, 6 and 7 of the Law of 11 January 1958.

33. As a consequence, the Pre-Trial Judge considers that the facts mentioned in the the Indictment together with the charges and modes of responsibility laid against the suspects do indeed fall within the jurisdiction of the Tribunal.

## **VIII. Evaluation of the counts**

### **1. Preliminary observations**

34. The evidentiary material provided in support of the Indictment amounts to more than 20,000 pages. It comprises a report relating to telephone communications made by the persons implicated in the attack carried out against Rafiq Hariri (the “Communications Report” or the “Report”), lists of these communications, official records of witness interviews, forensic police reports, video recordings, photographs, death certificates and other documents. Of this supporting material, the Report is essential in that it puts into perspective all the evidence gathered by the Prosecutor. It is itself based on a large number of documents and, in particular, on lists of telephone communications and witness statements.

35. In this regard, the Pre-Trial Judge notes that, during the meetings of 7 March and 7 April 2011, which were held pursuant to Article 68, paragraphs (E) and (F) of the Rules, in reply to the question put to him on this subject, the Prosecutor stated that the Communications Report was an expert report. The Pre-Trial Judge took account of this when he first evaluated the evidentiary material submitted in support of the Indictment. He nevertheless does not deem it necessary, at this stage in the proceedings, to examine whether this Report fulfils the requirements set by

international case law to be regarded as an Expert Report. The Pre-Trial Judge notes, however, that this Report was drawn up by an employee from the Office of the Prosecutor and that, as stated in this Report, it contains information which goes beyond the scope of analysis and interpretation of telephone data which is relevant to the skills of that person.<sup>40</sup>

## **2. Relevant facts**

36. In this section, the Pre-Trial Judge will refer, among the facts set out in the Prosecutor's file, to those he considered to be the most relevant, in order to decide upon the counts. These facts relate to the manner in which the attack took place and how responsibility for it was claimed, the analysis of the telephone data and the identification of the suspects, their identities and their roles.

37. To begin with, the Pre-Trial Judge notes that, as the Prosecutor himself has emphasised, the file relies to a large extent on circumstantial evidence "which works logically by inference and deduction".<sup>41</sup> It is only by having a comprehensive view of this evidence that it is possible to understand the attack of 14 February 2005, the events which preceded it and those which followed, as well as the manner in which the suspects were allegedly implicated in them. In light of his verifications, the Pre-Trial Judge deems that this evidence is sufficiently credible and relevant to review the Indictment initially. In order to lead to a conviction, it will nevertheless, if applicable, have to be shown to be established beyond reasonable doubt by the Trial Chamber.<sup>42</sup>

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

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40 Communications Report, para. 4.

41 Indictment, para. 3.

42 Art. 16, paragraph 3 (c) of the Statute.

*a) The attack and how responsibility for it was claimed*

39. On 14 February 2005 at 12:55, Mr Hariri, the former Prime Minister of Lebanon, died as a result of the detonation of a large quantity of explosives – approximately equivalent to 2500 kg of TNT – which had been concealed in a Mitsubishi Canter van, in the centre of Beirut, Lebanon. This suicide attack also caused the death of 21 other persons and injured at least 231 persons, in addition to partially destroying several buildings. Shortly after the attack, a video cassette accompanied by a letter claiming responsibility was received by the Al-Jazeera press agency in Beirut. This video cassette, broadcast on television during the day by that press agency, shows an unknown member of the public, called Mr Abu Adass, claiming responsibility for the attack in the name of a supposedly fictional fundamentalist group called “Victory and Jihad in Greater Syria” and announcing that further similar attacks would follow. However, without identifying the suicide bomber, the investigation was able to demonstrate that the suicide bomber was not Mr Abu Adass.

*b) Analysis of the telephone data and the identification of the suspects*

40. The records and analysis of the telephone data of 14 February 2005 appear to have enabled the Prosecutor to identify six mobile telephones which appear to have been communicating at key times and locations in relation to the attack. These six telephones, the users of which were apparently registered under false names, were reportedly used solely to communicate among themselves for the whole time they were active. For purposes of comprehension, the Prosecutor has referred to the covert network consisting of these telephones as the “Red Network”.

41. Later, using the technique of “co-location”,<sup>43</sup> the Prosecutor identified other mobile telephones which were apparently also used by the “Red Network” phone users. These telephones were also registered under false names and some were connected solely, or to a large extent, with each other, enabling them to be used in covert fashion. The Prosecutor appears to have identified four other telephone

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43 The technique of “co-location” consists of deducing from the fact that, when mobile telephones are used within the same geographical areas, recorded by cell-towers, at the same date and in the same period of time as other telephones and they do not communicate with each other, one and the same person is the user of these phones.

networks in this way that he has referred to as “Green”, “Blue”, “Yellow” and “Purple”.

42. In order to determine the identity of the users of the telephones for all these networks, by continuing to make use of the “co-location” technique, the Prosecutor identified the personal phones of a number of these users. These phones were used for day-to-day matters, to call people whose identity is more easily traced as they did not behave in a covert manner. The Prosecutor has referred to these personal mobile phones as “PMP”.

43. The identity of these “PMP” users was searched for based on the contacts called the most frequently, the content of text messages, whether the phone was active or ceased being used and the use of the mobile phones near locations where these persons were allegedly often to be found, as well as documentary evidence, statements or other types of evidence. Once a personal phone had been attributed to a particular person, the other phones belonging to one or more network(s) that were in “co-location” with this phone could be attributed to this same person.

44. At the end of his investigations, the Prosecutor concluded that, given all of this information and reasoning:

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

*c) The identity of the suspects*

45. Based on his investigations, the Prosecutor has identified four suspects:



- i) Mr Ayyash, Lebanese citizen, born on 10 November 1963 in Harouf, Nabatiyeh (Lebanon). He appears to reside in two locations: one in Hadath, in South Beirut and the other in Harouf, Nabatiyeh, in South Lebanon.
- ii) Mr Badreddine (also known as “Mustafa Youssef Badreddine”, “Sami Issa” and “Elias Fouad Saab”), Lebanese citizen born on 6 April 1961 in Al-Ghobeiry (Beirut). His exact address is unknown. He appears in particular to reside in two locations: one in Al-Ghobeiry in South Beirut and the other in Haret Hreik in Beirut. Under the alias “Elias Fouad Saab”, he appears to have been convicted in Kuwait for a series of terrorist acts carried out in particular against the French and United States embassies on 12 December 1983.
- iii) Mr Ayyash and Mr Badreddine appear to be related to each other by marriage as well as with the person known as Imad Mughniyah.
- iv) Mr Oneissi (also known as “Hussein Hassan Issa”), Lebanese citizen, born on 11 February 1974 in Beirut. He reportedly resided in Hadath, in South Beirut. In 2004, he and other members of his family changed their family name from “Issa” to “Oneissi”.
- v) Mr Sabra, Lebanese citizen, born on 15 October 1976 in Beirut. He reportedly resided in Hadath, in South Beirut.

*d) The roles of the suspects*

46. The Prosecutor has determined the role of the suspects in the events that are referred to in the preceding paragraphs mainly on the basis of the analysis of the telephone communications as well as the use and the location of the phones comprising the different phone networks.<sup>44</sup>

47. According to the Prosecutor, the users of the “Red” network are at first sight implicated in carrying out the attack on the basis in particular of the following:

- i) The “Red” phones all first became active, in a coordinated manner, on 4 January 2005 between 14:15 and 14:43 in Tripoli. They were then supplied with credit in this same town on 2 February 2005 within a very short space of time: less than 45 minutes. These phones were, however, never used in Tripoli;

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<sup>44</sup> Cf. *supra* paras 36-38.

- ii) The “Red” phones were no longer used after the last call on 14 February 2005 at 12:53, two minutes before the attack;
- iii) the “Red” phones were used solely to transmit and receive telephone communications with each other and did not have any contact with phones outside this network, nor did they transmit any text messages [SMS];<sup>45</sup>
- iv) the “Red” phones were apparently used near to locations where Mr Hariri was and during his movements in the days before the attack (particularly on 14, 20, 28 and 31 January 2005 and 3, 8, 9, 10, 11 and 12 February 2005) and the actual day of the attack; and
- v) on 14 February 2005, the last 33 calls between “Red” phones made between 11:00 and 12:53 were, in the main, made around the locations where Mr Hariri was present. In particular, a few minutes before the attack, the user of a “Red” phone, near a location where Mr Hariri and his convoy were, called another “Red” phone user who was near the location of the attack, at the exact time Mr Hariri’s convoy left. In the minutes that followed, the driver of the Mitsubishi Canter van containing the explosives apparently positioned the vehicle where the detonation took place as the convoy passed by.

48. According to the Prosecutor, the users of the “Green” phone network are at first sight implicated in coordinating the attack on the basis particularly of the following:

- i) the three “Green” phones communicated solely with each other and did not transmit any text messages between 13 October 2004 and 14 February 2005;
- ii) Mr Badreddine was the only person who was in communication with the two other users of the “Green” phones, including Mr Ayyash;
- iii) Mr Badreddine was apparently in contact with Mr Ayyash on 59 occasions between 1 January and 14 February 2005, particularly when the users of the “Red Network” and/or the “Blue” phones, including Mr Ayyash, followed Mr Hariri’s movements (particularly on 20, 28, 31 January, 3, 7, 8, 9, 11, 12 and 14 February 2005). Mr Badreddine was apparently himself present on occasion around the key locations connected to the surveillance of Mr Hariri (particularly on 18 and 31 January and on 3 February 2005);

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45 In French, *Service de messages succincts*.

- iv) Mr Ayyash and Mr Badreddine were in contact, through their “Green” phones, on 11 January 2005 while Mr Ayyash was in Tripoli, near the showroom where the Mitsubishi Canter van was that was used in the attack was located. Mr Ayyash was also in contact with Mr Badreddine on the day when the van was purchased, 25 January 2005; and
- v) the last call between the “Green” phones of Mr Ayyash and Mr Badreddine was made at 11:58 on 14 February 2005, at the time when Mr Hariri left Parliament, less than one hour before the attack.

49. According to the Prosecutor, the users of the “Blue” phones, including Mr Ayyash, are at first sight implicated in the surveillance of Mr Hariri and preparation of the attack on the basis in particular of the following:

- i) the “Blue 610” phone, the user of which is unknown, was active in Tripoli on 4 January 2005 at the time when the “Red” phones were activated there;
- ii) the movements of the “Blue” and “Red” phones coincided with the movements of Mr Hariri or with the locations where he was (particularly on 11 November 2004, 1, 7, 14, 28 and 31 January 2005 and on 3, 4, 7, 8, 9, 10, 11 and 12 February 2005), which corresponds with surveillance operations against the subject; and
- iii) on 25 January 2005, the day the Mitsubishi Canter van was purchased, while he was in Tripoli near the showroom where the van was on sale, the unknown user of phone “Blue 610” contacted Mr Ayyash on his “Blue 233” phone. Mr Ayyash, who was in Beirut, contacted Mr Badreddine shortly afterwards, using their respective “Green” phones.

50. According to the Prosecutor, the users of the “Purple” phones, including Mr Oneissi and Mr Sabra, are at first sight implicated in falsely claiming responsibility for the attack on the basis in particular of the following:

- i) the “Purple” phones attributed to Mr Oneissi and Mr Sabra were active for 10 days in December 2004 and January 2005 around the Arab University Mosque of Beirut apparently frequented by Mr Abu Adass and around his home. Mr Oneissi, falsely calling himself “Mohammed”, approached Mr Abu Adass and then remained in contact with him before he disappeared on 16 January 2005. Mr Abu Adass then claimed responsibility for the attack in

a video recording that was broadcast on television by Al-Jazeera after the attack;

- ii) By means of their “Purple” phones, Mr Oneissi and Mr Sabra were in frequent contact with each other and with a third unknown user of a “Purple” phone (“Purple 231”), who himself was in contact with Mr Ayyash on his personal mobile phones;
- iii) on 14 February 2005 before, between and after the four calls that either Mr Oneissi or Mr Sabra made to Al-Jazeera and Reuters using the same phone card from different public payphones in Beirut, Mr Sabra, using the “Purple 018” phone, was in contact seven times with the user of the “Purple 231” phone;
- iv) on 14 February 2005, Mr Sabra was in the vicinity of the four public payphones from which the four calls were made;
- v) on 14 February 2005, Mr Oneissi was in the vicinity of the tree in which the video cassette containing the recording claiming responsibility was placed; and
- vi) on 15 February 2005, use of the “Purple 231” phone ceased and on 16 February 2005, use of the “Purple 095” phone attributed to Mr Oneissi and the “Purple 018” phone attributed to Mr Sabra also completely ceased.

### **3. Review of the counts**

51. For the sake of consistency, the Pre-Trial Judge will start by examining Count 2 relating to “committing a terrorist act” before ruling on Counts 3, 4, 5, 6, 7, 8 and 9. He will conclude by examining Count 1 relating to “conspiracy aimed at committing a terrorist act”. Indeed, unlike the other counts, Count 1 concerns all the suspects and, in order for it to be examined, a comprehensive view of all the factors mentioned in the other counts, and in particular those relating to “committing a terrorist act”, is first necessary.

52. The Pre-Trial Judge will review each count as set out in the Indictment. By first making a distinction between the constituent elements of the offences and those of responsibility, he will then examine whether the legal characterisations

contained in the count conform to the definitions of the offences as given by the Appeals Chamber. Lastly, the Pre-Trial Judge will determine whether there is reason to prosecute the suspects in question on the basis of each count, and in the light of the evidence provided by the Prosecutor in support of the count.

*a) Count 2: committing a terrorist act, as co-perpetrators*

53. The Pre-Trial Judge notes that Count 2 contains the constituent elements of the offence of committing a terrorist act as defined by the Appeals Chamber, namely: the volitional commission of an act through means that are likely to pose a public danger, with the special intent to cause a state of terror.<sup>46</sup> He also notes that this count is in accordance with the Interlocutory Decision<sup>47</sup> when it specifies as aggravating circumstances “the death of Rafiq Hariri and 21 other persons” and “the partial destruction of the St. Georges Hotel and nearby buildings”.<sup>48</sup> Admittedly, according to the Appeals Chamber, these circumstances do not strictly speaking constitute elements of the offence of terrorism, but aggravating factors to be taken into consideration at the time of determining the sentence.<sup>49</sup> However, the Pre-Trial Judge considers that it is appropriate to refer to these circumstances in the Indictment in such a way that the suspects are fully informed of the nature and scope of the charges laid against them.<sup>50</sup> He will then examine whether these circumstances are well-founded at first sight. On the other hand, the Pre-Trial Judge considers that the attempt “to kill 231 other persons” mentioned in paragraph h of this count should not be included in the constituent elements of the terrorist act but in those of attempted intentional homicide. It is moreover mentioned as such in Count 5.<sup>51</sup>

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46 Interlocutory Decision, Disposition, para. 3.

47 Interlocutory Decision, para. 148.

48 Indictment, para. 70, g.

49 Interlocutory Decision, paras 59 and 145.

50 Cf. The case law of the European Court of Human Rights (“ECHR”) confirms this interpretation. Indeed, according to the Court, “for the purpose of preparing his or her defence, a person charged with a criminal offence is entitled to be informed not only of the material facts on which the accusation is based but also of the precise legal classification given to these facts. Since the finding of an aggravating circumstance led to a heavier sentence being imposed, the applicant should have been formally notified that such a finding was possible in his case.” (ECHR, *De Salvador Torres v. Spain*, Judgment, 24 October 1996, Collection 1996-V, para. 28).

51 Indictment, paras 75-76.

54. With regard to the responsibility of the suspects in committing a terrorist act, the Pre-Trial Judge notes that, according to Count 2, they are “co-perpetrators with shared intent”.<sup>52</sup> According to the Appeals Chamber, the co-perpetrators must contribute to bringing into being the objective and subjective elements of the crime of committing a terrorist act mentioned in the previous paragraph.<sup>53</sup>

55. In light of reviewing the evidence accompanying the Indictment and, in particular, the relevant facts referred to in section VIII, part 2, the Pre-Trial Judge finds that sufficient *prima facie* evidence exists that:<sup>54</sup>

- i) on 14 February 2005, at 12:55, an extremely powerful explosive device, concealed in a Mitsubishi Canter van, exploded on a public street, on Rue Minet el Hos’n in Beirut, Lebanon, as the convoy escorting Mr Hariri, the former Prime Minister and a prominent political figure in Lebanon, was passing;
- ii) the attack resulted in the death of Mr Hariri and 21 other persons and damaged several nearby buildings;<sup>55</sup>
- iii) due to the size of the explosion, this act created a state of terror which was aggravated by a public claim of responsibility and a threat that further similar attacks would follow. This claim of responsibility was also intended to create a false trail so as to shield the perpetrators from justice;<sup>56</sup>
- iv) Mr Ayyash and Mr Badreddine participated, as co-perpetrators, in the attack as, at key moments in the attack, they were in contact with each other as well as with other persons, both in proximity to the location of the attack and the places Mr Hariri was at before the attack;<sup>57</sup>
- v) Mr Ayyash and Mr Badreddine were implicated in the operations to locate and monitor the whereabouts of Mr Hariri, in particular, by way of their

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<sup>52</sup> *Ibid.*, para. 70, c.

<sup>53</sup> Interlocutory Decision, paras 213-217.

<sup>54</sup> These presumptions will have to be, if there are reasons, confirmed and the evidence substantiated by the Trial Chamber.

<sup>55</sup> *Cf. supra*, para. 39.

<sup>56</sup> *Idem.*

<sup>57</sup> *Cf. supra*, paras 48, iii and v.

covert mobile phones; the last call between them took place less than one hour before the attack;<sup>58</sup>

- vi) Mr Ayyash and Mr Badreddine were also in contact with each other during the location and purchase of the Mitsubishi Canter van in Tripoli which was used to conceal the explosive device and carry out the attack;<sup>59</sup> and
- vii) Mr Ayyash was indirectly in contact with Mr Oneissi and Mr Sabra who, in the months prior to the attack, were involved in the recruitment of Mr Abu Adass, who claimed responsibility for the attack in a video recording which was broadcast shortly afterwards.<sup>60</sup>

56. That being the case, in light of these presumptions, there is reason to prosecute Mr Ayyash and Mr Badreddine as co-perpetrators in a terrorist act. As a consequence, Count 2 should be confirmed against Mr Ayyash and Mr Badreddine subject to paragraph 70, point h of the Indictment, which refers to the attempt “to kill 231 other persons”.

*b) Count 3: intentional homicide (of Mr Hariri), as co-perpetrators*

57. The Pre-Trial Judge notes that Count 3 does not list the constituent elements of intentional homicide as they were defined by the Appeals Chamber, whereas the Prosecutor has listed them, and rightly so, for the offences mentioned in the other counts. The Pre-Trial Judge considers, however, that the concise statement of the facts in the Indictment contains facts on which the Prosecutor founded the legal characterisation of intentional homicide, namely the attack of 14 February 2005 which resulted in the death of Mr Hariri, committed with intent and with means likely to cause death.<sup>61</sup> The Pre-Trial Judge considers that both this statement of facts and their legal characterisation, together with the reference to the relevant provisions of the Statute and Lebanese law mentioned in Count 3, ensure that the accused are sufficiently informed of the charges laid against them.

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<sup>58</sup> *Idem*.

<sup>59</sup> *Cf. supra*, paras 48, iv and 49, iii.

<sup>60</sup> *Cf. supra*, para. 50, ii.

<sup>61</sup> Indictment, paras 7 *et seq.*

58. The Pre-Trial Judge likewise notes that paragraph 72, point e of Count 3 is compatible with the Interlocutory Decision<sup>62</sup> and, in particular, with paragraphs 1 and 7 of Article 549 of the Lebanese Criminal Code, when it indicates “premeditation” and “the detonation at 12:55 at Rue Minet el Hos’n, Beirut, Lebanon, of explosive materials of approximately 2500 kilograms of TNT equivalent” as aggravating circumstances. Admittedly, according to the Appeals Chamber, these circumstances are not strictly speaking elements of the offence of intentional homicide, but aggravating factors to be taken into consideration at the time of determining the sentence.<sup>63</sup> However, the Pre-Trial Judge considers that it is appropriate to refer to these circumstances in the Indictment so as to ensure the accused are fully informed of the nature and scope of the charges laid against them.<sup>64</sup> He will therefore examine whether these circumstances are well-founded at first sight.

59. With regard to the responsibility of the suspects in the commission of intentional homicide, the Pre-Trial Judge notes that, according to Count 3, they are “co-perpetrators with shared intent”.<sup>65</sup> According to the Appeals Chamber, the co-perpetrators must contribute to bringing into being the objective and subjective elements of the crime of intentional homicide.<sup>66</sup>

60. On examining the material accompanying the Indictment and, in particular, the relevant facts referred to in section VIII, part 2, the Pre-Trial Judge finds that a sufficient *prima facie* case exists, in that:<sup>67</sup>

- i) the attack, whose intended target was Mr Hariri, resulted in his death;<sup>68</sup>

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62 Interlocutory Decision, paras 167-175. Although the Appeals Chamber solely mentions premeditation, Article 549, paragraph 7 of the Lebanese Criminal Code, as amended by Article 33 of Legislative Decree No. 112 of 16 September, also specifies the use of explosive materials as an aggravating circumstance.

63 *Ibid.*, paras 167-175.

64 *Cf. supra* para. 53.

65 Indictment, para. 72, c.

66 Interlocutory Decision, paras 213-217.

67 *Cf. supra*, footnote 54.

68 *Cf. supra*, para. 39.



- ii) Mr Ayyash and Mr Badreddine at first sight each participated in carrying out this act, notably on account of the fact that they were implicated in the surveillance operations against Mr Hariri on the day of the attack and in the days prior to it and in the purchase of the Mitsubishi Canter van which was used to conceal the explosive device and carry out the attack;<sup>69</sup> and
- iii) Mr Ayyash and Mr Badreddine, with others, planned and carried out the attack in such a way that they necessarily intended to cause the death of Mr Hariri, as is shown, in particular, by the large quantity of explosives that was employed.

61. Therefore, in light of these presumptions, there is reason to prosecute Mr Ayyash and Mr Badreddine as co-perpetrators in the intentional homicide of Mr Hariri. As a consequence, Count 3 should be confirmed against Mr Ayyash and Mr Badreddine.

*c) Count 4: intentional homicide (of 21 persons in addition to Mr. Hariri), as co-perpetrators*

62. The Pre-Trial Judge notes that the observations made in the context of examining Count 3 relating to the constituent elements of intentional homicide, aggravating circumstances and the responsibility of the suspects may be applied *mutatis mutandis* to the review of Count 4.<sup>70</sup> He recalls moreover that, in accordance with the Interlocutory Decision of the Appeals Chamber, 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*)”.<sup>71</sup> Lastly, the Pre-Trial Judge takes note of the fact that, according to the Interlocutory Decision:

[...] 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

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<sup>69</sup> Cf. *supra*, paras. 48, iii-v.

<sup>70</sup> Cf. *supra*, paras 57-59.

<sup>71</sup> Interlocutory Decision, Disposition, para. 12.

both of the targeted homicide and of the additional homicides. The accused should 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.<sup>72</sup>

63. On examining the material accompanying the Indictment and, in particular, the relevant facts mentioned in section VIII, part 2, the Pre-Trial Judge finds that a sufficient *prima facie* case exists, in that:<sup>73</sup>

- i) in addition to the death of Mr Hariri, the attack of 14 February 2005 killed 21 persons who were in the vicinity of the explosion.<sup>74</sup> Noting in particular the large quantity of explosive material that was employed, the specific facts and the *modus operandi* of this attack, the perpetrators acted with intent to cause these deaths or, at the very least, foresaw and accepted this possibility; and
- ii) for the same reasons as those mentioned with regard to Count 3, Mr Ayyash and Mr Badreddine are each implicated in this act;<sup>75</sup>

64. Therefore, in light of these presumptions, there is reason to prosecute Mr Ayyash and Mr Badreddine as co-perpetrators of intentional homicide of the 21 persons listed in Annex A of the Indictment. As a consequence, Count 4 should be confirmed against Mr Ayyash and Mr Badreddine.

d) *Count 5: attempted intentional homicide (of 231 persons), as co-perpetrators*

65. The Pre-Trial Judge notes that the observations made in the context of examining Count 3 relating to the constituent elements of intentional homicide, aggravating circumstances and modes of responsibility may be applied *mutatis mutandis* to the review of Count 5.<sup>76</sup>

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<sup>72</sup> *Ibid.*, para. 172.

<sup>73</sup> *Cf. supra*, footnote 54.

<sup>74</sup> *Cf. supra*, para. 39.

<sup>75</sup> *Cf. supra*, para. 60, ii and iii.

<sup>76</sup> *Cf. supra*, paras 57-59.

66. The Pre-Trial Judge takes note of the fact that, according to the Interlocutory Decision:

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.<sup>77</sup>

67. On examining the material accompanying the Indictment and, in particular, the relevant facts mentioned in section VIII, part 2, the Pre-Trial Judge finds that a sufficient *prima facie* case exists, in that:<sup>78</sup>

- i) the attack of 14 February 2005 injured 231 persons;<sup>79</sup>
- ii) noting in particular the large quantity of explosive material employed, the specific facts and the *modus operandi* of this attack, the perpetrators foresaw or accepted the risk that this attack would kill persons in the vicinity of the explosion; the fact that there were no deaths amongst these persons was not of their concern;<sup>80</sup> and
- iii) for the same reasons as those mentioned previously in Count 3, Mr Ayyash and Mr Badreddine are each implicated in these acts.<sup>81</sup>

68. Therefore, in light of these presumptions, there is reason to prosecute Mr Ayyash and Mr Badreddine as co-perpetrators of attempted intentional homicide of the 231 persons listed in Annex B of the Indictment. As a consequence, Count 5 should be confirmed against Mr Ayyash and Mr Badreddine.

*e) Count 6: committing a terrorist act, as accomplices*

69. The Pre-Trial Judge notes that Count 6 sets forth the constituent elements of the offence of committing a terrorist act as defined by the Appeals Chamber.

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<sup>77</sup> Interlocutory Decision, para. 183.

<sup>78</sup> *Cf. supra*, footnote 54.

<sup>79</sup> *Cf. supra*, para. 39.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Cf. supra*, para. 60, ii and iii.

70. With regard to the responsibility of the suspects in committing a terrorist act, the Pre-Trial Judge notes that, according to the Indictment, they “each bear individual criminal responsibility [...] as an accomplice”.<sup>82</sup> According to the Appeals Chamber,<sup>83</sup> accomplices are those who must have acted in a form specified by Article 219 of the Lebanese Criminal Code<sup>84</sup> and be motivated by the knowledge of the intent of the primary perpetrators to commit a crime and the intention to assist these perpetrators in carrying out the crime.

71. On examining the material accompanying the Indictment and, in particular the relevant facts referred to in section VIII, part 2, the Pre-Trial Judge finds that a sufficient *prima facie* case exists, in that;<sup>85</sup>

- i) Mr Oneissi and Mr Sabra were indirectly in contact with Mr Ayyash and were involved in the months prior to the attack in the recruitment of Mr Abu Adass, who claimed responsibility for the attack in a video recording which was broadcast shortly afterwards;<sup>86</sup>
- ii) Mr Oneissi and Mr Sabra participated in transmitting the video cassette to the Al-Jazeera press agency, in particular by telephoning the agency and monitoring that the video cassette was discovered;<sup>87</sup>
- iii) Mr Oneissi and Mr Sabra are therefore implicated in the claim of responsibility for the attack of 14 February 2005, the shared aim of which was to create a false trail so as to shield the perpetrators from justice and add to the state of terror;<sup>88</sup>
- iv) by preparing the claim of responsibility for the attack mentioned in Count 2 before its execution, Mr Oneissi and Mr Sabra were aware of the intention

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82 Indictment, para. 78, f.

83 Interlocutory Decision, paras 218-228.

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

85 *Cf. supra*, footnote 54.

86 *Cf. supra*, para. 50, i and ii.

87 *Cf. supra*, para. 50, iii-v.

88 *Cf. supra*, paras 39 and 55, iii.

of Mr Ayyash and Mr Badreddine to commit this attack and were personally willing to contribute to these preparatory acts; and

- v) in so doing, Mr Oneissi and Mr Sabra lent their support to the preparation and commission of the terrorist act referred to in Count 2.<sup>89</sup>

72. Therefore, in light of these presumptions, there is reason to prosecute Mr Oneissi and Mr Sabra as being accomplices to a terrorist act. As a consequence, Count 6 should be confirmed against Mr Oneissi and Mr Sabra.

*f) Count 7: intentional homicide (of Mr Hariri), as accomplices*

73. The Pre-Trial Judge notes that the observations made in the context of the review of Count 3 relating to the constituent elements of intentional homicide may also be applied to the review of Count 7.

74. With regard to the responsibility of the suspects in the intentional homicide, the Pre-Trial Judge notes that the observations made in the context of the review of Count 6 may also be applied to the review of Count 7.<sup>90</sup>

75. On examining the material accompanying the Indictment and, in particular the relevant facts referred to in section VIII, part 2, the Pre-Trial Judge finds that a sufficient *prima facie* case exists, in that:<sup>91</sup>

- i) for the same reasons as those mentioned in Count 6,<sup>92</sup> Mr Oneissi and Mr Sabra lent their support to the preparation and commission of the intentional homicide of Rafiq Hariri mentioned in Count 3; and
- ii) Mr Oneissi and Mr Sabra were aware of the intention of Mr Ayyash and Mr Badreddine to commit the intentional homicide of Mr Hariri and they were personally willing to contribute to that act by way of these preparatory acts.

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<sup>89</sup> *Cf. supra*, paras 55-56.

<sup>90</sup> *Cf. supra*, para. 70.

<sup>91</sup> *Cf. supra*, footnote 54.

<sup>92</sup> *Cf. supra*, para. 71.

76. Therefore, in light of these presumptions, there is reason to prosecute Mr Oneissi and Mr Sabra as being accomplices to the intentional homicide of Mr Hariri. As a consequence, Count 7 should be confirmed against Mr Oneissi and Mr Sabra.

g) *Count 8: intentional homicide (of 21 persons in addition to Mr Hariri), as accomplices*

77. The Pre-Trial Judge notes that the observations made in the context of the review of Count 3 relating to the constituent elements of intentional homicide may be applied *mutatis mutandis* to the review of Count 8.<sup>93</sup>

78. With regard to the responsibility of the suspects in the intentional homicide, the Pre-Trial Judge notes that the observations made in the context of the review of Count 6 may also be applied to the review of Count 8.<sup>94</sup>

79. Having examined the material accompanying the Indictment and, in particular, the relevant facts referred to in section VIII, part 2, the Pre-Trial Judge finds that a sufficient *prima facie* case exists, in that:<sup>95</sup>

- i) for the same reasons as those mentioned in relation to Count 6, Mr Oneissi and Mr Sabra lent their support to the preparation and commission of the intentional homicide of 21 persons in addition to Mr Hariri as mentioned in Count 4;<sup>96</sup> and
- ii) Mr Oneissi and Mr Sabra were aware of the intention of Mr Ayyash and of Mr Badreddine to commit the intentional homicide of the 21 other persons and they were personally willing to contribute to this act by way of these preparatory acts.

80. Therefore, in light of these presumptions, there is reason to prosecute Mr Oneissi and Mr Sabra as being accomplices to the intentional homicide of the 21

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<sup>93</sup> *Cf. supra*, para. 57.

<sup>94</sup> *Cf. supra*, para. 70.

<sup>95</sup> *Cf. supra*, footnote 54.

<sup>96</sup> *Cf. supra*, paras 55-56.

persons listed in Annex A of the Indictment. As a consequence, Count 8 should be confirmed against Mr Oneissi and Mr Sabra.

*h) Count 9: attempted intentional homicide (of 231 persons), as accomplices*

81. The Pre-Trial Judge notes that the observations made in the context of the review of Count 3 relating to the constituent elements of intentional homicide may be applied *mutatis mutandis* to the review of Count 9.

82. With regard to the responsibility of the suspects in the attempted intentional homicide, the Pre-Trial Judge notes that the observations made in the context of Count 6 may be also be applied to the review of Count 9.<sup>97</sup>

83. Having examined the material accompanying the Indictment and, in particular, the relevant facts referred to in section VIII, part 2, the Pre-Trial Judge finds that a sufficient *prima facie* case exists, in that:<sup>98</sup>

- i) for the same reasons as those mentioned in relation to Count 6, Mr Oneissi and Mr Sabra lent their support to the preparation and commission of the attempted intentional homicide of 231 persons referred to in Count 5;<sup>99</sup> and
- ii) Mr Oneissi and Mr Sabra were aware of the intention of Mr Ayyash and of Mr Badreddine to attempt to commit the intentional homicide of the 231 other persons and they were personally willing to contribute to that act by way of those preparatory acts.

84. Therefore, in light of these presumptions, there is reason to prosecute Mr Oneissi and Mr Sabra as being accomplices to the attempted intentional homicide of the 231 persons listed in Annex B of the Indictment. As a consequence, Count 9 should be confirmed against Mr Oneissi and Mr Sabra.

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<sup>97</sup> Cf. *supra*, para. 70.

<sup>98</sup> Cf. *supra*, footnote 54.

<sup>99</sup> Cf. *supra*, paras 55-56.

*i) Count 1: conspiracy aimed at committing a terrorist act, as co-perpetrators*

85. The Pre-Trial Judge notes that Count 1<sup>100</sup> contains the constituent elements of the offence of conspiracy as defined by the Appeals Chamber, namely: the presence of two or more individuals; the conclusion or joining an agreement for the purpose of committing a crime against State security according to the means required by law to commit this crime; and criminal intent relating to the object of the conspiracy.<sup>101</sup> He notes, however, that the agreement concerns not only the commission of an act against State security, but also two objectives that are an integral part of that act, namely: “to blame [the terrorist act] falsely on others in a fictional fundamentalist group so as to shield themselves from justice, and add to the state of terror, by raising in the mind of the population insecurity and fear of further indiscriminate public attack”.<sup>102</sup>

86. With regard to the responsibility of the suspects in the conspiracy, the Pre-Trial Judge notes that, according to Count 1, they are “co-perpetrators with shared intent”.<sup>103</sup> According to the Appeals Chamber, co-perpetrators must contribute to bringing into being the objective and subjective constituent elements of the crime of conspiracy aimed at committing a terrorist act.<sup>104</sup>

87. Having examined the material accompanying the Indictment and, in particular, the relevant facts referred to in the previous section, the Pre-Trial Judge finds that a sufficient *prima facie* case exists, in that:<sup>105</sup>

- i) as emerges from the review of Counts 2 to 9 above, Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra together with others unidentified were in contact, directly or indirectly, for a significant period of time prior to the

<sup>100</sup> Indictment, para. 68, d and e.

<sup>101</sup> Interlocutory Decision, Disposition, para. 7.

<sup>102</sup> Indictment, para. 68, i.

<sup>103</sup> *Ibid.*, para. 68, c.

<sup>104</sup> Interlocutory Decision, paras 213 -217.

<sup>105</sup> *Cf. supra*, footnote 54.



attack of 14 February 2005, in particular at key moments linked to this act, its preparation and the way in which responsibility for the attack was claimed;

- ii) due to its size, the intended victim and the resulting state of terror, this terrorist act was an attack on Lebanese State security; and
- iii) the actions of the four suspects, and their direct or indirect contact with each other, suggest that they acted within the framework of a prior agreement aimed at committing the terrorist act of 14 February 2005.

88. Therefore, in light of these presumptions, there is reason to prosecute Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra as co-perpetrators of conspiracy aimed at committing a terrorist act. As a consequence, Count 1 should be confirmed against Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra.

#### **4. Cumulative charging<sup>106</sup>**

89. The Pre-Trial Judge recalls that Mr Ayyash and Mr Badreddine are suspected, as *co-perpetrators*, of other offences: conspiracy aimed at committing a terrorist act, committing a terrorist act, intentional homicide of Mr Hariri, intentional homicide of 21 persons in addition to Mr Hariri and attempted intentional homicide of 231 persons. With the exception of the offence of conspiracy, all these offences rely on the same facts, namely: “the detonation at 12:55 on the fourteenth day of February 2005 at Rue Minet el Hos’n, Beirut, Lebanon, being a public street, of approximately 2500 kilogrammes of TNT equivalent”.<sup>107</sup> These offences therefore can be charged cumulatively. With regard to conspiracy, this is based on a separate action, namely: “an agreement, aimed at committing a terrorist act.”<sup>108</sup>

90. The Pre-Trial Judge notes that Mr Oneissi and Mr Sabra are suspected, as co-perpetrators, of conspiracy aimed at committing a terrorist act. They are also suspected, as *accomplices*, of other offences: committing a terrorist act, intentional

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106 With regard to cumulative charging, the Appeals Chamber notes that “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.” (Italics added) (Interlocutory Decision, para. 298).

107 Indictment, paras 70, f, 72, e, ii, 74, h and 76, g.

108 *Ibid.*, para. 68, d.

homicide of Mr Hariri, intentional homicide of 21 persons in addition to Mr Hariri and attempted intentional homicide of 231 persons. With the exception of the offence of conspiracy, all these offences are based on the same facts, namely: “acts preparatory to the offence,” and “acts to shield the co-perpetrators and themselves from justice”.<sup>109</sup> These offences therefore can be charged cumulatively.

91. In this respect, the Pre-Trial Judge recalls that, according to the Appeals Chamber,

[...] 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.<sup>110</sup>

92. The Pre-Trial Judge finds that this jurisprudence may also be applied to the offence of attempted intentional homicide which, although it was not specifically mentioned in the paragraph cited from the Interlocutory Decision, is also intended to protect a “substantially different” value from the aforementioned offences, namely, ‘the personal integrity of the victims concerned’.<sup>111</sup> Consequently, charging this offence cumulatively with the other aforementioned crimes is in theory admissible.

93. It follows from the above that there is no objection to the Prosecutor charging concurrently the crimes of conspiracy aimed at committing a terrorist act, committing a terrorist act, intentional homicide and attempted intentional homicide in the Indictment even if, with the exception of the offence of conspiracy, these crimes are all based on the same facts. The Pre-Trial Judge notes furthermore that the intentional homicide of Mr Hariri and that of 21 other persons in addition to Mr Hariri constitutes, according to the terminology of the Appeals Chamber *un concours*

<sup>109</sup> *Ibid.*, paras 78, f and 80, f.

<sup>110</sup> Interlocutory Decision, para. 301.

<sup>111</sup> It should be pointed out that the victims of these crimes are different from those of other crimes.

*réel d'infractions*.<sup>112</sup> They can also be charged cumulatively insofar as the presumed victims are different.

94. Furthermore, the modes of responsibility do not pose a problem with regard to cumulative charging.<sup>113</sup> Indeed, each count refers solely to one single mode of responsibility, as a co-perpetrator or as an accomplice.

95. The Pre-Trial Judge concludes that, at first sight, the offences and modes of responsibility referred to in the Indictment have been defined in accordance with the law in force.

## **5. Requirements of grounds and specific facts**

96. The Pre-Trial Judge finds that the Indictment meets the requirements with regard to the specific facts and grounds as required under international case law, the Statute and the Rules. Indeed, the Indictment describes in sufficient detail and accuracy the offences with which the suspects are charged and the responsibilities that are incumbent upon them.<sup>114</sup> However, without giving indications as to the motive(s) of the attack, it provides specific information as to the chronology of the attack,<sup>115</sup> the sequence of events surrounding it,<sup>116</sup> the conspiracy behind it,<sup>117</sup> the

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112 According to the Appeals Chamber, “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. (*Ibid.*, para. 275).

113 *Ibid.*, para. 298.

114 Indictment, paras 66-84.

115 *Ibid.*, paras 33-47.

116 *Ibid.*, paras 48-57.

117 *Ibid.*, paras 58-62.

identity of the suspects,<sup>118</sup> the way in which they were identified by analysing the telephone data,<sup>119</sup> their presumed role in the facts<sup>120</sup> and the identity of the victims.<sup>121</sup>

97. On this basis, the Pre-Trial Judge considers that, at first sight, subject to a decision issued with regard to preliminary motions,<sup>122</sup> the Indictment is sufficiently clear and accurate so as to ensure that the suspects understand the allegations made against them and, consequently, allow them in particular to prepare their defence and, if appropriate, challenge the legality of their detention.

## **IX. Requirements of confidentiality**

98. In the Motion, the Prosecutor requests the non-disclosure to the public of the Indictment and the supporting material until a further order is issued on application from the Prosecutor.<sup>123</sup> He also requested the redaction of the Indictment with a view to its service specifically to each accused by only referring to the charges laid against him.<sup>124</sup>

99. Within the context of this decision, the Pre-Trial Judge will only rule on the first issue. The second issue will be examined within the context of the arrest warrants and transfer and detention orders.

100. The Prosecutor puts forward several reasons in support of his request for non-disclosure that are principally linked to the need for all possible steps to be taken to ensure the arrest of the accused, safeguard the ongoing investigations and ensure the protection of witnesses.<sup>125</sup>

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118 *Ibid.*, para. 4 a-d.

119 *Ibid.*, paras 17-32.

120 *Ibid.*, paras 58-65.

121 *Cf.* in particular Annexes A and B.

122 Rule 90 of the Rules.

123 Motion, para. 42.

124 *Ibid.*, para. 43.

125 *Ibid.*, paras 44-48.

101. The Pre-Trial Judge considers that, in accordance with Rule 74 of the Rules, there are grounds for the Indictment and the accompanying material to remain confidential due to the following exceptional circumstances. This measure should ensure the integrity of the judicial procedure and, in particular, ensure that the search and, where appropriate, apprehension of the accused are carried out effectively. It should likewise assist in ensuring the protection of the witnesses concerned by not revealing their identity and in safeguarding the ongoing investigations by not disclosing the techniques that have been employed and the information that has been gathered.

102. For the same reasons, the Pre-Trial Judge considers *proprio motu* that this decision should remain confidential.

103. With regard to the material submitted in support of the Indictment, this will be disclosed to the accused pursuant to the relevant Rules.

104. The Indictment and this decision may not be disclosed until after service of the Indictment on the accused is effective, or a new order has been rendered following a request from the Prosecutor or *proprio motu*. The Indictment may however be disclosed to the competent authorities of the Lebanese Republic and to those of other States to whom the Prosecutor might transmit the Indictment pursuant to Rule 74 of the Rules.

## DISPOSITION

### FOR THESE REASONS,

Pursuant to Article 18, paragraph I of the Statute, and Rules 68 and 74, paragraph (A) of the Rules,

### THE PRE-TRIAL JUDGE,

### CONFIRMS:

1. against Mr **Ayyash**, as co-perpetrator, the counts mentioned in the Indictment of:
  - i) conspiracy aimed at committing a terrorist act (Count 1);
  - ii) committing a terrorist act (Count 2, subject to paragraph 70, point h of the Indictment);
  - iii) intentional homicide (of Mr Hariri) (Count 3);
  - iv) intentional homicide (of 21 persons listed in Annex A of the Indictment) (Count 4); and
  - v) attempted intentional homicide (of 231 persons listed in Annex B of the Indictment) (Count 5);
2. against Mr **Badreddine**, as co-perpetrator, the counts mentioned in the Indictment of:
  - i) conspiracy aimed at committing a terrorist act (Count 1);
  - ii) committing a terrorist act (Count 2, subject to paragraph 70, point h of the Indictment);
  - iii) intentional homicide (of Mr Hariri) (Count 3);
  - iv) intentional homicide (of 21 persons listed in Annex A of the Indictment) (Count 4); and

- v) attempted intentional homicide (of 231 persons listed in Annex B of the Indictment) (Count 5);

3. against Mr **Oneissi** the counts mentioned in the Indictment of:

- i) as a co-perpetrator, conspiracy aimed at committing a terrorist act (Count 1);
- ii) as an accomplice:
  - a. committing a terrorist act (Count 6);
  - b. intentional homicide (of Mr Hariri) (Count 7);
  - c. intentional homicide (of 21 persons listed in Annex A of the Indictment (Count 8), and
  - d. attempted intentional homicide (of 231 persons listed in Annex B of the Indictment) (Count 9);

4. against Mr **Sabra** the counts mentioned in the Indictment of:

- i) as a co-perpetrator, conspiracy aimed at committing a terrorist act (Count 1);
- ii) as an accomplice:
  - a. committing a terrorist act (Count 6);
  - b. intentional homicide (of Mr Hariri) (Count 7);
  - c. intentional homicide (of 21 persons listed in Annex A of the Indictment (Count 8), and
  - d. attempted intentional homicide (of 231 persons listed in Annex B of the Indictment) (Count 9); and

**DECLARES** that the evidentiary material submitted in support of the Indictment be disclosed to the accused pursuant to the relevant provisions of the Rules; and

**ORDERS** that the Indictment and the present decision remain confidential, until the Indictment has effectively been served on the accused or until further notice, with the exception that the Indictment may be disclosed to the relevant authorities

of the Lebanese Republic and to those of other States to whom the Prosecutor might transmit the Indictment pursuant to Rule 74 of the Rules.

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

Leidschendam, 28 June 2011.

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Daniel Fransen  
Pre-Trial Judge





Case name: ***The Prosecutor v. Ayyash et al.***

Before: **Pre-Trial Judge**

Title: **Indictment**





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

## BEFORE THE PRE-TRIAL JUDGE

Case No: **STL-II-01/I/PTJ**  
Filed with: **Pre-Trial Judge**  
Party filing: **The Prosecutor**  
Date of document: **10 June 2011**  
Original language: **English**  
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THE PROSECUTOR

v.

MUSTAFA AMINE BADREDDINE,  
SALIM JAMIL AYYASH,  
HUSSEIN HASSAN ONEISSI &  
ASSAD HASSAN SABRA

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## INDICTMENT

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Filed by:

**The Prosecutor**

D.A. Bellemare, MSM, QC

Distribution to:

**The Registrar**

Mr. Herman von Hebel

## **I. Preamble**

1. The Prosecutor of the Special Tribunal for Lebanon, pursuant to the authority stipulated in Articles 1 and 11 of the Statute for the Special Tribunal for Lebanon, charges under Articles 2 and 3 of the Statute, and thereby under the Lebanese Criminal Code<sup>1</sup> and the Lebanese Law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith struggle'<sup>2</sup>:

- a. **MUSTAFA AMINE BADREDDINE, SALIM JAMIL AYYASH, HUSSEIN HASSAN ONEISSI, and ASSAD HASSAN SABRA, each and together with:**

**Count 1 - Conspiracy aimed at committing a Terrorist Act; and**

- b. **MUSTAFA AMINE BADREDDINE and SALIM JAMIL AYYASH, each and together with:**

**Count 2 - Committing a Terrorist Act by means of an explosive device;**

**Count 3 - Intentional Homicide (of Rafik HARIRI) with premeditation by using explosive materials;**

**Count 4 - Intentional Homicide (of 21 persons in addition to the Intentional Homicide of Rafik HARIRI) with premeditation by using explosive materials;**

**Count 5 - Attempted Intentional Homicide (of 231 persons in addition to the Intentional Homicide of Rafik HARIRI) with premeditation by using explosive materials; and**

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<sup>1</sup> As translated from Arabic into English by the Languages Services Section of the Special Tribunal for Lebanon.

<sup>2</sup> As translated from Arabic into English by the Languages Services Section of the Special Tribunal for Lebanon.

- c. **HUSSEIN HASSAN ONEISSI and ASSAD HASSAN SABRA, each and together with:**

**Count 6 - Being an Accomplice to the felony of Committing a Terrorist Act by means of an explosive device;**

**Count 7- Being an Accomplice to the felony of Intentional Homicide (of Rafik HARIRI) with premeditation by using explosive materials;**

**Count 8 - Being an Accomplice to the felony of Intentional Homicide (of 21 persons in addition to the Intentional Homicide of Rafik HARIRI with premeditation by using explosive materials; and**

**Count 9 - Being an Accomplice to the felony of Attempted Intentional Homicide (of 231 persons in addition to the Intentional Homicide of Rafik HARIRI) with premeditation by using explosive materials.**

2. The Indictment contains the Prosecutor's allegations concerning the 14 February 2005 attack that killed Rafik HARIRI and 21 others and that resulted in injury to 231 others. As is the case in all criminal proceedings, the Accused are presumed innocent until proven guilty in a court of law.
3. The case against the Accused is built in large part on circumstantial evidence. Circumstantial evidence, which works logically by inference and deduction, is often more reliable than direct evidence, which can suffer from first-hand memory loss or eye-witness distortion. It is a recognised legal principle that circumstantial evidence has similar weight and probative value as direct evidence and that circumstantial evidence can be stronger than direct evidence.

## II. The Accused

4. Pursuant to Rule 68(D) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, the name and particulars of the Accused persons on this indictment are as follows:
- a. **MUSTAFA AMINE BADREDDINE<sup>3</sup> (BADREDDINE)** (also known as 'Mustafa Youssef BADREDDINE', 'Sami ISSA' and 'Elias Fouad SAAB') was born on 6 April 1961 in Al-Ghobeiry, Beirut, Lebanon. He is the son of Amine BADREDDINE (father) and Fatima JEZEINI (mother). His precise address is not known, though he has been associated with: the property of Khalil Al-Raii, Abdallah Al-Hajj Street, Al-Ghobeiry, in South Beirut; and the Al-Jinan Building, Al-Odaimi Street, Haret Hreik, in Beirut. He is a citizen of Lebanon. His Lebanese civil registration number is 341/Al-Ghobeiry. BADREDDINE, under the alias 'Elias Fouad SAAB', was convicted in Kuwait for a series of terrorist acts there on 12 December 1983, where *inter alia* suicide bombers drove trucks loaded with explosives into the French and US embassies. He was sentenced to death but he escaped from prison when Iraq invaded Kuwait in 1990.
- b. **SALIM JAMIL AYYASH<sup>4</sup> (AYYASH)** was born on 10 November 1963 in Harouf, Lebanon. He is the son of Jamil Dakhil AYYASH (father) and Mahasen Issa SALAMEH (mother). He has resided *inter alia* at: Al-Jamous Street, Tabajah building, Hadath, in South Beirut; and at the AYYASH family compound in Harouf, Nabatiyeh in South Lebanon. He is a citizen of Lebanon. His Lebanese civil registration is 197/Harouf, his Hajj passport number is 059386, and his social security number is 63/690790.
- c. **HUSSEIN HASSAN ONEISSI<sup>5</sup> (ONEISSI)** (also known as 'Hussein Hassan ISSA') was born on 11 February 1974 in Beirut, Lebanon. He is the son of Hassan ONEISSI (also known as 'Hassan ISSA') (father) and Fatima DARWISH (mother). He has resided in the Ahmad Abbas Building, at Al-Jamous St, near the

<sup>3</sup> In Arabic أمين بدر الدين مصطفى

<sup>4</sup> In Arabic سليم جميل عياش

<sup>5</sup> In Arabic حسين حسن عنوي, the birth name 'ISSA' having been changed to 'ONEISSI' by judicial declaration on 12 January 2004.

Lycée des Arts, in Hadath, South Beirut. He is a citizen of Lebanon. His Lebanese civil registration is 7/Shahour.

- d. **ASSAD HASSAN SABRA**<sup>6</sup> (**SABRA**) was born on 15 October 1976 in Beirut, Lebanon. He is the son of Hassan Tahan SABRA (father) and Leila SALEH (mother). He has resided at apartment 2, 4<sup>th</sup> floor, Building 28, Rue 58, in Hadath 3, South Beirut, also described as St. Thérèse Street, Hadath, in South Beirut. He is a citizen of Lebanon. His Lebanese civil registration is 1339/Zqaq Al-Blat.

5. The four Accused participated in a conspiracy with others aimed at committing a terrorist act to assassinate Rafik HARIRI and their respective roles may be summarised as follows: **BADREDDINE** served as the overall controller of the operation; **AYYASH** coordinated the assassination team, which was responsible for the physical perpetration of the attack; **ONEISSI** and **SABRA** had the task of preparing the false claim of responsibility, which served to identify the wrong people to investigate, in order to shield the conspirators from justice. As participants in the conspiracy, all four Accused played important roles in the attack on 14 February 2005 and therefore all four bear criminal responsibility for the results of the attack.

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<sup>6</sup> In Arabic, أسد حسن صبرا



### **III. A Concise Statement of the Facts**

6. The Prosecutor submits, pursuant to Rule 68(D) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, that the following facts have been ascertained during the ongoing investigation.

#### **A. OVERVIEW**

7. On 14 February 2005, at 12:55 on Rue Minet el Hos'n in Beirut, Rafik HARIRI, the former Prime Minister of Lebanon, was assassinated as a result of a terrorist act in which a suicide bomber detonated a large quantity of high explosives concealed in a Mitsubishi Canter van. In addition to killing HARIRI, the explosion killed 21 other persons (listed in Schedule A) and injured 231 persons (listed in Schedule B).
8. Shortly after the explosion, Al-Jazeera news network in Beirut received a video with a letter attached on which a man named Ahmad ABU ADASS (ABU ADASS) falsely claimed to be the suicide bomber on behalf of a fictional fundamentalist group called '*Victory and Jihad in Greater Syria*'. The video was later broadcast on television.

#### **B. RAFIK HARIRI**

9. Rafik Baha'eddine AL-HARIRI (HARIRI) was born on 1 November 1944 in the city of Sidon, Lebanon. HARIRI served as Prime Minister of Lebanon in five governments from 31 October 1992 to 4 December 1998, and from 26 October 2000 until his resignation on 26 October 2004.
10. From 20 October 2004 until his assassination, HARIRI was a Member of Parliament and a prominent political figure in Lebanon. Upon resigning as Prime Minister in 2004, he started preparing for parliamentary elections to be held in June 2005.
11. In the morning of 14 February 2005, HARIRI departed his residence at Quraitem Palace, in West Beirut, to attend a session of Parliament, located at Place de l'Étoile, Beirut.

12. Shortly before 11:00, HARIRI arrived at Parliament where he met with many Members of Parliament, including his sister, MP Bahia HARIRI, and MP Marwan HAMADEH.
13. Shortly before 12:00, HARIRI left Parliament to go to Café Place de l'Étoile, located nearby where he stayed for approximately 45 minutes.
14. At about 12:45, HARIRI left the Café and asked his security detail to prepare the convoy to go back to his residence for a lunch appointment.
15. At about 12:49, HARIRI entered his armoured vehicle accompanied by MP Bassel FULEIHAN and the convoy then departed the Place de l'Étoile. His security detail had planned to drive back to Quraitem Palace along the coastal road.
16. Approximately 2 minutes ahead of the convoy, the Mitsubishi Canter van slowly moved towards its final position on Rue Minet el Hos'n. As the convoy passed, the suicide bomber detonated the explosives.

### **C. THE COMMUNICATIONS ANALYSIS**

17. The evidence gathered throughout the investigation, including witness statements, documentary evidence and Call Data Records (CDR) for mobile phones in Lebanon has led to the identification of some of the persons responsible for the attack on HARIRI.
18. Call Data Records contain information such as incoming and outgoing phone numbers, the date and time of a call, its duration, call type (whether voice or text message), and the approximate location of mobile phones by reference to the cell-towers which carried a call.

#### **1. MOBILE PHONE NETWORKS**

19. Analysis of the CDR has revealed the presence of a number of interconnected mobile phone networks involved in the assassination of HARIRI. Each network consisted of a group of phones, usually registered under false names, which had a high frequency of contact with each other.

20. There are two types of networks, which can be described either as:
- a. 'covert networks' where members only call each other; or
  - b. 'open networks' where members sometimes call others outside the group.
21. The investigation identified five covert and open networks which have been colour-coded as follows:
- a. **Red Network:** a covert network used by the assassination team and consisting of [REDACTED] phones (of which [REDACTED] were particularly active) operational from 4 January 2005, until it ceased all activity 2 minutes before the attack on 14 February 2005. The **Red Network** phones are listed below with their short-names:

Red Network Number	[REDACTED]
Short-name	[REDACTED]

- b. **Green Network:** a group of [REDACTED] phones that formed a covert network from 13 October 2004 until it ceased all activity on 14 February 2005 about one hour before the attack. Two of the **Green Network** phones were used to control and coordinate the attack. The [REDACTED] **Green Network** phones were once part of a group of [REDACTED] phones. The [REDACTED] **Green Network** phones are listed below with their short-names:

Green Network Number	[REDACTED]
Short-name	[REDACTED]

- c. **Blue Phones:** an open network consisting of [REDACTED] phones operational between September 2004 and September 2005. **Blue Phones** were used by the assassination team *inter alia* for preparation of the attack and for surveillance of HARIRI.
- d. **Yellow Phones:** an open network consisting of [REDACTED] phones activated between 1999 and 2003 and operational until 7 January 2005. **Yellow Phones** were over time mostly replaced by **Blue Phone** use.

- e. **Purple Phones:** an open network consisting of [REDACTED] conventionally used phones activated before 2003 and operational until 15 or 16 February 2005. **Purple Phones** were used to coordinate the false claim of responsibility.
22. Some users of the network phones carried and used multiple phones on the different networks.
- a. The analysis of CDR shows many instances where a **Red Network** phone was active at the same location, on the same date, and within the same timeframe as other phones, including a **Green Network** phone and **Blue Phones**. It is reasonable to conclude from these instances that one person is using multiple phones together when over a significant period, the patterns of use for each phone never deviate in an inexplicable manner, the phones are recorded by cell-towers as being together over extensive geographical areas, and the phones do not contact each other. This is called '**CO-LOCATION**'.
- b. For example, [REDACTED] **Blue Phones** co-located with [REDACTED] **Red Network** phones as follows:

Blue Phones	[REDACTED]
Blue Phones short name	
Co-located Red Network	

23. In addition, analysis of CDR shows co-location between network phones and personal mobile phones (PMP).
- a. A PMP is a phone used for day-to-day matters, including contact with family, friends and legitimate business associates. In general, a PMP is therefore used to make calls to people who do not behave in a covert manner and whose identity is more easily traced.
- b. By identifying and then investigating persons who have been in contact with a PMP, the user of that PMP can be identified.
- c. Identifying the user of a phone is called '**ATTRIBUTION**'.

24. Once network phones, subscribed under false names, are shown to be co-locating with PMPs, then through attribution of a PMP, a person can ultimately be identified by co-location to be the user of a network phone.

## 2. THE RED NETWORK IS THE ASSASSINATION TEAM

25. The users of the **Red Network**, [REDACTED] of whom were in the possession of a co-located **Blue** phone, made up the assassination team that killed HARIRI. The [REDACTED]-member assassination team was led by **AYYASH** and the other [REDACTED] members of that team are unidentified at present. The assassination team conducted surveillance and physically carried out the attack. This can be reasonably concluded from the following:
- a. The **Red Network** was covert in nature and functioned in an organised and disciplined manner because:
    - i. **Red Network** users exclusively called each other;
    - ii. All [REDACTED] **Red Network** phones were activated in the Tripoli area within 30 minutes of each other on 4 January 2005 which shows that its activation was coordinated;
    - iii. The **Red Network** phones were all registered under false names; and
    - iv. Credit was added on all of the **Red Network** phones together in the Tripoli area within 45 minutes of each other on 2 February 2005 which shows that the addition of credit was coordinated.
  - b. The location and concomitant movement of **Red Network** phones and **Blue Phones** shows surveillance on HARIRI on at least 15 days before 14 February 2005. Between 11 November 2004 and 14 February 2005, the concomitant movement of the **Red Network** phones and co-locating **Blue Phones**, as evidenced by the timing and location of calls, often coincided with:
    - i. the movements of HARIRI; and
    - ii. locations relating to HARIRI, such as his residence at Quraitem Palace in Beirut or at his villa in Faqra.

- c. The co-located **Blue Phones** show association with the purchase of the Mitsubishi Canter van which occurred in Tripoli on 25 January 2005.
- d. It may be reasonably concluded that the activity of the **Red Network** phones on 14 February 2005 shows the execution of the attack on HARIRI because:
  - i. [REDACTED] of the **Red Network** phones were active in Beirut;
  - ii. The movements of the **Red Network** phones reflect HARIRI's movements, starting from the vicinity of his residence at Quraitem palace in the morning, later moving to the vicinity of Parliament, and then to the vicinity of the St. Georges Hotel where the attack took place;
  - iii. The final 33 calls made by the **Red Network** phones between 11:00 and 12:53 were mostly in the vicinity of Parliament and the St. Georges Hotel;
  - iv. At 12:50 the user of a **Red Network** phone located in the vicinity of Parliament called the user of a **Red Network** phone located in the vicinity of the St. Georges Hotel at the same time as HARIRI left the area of Parliament in his vehicle convoy which coincides with the Mitsubishi Canter van moving into its final position for detonation.
- e. All **Red Network** phones ceased use 2 minutes prior to the attack, by which time the Mitsubishi Canter van had reached its final position. The phones were never used again.
- f. From paragraphs 25(a)-(e) above, it is reasonable to conclude that phone use in the **Red Network** is inconsistent with innocent or coincidental communications and shows instead a coordinated use of these phones to carry out the assassination. Moreover, it is reasonable to conclude that the movement of the Mitsubishi Canter van within 2 minutes of the arrival of the convoy cannot be coincidental and must be the result of a coordination, demonstrable in the **Red Network** usage, between people observing the convoy and the person driving the van.

**3. IDENTIFICATION OF THE ACCUSED**

26. Communications analysis, including co-location, witness statements and documentary evidence, identified **Mustafa Amine BADREDDINE**, **Salim Jamil AYYASH**, **Hussein Hassan ONEISSI** and **Assad Hassan SABRA**, amongst others as yet unidentified, as having different roles in the killing of **HARIRI** and others by a terrorist act.
27. The Accused used various phones before, during and after the attack.
28. **AYYASH** used, over time, at least 8 phones, including a phone in each of the **Red Network**, **Green Network**, **Blue Phones** and **Yellow Phones**, and four PMPs.
- a. His **Red Network** phone was [REDACTED]
  - b. His **Green Network** phone was [REDACTED]
  - c. His **Blue Phone** was [REDACTED]
  - d. His **Yellow Phone** was [REDACTED] and
  - e. His 4 PMPs were:
    - i. [REDACTED]
    - ii. [REDACTED]
    - iii. [REDACTED] and
    - iv. [REDACTED]
29. **BADREDDINE** used, over time, at least 8 phones, including one **Green Network** phone and 7 PMPs.
- a. His **Green Network** phone was [REDACTED] and
  - b. His PMPs were:
    - i. [REDACTED]
    - ii. [REDACTED]

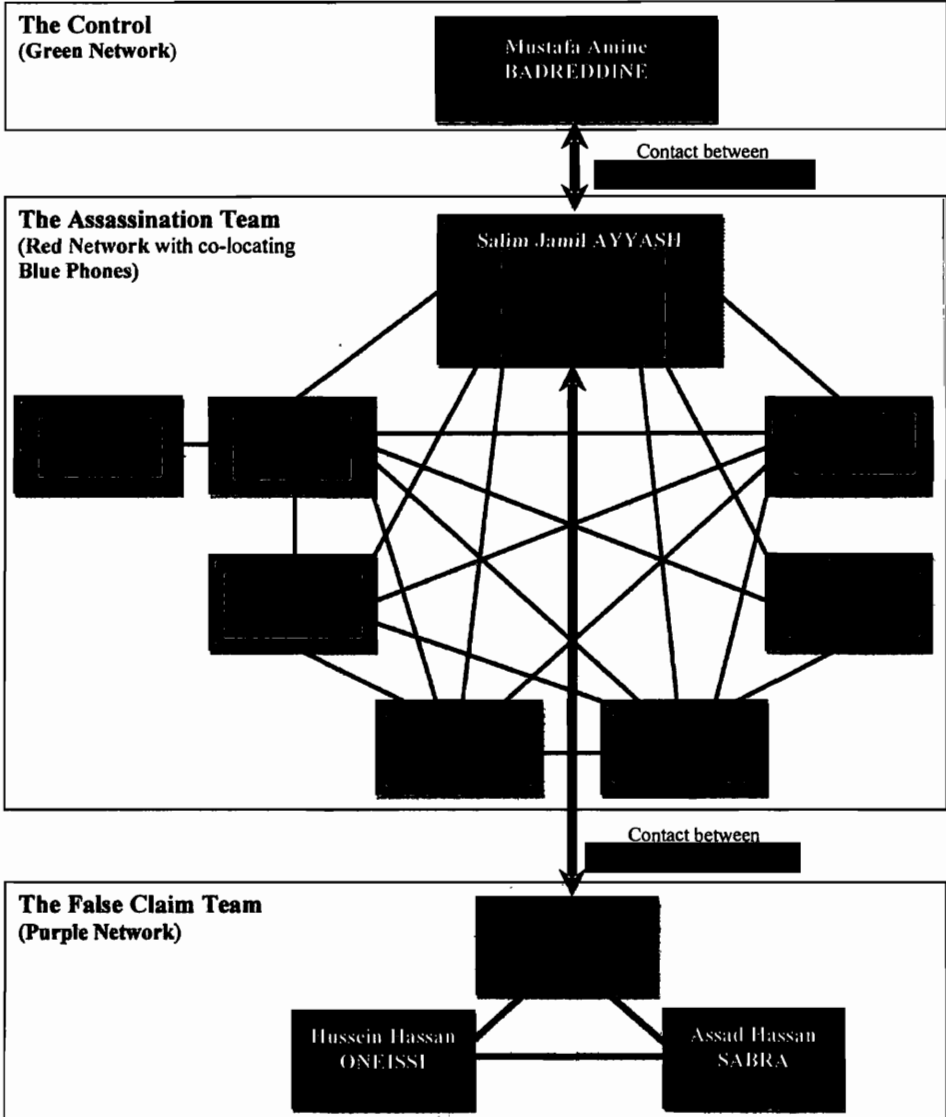
- iii. [REDACTED]
- iv. [REDACTED]
- v. [REDACTED]
- vi. [REDACTED] and
- vii. [REDACTED]

c. Analysis initially attributed some of the PMPs in paragraph 29(b) to a man named 'Sami ISSA'. Further communications analysis and investigation into 'Sami ISSA' revealed that this was a false identity being used by **BADREDDINE**. It can be reasonably concluded that the background of **BADREDDINE** as a man experienced in committing terrorist acts corroborates that 'Sami ISSA' is his alias.

- 30. **ONEISSI** used at least one phone, being a **Purple Phone**, namely [REDACTED]  
[REDACTED]
- 31. **SABRA** used at least one phone, being a **Purple Phone**, namely [REDACTED]  
[REDACTED]
- 32. By analysing their phone use, the respective role of each Accused in the attack became clear:
  - a. **BADREDDINE** on **Green** [REDACTED] communicated covertly with **AYYASH** on **Green** [REDACTED] and through these calls exercised control over the preparation and execution of the attack carried out by **AYYASH** and the other members of the assassination team.
  - b. **AYYASH**, on both **Red** [REDACTED] and **Blue** [REDACTED] coordinated the assassination team through their respective **Red Network** phones and **Blue Phones**.
  - c. **ONEISSI** on **Purple** [REDACTED] and **SABRA** on **Purple** [REDACTED] communicated with an unidentified person who used the [REDACTED] **Purple** [REDACTED] to report on the progress of the false claim of responsibility. During this period, **AYYASH** on PMP [REDACTED] was also in communication with **Purple** [REDACTED]. It is reasonable to conclude that **AYYASH** was monitoring the false claim preparation.



- d. The following section, detailing the Chronology of the Attack, provides greater detail on the role of each of the Accused. A pictorial representation of these relationships appears below:



## D. CHRONOLOGY OF THE ATTACK

### 1. Preparations

33. The investigation uncovered evidence that **AYYASH** and other members of the assassination team observed Rafik **HARIRI** on a number of days prior to the attack. By comparing the movements of Rafik **HARIRI** and the concomitant movement of the **Blue Phones** and **Red Network** phones, it is reasonable to conclude that these periods of observation were preparatory steps for the assassination. In short, these parallel movements of **HARIRI** and the **Blue Phones** and **Red Network** phones cannot be explained as mere coincidence.
34. On at least 20 days between 11 November 2004 and 14 February 2005, **AYYASH** and other members of the assassination team, communicating on their **Blue Phones** and **Red Network** phones, carried out acts in preparation for the attack including observation and surveillance, in order to learn the routes and movements of his convoy and the position of **HARIRI**'s vehicle within it. Surveillance occurred on at least 15 days and in particular on 11 November 2004, 1, 7, 14, 20, 28 and 31 January 2005, and 3, 4, 7, 8, 9, 10, 11 and 12 February 2005. By doing so, **AYYASH** and the assassination team determined the most suitable day, location and method for the attack, which they then executed on 14 February 2005.
35. As part of the assassination preparations, between 22 December 2004 and 17 January 2005, **ONEISSI** and **SABRA** were responsible for locating a suitable stranger who would be used to make a false claim of responsibility, on a video, for the attack against **HARIRI**. With **ONEISSI** falsely calling himself 'Mohammed', the person they chose was **ABU ADASS**, a 22-year old Palestinian man, found at the Arab University Mosque of Beirut, also known as 'the Al-Houry Mosque'.
  - a. The activity of **ONEISSI** and **SABRA** is illustrated *inter alia* by the fact that their **Purple Phones**, **Purple** [REDACTED] and **Purple** [REDACTED] registered against the cell-tower covering the mosque on 11 days, being on 22, 29, 30, and 31 December 2004 and 1, 3, 4, 5, 6, 7, and 17 January 2005. **ONEISSI** and **SABRA** would later deliver the video for broadcast, accompanied by a letter in Arabic, after the assassination.

- b. **ONEISSI** and **SABRA** have a history of contact with the unidentified person on **Purple** [REDACTED]. In particular, **SABRA** has been in contact 213 times with **Purple** [REDACTED] between 7 January 2003 and 14 February 2005, and **ONEISSI** 195 times with **Purple** [REDACTED] between 25 June 2003 and 26 January 2005. This pattern of phone usage shows both compartmentalisation and that **Purple** [REDACTED] served as the intermediary between **AYYASH** and **ONEISSI** and **SABRA**.
- c. Between 4 December 2003 and 6 February 2005, the unidentified person on **Purple** [REDACTED] was in contact 32 times with **AYYASH** on **PMP** [REDACTED] **PMP** [REDACTED] and **PMP** [REDACTED] and in particular 7 times on **PMP** [REDACTED] between 23 January 2005 and 6 February 2005.
36. Between 1 January 2005 and 14 February 2005, often during activity by the assassination team, **BADREDDINE** on **Green** [REDACTED] was in contact 59 times with **AYYASH** on **Green** [REDACTED].
37. On 4 January 2005, the [REDACTED] **Red Network** phones were activated in the Tripoli area over a period of approximately 30 minutes. [REDACTED] **Blue Phone** and [REDACTED] **Yellow Phones** were in the vicinity at the time of activation.
38. On 11 January 2005, **AYYASH** visited the area of Al-Beddaoui in Tripoli where vehicle showrooms are located including the one from which the Mitsubishi Canter van would be purchased on 25 January 2005. From the same area, **AYYASH**, on **Green** [REDACTED] contacted **BADREDDINE** twice on **Green** [REDACTED].
39. On 16 January 2005, at about 07:00, **ABU ADASS** left his home to meet with **ONEISSI** calling himself 'Mohammed'. **ABU ADASS** has been missing since that day.
40. [REDACTED]

41. On 20 January 2005, HARIRI was scheduled to attend the Grand Mosque of Beirut in the morning but instead attended the Imam Ali Mosque for Eid prayers. All active **Red Network** phones operated for less than one hour in the areas surrounding Quraitem Palace and the Grand Mosque. AYYASH, on Red [REDACTED] participated in the observations on that day.
42. On 25 January 2005, [REDACTED] relevant **Blue Phones** were active, including Blue [REDACTED] belonging to AYYASH who made 16 calls. In particular:
  - a. Between 14:41 and 14:59, AYYASH on Blue [REDACTED] in Beirut was in contact 3 times with a member of the assassination team on Blue [REDACTED] who was in the Tripoli area.
  - b. At 15:10, AYYASH on Green [REDACTED] called BADREDDINE on Green [REDACTED] for 81 seconds.
  - c. Between 15:30 and 16:00, the member of the assassination team on Blue [REDACTED] with another unidentified person, both giving false names, purchased for \$11250 in cash a Mitsubishi Canter van with engine block number 4D33-J01926 from a vehicle showroom in the Al-Beddaoui area of Tripoli. The assassination team later used the vehicle to carry the explosives in the attack.
  - d. At 15:37, the member of the assassination team on Blue [REDACTED] during the purchase negotiations called AYYASH on Blue [REDACTED] for 81 seconds.
  - e. It is a reasonable conclusion from these calls that BADREDDINE authorised the purchase of the Mitsubishi Canter van through AYYASH, and AYYASH then coordinated it.
43. On 28 January 2005, HARIRI stayed at Quraitem Palace throughout the day. The assassination team, using the **Red Network** phones, including AYYASH on Red [REDACTED] operated for more than six hours around Quraitem Palace and HARIRI's residence in Faqra.
44. On 31 January 2005, HARIRI was at Quraitem Palace before going to the Higher Shiite Council, later returning to the Palace. The assassination team, using the **Red Network** phones, were active for less than three hours covering the period before, during and after HARIRI's movements. They were located around Quraitem Palace

and the Higher Shiite Council when HARIRI was present. In both areas and in the same timeframe, AYYASH used Red [REDACTED], Blue [REDACTED] and Green [REDACTED]. In particular, on Green [REDACTED] he was in communication 11 times between 10:49 and 12:07 with BADREDDINE on Green [REDACTED].

45. On 2 February 2005, the credit of the [REDACTED] Red Network phones was topped up in Tripoli over a 45 minute period. In the same vicinity, within 10 minutes of the top-up, one member of the assassination team, on Blue [REDACTED] called another member of the assassination team on Blue [REDACTED]. Later, while travelling back to Beirut, the same member of the assassination team, on Blue [REDACTED] was in communication 3 times with AYYASH in Beirut on Blue [REDACTED].
46. On 3 February 2005, HARIRI had a meeting close to his residence before going to the St. Georges Yacht Club for lunch and later returning to Quraitem Palace. [REDACTED] Red Network phones were active for more than 4 hours and some co-locating Blue Phones for longer. [REDACTED] Red Network phones were active around Quraitem Palace, and [REDACTED] Red Network phones (with [REDACTED] Blue Phones) around the St. Georges Yacht Club at the same time that HARIRI was having lunch there. In particular:
  - a. AYYASH, on Red [REDACTED] was around the St. Georges Yacht Club and in regular contact with other members of the assassination team.
  - b. Between 13:56 and 15:44, AYYASH had contact four times on Green [REDACTED] with BADREDDINE on Green [REDACTED].
  - c. By around 15:44, AYYASH and BADREDDINE were in the same area, in close proximity to HARIRI and to the location that would be used for the attack on 14 February 2005.
47. On 8 February 2005, HARIRI's movements and those of the assassination team are similar to their respective movements on 14 February 2005, being the day of the attack. HARIRI was at Quraitem Palace in the morning before attending Parliament and afterwards returning to the Palace at around 13:45. [REDACTED] Red Network phones and their co-located Blue Phones were mainly active around Quraitem Palace, Parliament and the routes normally used by HARIRI to travel between both locations. In particular:

- a. **AYYASH** was active on **Red** [REDACTED], **Blue** [REDACTED], **Green** [REDACTED] and on his **PMP** [REDACTED] and **PMP** [REDACTED], at relevant locations, in particular around Parliament and where the attack would take place on 14 February 2005.
- b. At 13:40 and 15:05, **AYYASH** on **Green** [REDACTED] was twice in communication with **BADREDDINE** on **Green** [REDACTED].

## 2. The Attack

48. On 14 February 2005, the assassination team consisting of **AYYASH** and [REDACTED] others positioned themselves in locations where they were able to track and observe **HARIRI**'s convoy from his residence at Quraitem Palace in Beirut to Parliament and thereafter, travelling back to his residence, into the area of the St. Georges Hotel. They kept in frequent contact with each other on their **Red Network** phones and their co-located **Blue Phones**. In particular, there were 33 calls within the **Red Network** between 11:00 and 12:53. Significant calls included:
  - a. At 11:58, **AYYASH**, on **Green** [REDACTED] while positioned close to the area of the St. Georges Hotel, contacted **BADREDDINE** on **Green** [REDACTED] for 14 seconds. The **Green Network** phones were never used again. It is reasonable to conclude from this last **Green Network** call that **BADREDDINE** issued the final authorisation for the attack.
  - b. At 12:50:34, as **HARIRI** was leaving Parliament to drive home, **Red** [REDACTED] located near Parliament, called for 5 seconds to **Red** [REDACTED] located near the St. Georges Hotel and near the Mitsubishi Canter van. Immediately after, at 12:50:55, **Red** [REDACTED] then called **AYYASH** on **Red** [REDACTED] for 10 seconds who was located between Parliament and the St. Georges Hotel. At around this time, from a location close to **AYYASH**, the van began moving towards the St. Georges Hotel. It is reasonable to conclude from these calls that the assassination team member on **Red** [REDACTED] informed **AYYASH** and another member on **Red** [REDACTED] of **HARIRI**'s departure from Parliament so that the van could move into its final position for attack.
  - c. At 12:53, the last ever call within the **Red Network** took place, from **Red** [REDACTED] in the area of Parliament to **Red** [REDACTED] nearby. By that time, all members of the assassination team had been informed of **HARIRI**'s final movements.

49. On 14 February 2005, at about 12:52, closed-circuit TV footage shows the Mitsubishi Canter van move slowly towards the St. Georges Hotel.
50. On 14 February 2005, at about 12:55, a male suicide bomber detonated a large quantity of high explosives concealed in the cargo area of the Mitsubishi Canter van with engine block number 4D33-J01926, killing HARIRI as his convoy of six vehicles on Rue Minet el Hos'n passed the St. Georges Hotel.
51. The explosion took place on a busy public street and was enormous and terrifying. Forensic examination has established the quantity of explosives was approximately 2500 kilogrammes of TNT (trinitrotoluene) equivalent. In addition to HARIRI, 8 members of his convoy and 13 members of the public were killed. Not including the suicide bomber, the explosion killed a total of 22 persons. Due to the size of the explosion, the attack attempted to kill a further 231 persons who were injured, and also caused partial destruction of the St. Georges Hotel and nearby buildings.
52. Fragments of the suicide bomber were recovered at the scene and forensic examination has established both that the remains were: (a) of a male, and (b) not of ABU ADASS. The identity of the suicide bomber remains unknown.

### 3. Delivery of the Video

53. Starting about 75 minutes after the attack, **ONEISSI** and **SABRA** made a total of 4 calls to the offices of the Reuters and Al-Jazeera news networks in Beirut. All 4 phone calls were made using the same prepaid Telecard 6162569 from 4 different public payphones:
  - a. At about 14:11, **ONEISSI** or **SABRA**, both acting together, claimed to Reuters that a fictional fundamentalist group called '*Victory and Jihad in Greater Syria*' executed the attack.
  - b. At about 14:19, **ONEISSI** or **SABRA**, both acting together, uttered into the phone to Al-Jazeera a claim of responsibility from '*Victory and Jihad in Greater Syria*', a report of which was broadcast shortly after.
  - c. At about 15:27, **SABRA** called Al-Jazeera and gave information on where to find a videocassette which had been placed in a tree at the ESCWA Square near the

Al-Jazeera offices at Shakir Ouayeh building, Beirut. **ONEISSI** was watching the location to confirm receipt by Al-Jazeera of the videocassette. On the video, **ABU ADASS** claimed responsibility for the attack, that it was in support of 'Mujahidin' in Saudi Arabia, and that further attacks would follow. Attached to the videocassette was a letter in Arabic which stated *inter alia* that **ABU ADASS** was the suicide bomber.

d. At about 17:04, **ONEISSI** or **SABRA**, both acting together, demanded with menace that Al-Jazeera broadcast the video, which was done shortly after.

54. On 14 February 2005, **ONEISSI** and **SABRA** delivered the **ABU ADASS** videocassette while using their **Purple Phones** close to the public payphones which they used to call Reuters and Al Jazeera and close to the tree in which the videocassette was hidden.

55. On 14 February 2005, between about 14:03 and 17:24, before, between and after these 4 public payphones calls to the news networks, **SABRA** on **Purple [REDACTED]** was in contact with the unidentified person on **Purple [REDACTED]** on 7 occasions.

56. On 15 February 2005, **Purple [REDACTED]** ceased being used.

57. On 16 February 2005, **ONEISSI's Purple [REDACTED]** and **SABRA's Purple [REDACTED]** ceased being used.

## **E. THE CRIMINAL AGREEMENT**

### **1. The Conspiracy**

58. The facts as outlined above show that a conspiracy had come into existence by sometime between at least 11 November 2004 and 16 January 2005. In the conspiracy, **BADREDDINE**, **AYYASH**, **ONEISSI** and **SABRA**, together with others as yet unidentified, including the assassination team and the person on **Purple [REDACTED]** agreed to commit a terrorist act by means of an explosive device in order to assassinate **HARIRI**.

a. The conspiracy began sometime between at least 11 November 2004 and 16 January 2005, and was executed on 14 February 2005. This is because:




- i. On 11 November 2004 two unidentified conspirators, using **Blue Phones**, carried out the first detected surveillance of HARIRI; and
    - ii. By 16 January 2005 the **Red Network** had been established and ABU ADASS was missing; while
    - iii. The conspiracy was then executed on 14 February 2005 with the attack on HARIRI.
  - b. **BADREDDINE**, as the controller, **AYYASH**, as the assassination team coordinator, and the other members of the assassination team were early members of the conspiracy.
  - c. **ONEISSI** and **SABRA** together with the unidentified person on **Purple** [REDACTED] joined the conspiracy at the latest by between 22 December 2004 and 16 January 2005 with the task of preparing the false claim of responsibility. This timeframe starts on 22 December 2004 because *inter alia* the **Purple Phones** of **ONEISSI** and **SABRA** were then active around the Arab University Mosque of Beirut where ABU ADASS prayed. In the conspiracy, they agreed to act as accomplices performing supporting tasks for the assassination, namely:
    - i. to seek a suitable individual, later identified as ABU ADASS, who would be used to make a false claim of responsibility, on a video, for the attack against HARIRI; and,
    - ii. to deliver the video, with a letter attached, for broadcast after the assassination.
59. All four Accused are supporters of Hezbollah, which is a political and military organisation in Lebanon.
- a. In the past, the military wing of Hezbollah has been implicated in terrorist acts. Persons trained by the military wing have the capability to carry out a terrorist attack, whether or not on its behalf.
  - b. **BADREDDINE** and **AYYASH** are related to each other through marriage and together to a certain Imad MUGHNIYAH: they are brothers-in-law. Imad

MUGNIYAH was a founding member of Hezbollah and in charge of its military wing from 1983 until he was killed in Damascus on 12 February 2008. He was wanted internationally for terrorist offences.

- c. Based on their experience, training and affiliation with Hezbollah, therefore, it is reasonable to conclude that **BADREDDINE** and **AYYASH** had the capability to undertake the 14 February 2005 attack.
60. All who concluded or joined the criminal agreement were perpetrators of the conspiracy against state security. **BADREDDINE**, **AYYASH**, and the assassination team, were perpetrators of the substantive offences of committing a terrorist act, intentional homicide of **HARIRI**, and of 21 others, and attempted intentional homicide of 231 others. **ONEISSI**, **SABRA**, and the unidentified person on **Purple** [REDACTED] were accomplices to the above substantive offences by preparing and delivering the false claim of responsibility.
  61. It is reasonable to conclude that the aim of the conspiracy, to which all conspirators knowingly agreed, was to commit a terrorist act by detonating a large quantity of explosives in a public place, in order to kill **HARIRI**.
  62. The conspirators had two additional goals, namely:
    - a. To create a false claim of responsibility on behalf of a fictional fundamentalist group named '*Victory and Jihad in Greater Syria*', to identify the wrong people to investigate, and so shield the conspirators from justice; and
    - b. By doing so, to add to the state of terror, by raising in the mind of the population insecurity and fear of further indiscriminate public attack.

## 2. Blaming Others

63. Phone use shows that the conspirators, including **AYYASH** and other members of the assassination team, as well as the false claim team, were centred in South Beirut.
64. To create a false trail away from Beirut, the conspirators chose Tripoli for certain traceable acts, such as:

- a. On 4 January 2005, the ■Red Network phones were first activated, including the number used by AYYASH, traceably in Tripoli.
  - b. 
  - c. On 25 January 2005, the device employed to carry the explosives for the terrorist act, namely the Mitsubishi Canter van, was traceably purchased in Tripoli.
  - d. On 2 February 2005, the credit of each of the ■Red Network phones was traceably topped up in Tripoli.
65. The conspirators expected that the false trail, together with the false claim of responsibility by ABU ADASS, would cause the authorities to investigate others in Tripoli, and so shield the conspirators from justice by shifting attention away from Beirut.

#### **IV. The Counts**

66. WHEREFORE, pursuant to Rule 68(D) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, the Prosecutor charges the Accused persons with the following counts:

##### **COUNT ONE**

##### **Statement of Offence**

67. **Conspiracy aimed at committing a Terrorist Act,**
- a. pursuant to Articles 188, 212, 213, 270, and 314 of the Lebanese Criminal Code, 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', and
  - c. Article 3(1)(a) of the Statute of the Special Tribunal for Lebanon.

##### **Particulars of Offence**

68. **MUSTAFA AMINE BADREDDINE, SALIM JAMIL AYYASH, HUSSEIN HASSAN ONEISSI, and ASSAD HASSAN SABRA,**
- a. between at least the eleventh day of November 2004 and the sixteenth day of January 2005,
  - b. together with others unidentified,
  - c. each bearing individual criminal responsibility as co-perpetrators with shared intent,
  - d. concluded or joined an agreement, aimed at committing a terrorist act intended to cause a state of terror by a predetermined means liable to create a public danger,
  - e. namely by the assassination by means of a large explosive device in a public place of the former Prime Minister, and leading political figure, Rafik HARIRI,

- f. which intentionally with premeditation should,
- g. or they foresaw and accepted the risk would,
- h. kill and attempt to kill others in the immediate vicinity of the explosion, and cause the partial destruction of buildings,
- i. all of which they agreed as two additional goals of the said conspiracy
  - i. to blame falsely on others in a fictional fundamentalist group so to shield themselves from justice, and
  - ii. to add to the state of terror, by raising in the mind of the population insecurity and fear of further indiscriminate public attack,
- j. and in so doing thereby, together they committed a conspiracy against state security.

## **COUNT TWO**

### **Statement of Offence**

69. **Committing a Terrorist Act by means of an explosive device,**
- a. pursuant to Articles 188, 212, 213, and 314 of the Lebanese Criminal Code, and
  - b. Article 6 of the Lebanese Law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith struggle', and
  - c. Article 3(1)(a) of the Statute of the Special Tribunal for Lebanon.

### **Particulars of Offence**

70. **MUSTAFA AMINE BADREDDINE and SALIM JAMIL AYYASH,**
- a. on the fourteenth day of February 2005,
  - b. together with others unidentified,

- c. each bearing individual criminal responsibility as co-perpetrators with shared intent,
- d. committed a terrorist act intended to cause a state of terror by a means liable to create a public danger,
- e. namely by the assassination by means of a large explosive device in a public place of the former Prime Minister, and leading political figure, Rafik HARIRI,
- f. thereby bringing about the detonation at 12:55 on the fourteenth day of February 2005 at Rue Minet el Hos'n, Beirut, Lebanon, being a public street, of approximately 2500 kilogrammes of TNT equivalent,
- g. and, it being an aggravating circumstance that, in so doing,
  - i. resulting in the deaths of Rafik HARIRI and 21 other persons, and
  - ii. in the partial destruction of the St. Georges Hotel and nearby buildings,
- h. while also attempting to kill 231 other persons.

### **COUNT THREE**

#### **Statement of Offence**

71. **Intentional Homicide (of Rafik HARIRI) with premeditation by using explosive materials,**
- a. pursuant to Articles 188, 212, 213, 547 and 549(1) and (7), of the Lebanese Criminal Code, and
  - b. Article 3(1)(a) of the Statute of the Special Tribunal for Lebanon.

#### **Particulars of Offence**

72. **MUSTAFA AMINE BADREDDINE and SALIM JAMIL AYYASH,**
- a. on the fourteenth day of February 2005,

- b. together with others unidentified,
- c. each bearing individual criminal responsibility as co-perpetrators with shared intent,
- d. committed the intentional homicide of Rafik HARIRI,
- e. in the aggravating circumstance of
  - i. premeditation, and
  - ii. by bringing about the detonation at 12:55 at Rue Minet el Hos'n, Beirut, Lebanon, of explosive materials of approximately 2500 kilogrammes of TNT equivalent.

## **COUNT FOUR**

### **Statement of Offence**

73. **Intentional Homicide** (of 21 persons in addition to the Intentional Homicide of Rafik HARIRI) **with premeditation by using explosive materials**,
- a. pursuant to Articles 188, 189, 212, 213, 547 and 549(1) and (7) of the Lebanese Criminal Code, and
  - b. Article 3(1)(a) of the Statute of the Special Tribunal for Lebanon.

### **Particulars of Offence**

74. **MUSTAFA AMINE BADREDDINE and SALIM JAMIL AYYASH**,
- a. on the fourteenth day of February 2005,
  - b. (or subsequently as a result of injuries sustained on the fourteenth day of February 2005),
  - c. together with others unidentified,
  - d. each bearing individual criminal responsibility as co-perpetrators,

- e. by using a large quantity of explosive materials in a public place with shared intent and premeditation to commit the intentional homicide of former Prime Minister, and leading political figure, Rafik HARIRI, within his motor convoy,
- f. in addition, either intending to kill members of the said convoy and members of the general public in the vicinity,
- g. or by reason of foreseeing and accepting the risk that deaths would occur within the said motor convoy and among the general public in the vicinity,
- h. by then bringing about the detonation at 12:55 at Rue Minet el Hos'n, Beirut, Lebanon, being a public street, of approximately 2500 kilogrammes of TNT equivalent,
- i. thereby with shared intent,
- j. and in the aggravating circumstance of
  - i. premeditation, and
  - ii. by bringing about the said detonation of explosive materials,
- k. committed the intentional homicide, as named alphabetically in Schedule A,
- l. of eight members of the said convoy, namely:
  - 1. Yahya Mustafa AL-ARAB,
  - 2. Omar Ahmad AL-MASRI,
  - 3. Mazen Adnan AL-ZAHABI,
  - 4. Mohammed Saadeddine DARWISH,
  - 5. Bassel Farid FULEIHAN (who died on 18 April 2005 as a result of injuries sustained on 14 February 2005),
  - 6. Mohammed Riyadh Hussein GHALAYEENI,
  - 7. Talal Nabih NASSER, and
  - 8. Ziad Mohammed TARRAF;
- m. and of thirteen members of the general public, namely:
  - 1. Joseph Emile AOUN,



2. Zahi Halim ABU RJEILY (who died on 15 February 2005 as a result of injuries sustained on 14 February 2005),
3. Mahmoud Saleh AL-HAMAD AL-MOHAMMED,
4. Mahmoud Saleh AL-KHALAF,
5. Sobhi Mohammed AL-KHODR,
6. Rima Mohammed Raif BAZZI,
7. Abdo Tawfik BOU FARAH,
8. Yamama Kamel DAMEN,
9. Abd Al-Hamid Mohammed GHALAYEENI,
10. Rawad Hussein Suleiman HAIDAR,
11. Farhan Ahmad ISSA,
12. Alaa Hassan OSFOUR, and
13. Haitham Khaled OTHMAN (who died on 15 February 2005 as a result of injuries sustained on 14 February 2005).

## COUNT FIVE

### Statement of Offence

75. **Attempted Intentional Homicide** (of 231 persons in addition to the Intentional Homicide of Rafik HARIRI) **with premeditation by using explosive materials**,
  - a. pursuant to Articles 188, 189, 200, 212, 213, 547, and 549(1) and (7) of the Lebanese Criminal Code, and
  - b. Article 3(1)(a) of the Statute of the Special Tribunal for Lebanon.

### Particulars of Offence

76. **MUSTAFA AMINE BADREDDINE and SALIM JAMIL AYYASH**,
  - a. on the fourteenth day of February 2005,
  - b. together with others unidentified,
  - c. each bearing individual criminal responsibility as co-perpetrators,

- d. by using a large quantity of explosive materials in a public place with shared intent and premeditation to commit the intentional homicide of former Prime Minister, and leading political figure, Rafik HARIRI, within his motor convoy,
- e. in addition, either intending to kill members of the said convoy and members of the general public in the vicinity,
- f. or by reason of foreseeing and accepting the risk that deaths would occur within the said motor convoy and among the general public in the vicinity,
- g. by then bringing about the detonation at 12:55 at Rue Minet el Hos'n, Beirut, Lebanon, of approximately 2500 kilogrammes of TNT equivalent,
- h. thereby, with shared intent,
- i. and in the aggravating circumstance of
  - i. premeditation, and
  - ii. by bringing about the said detonation of explosive materials,
- j. in so causing injury in the explosion to persons from the said convoy and general public, attempted to commit the intentional homicide of 231 other persons, as named alphabetically in Schedule B.

## COUNT SIX

### Statement of Offence

77. **Being an Accomplice to the felony of Committing a Terrorist Act by means of an explosive device,**
- a. pursuant to Articles 188, 219(4) and (5), and 314 of the Lebanese Criminal Code, and
  - b. Article 6 of the Lebanese Law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith struggle', and
  - c. Article 3(1)(a) of the Statute of the Special Tribunal for Lebanon.

**Particulars of Offence**

- 78. HUSSEIN HASSAN ONEISSI and ASSAD HASSAN SABRA,**
- a. between not later than the sixteenth day of January 2005 and the fourteenth day of February 2005,
  - b. knowing that others as co-perpetrators intended to, and on the fourteenth day of February 2005 then did,
  - c. commit a terrorist act intended to cause a state of terror by a means liable to create a public danger, namely by means of a large explosive device in a public place;
  - d. which the co-perpetrators agreed as two additional goals:
    - i. to blame falsely on others in a fictional fundamentalist group so to shield themselves from justice; and
    - ii. to add to the state of terror, by raising in the mind of the population insecurity and fear of further indiscriminate public attack;
  - e. **ONEISSI and SABRA**, knowing the intent of the said co-perpetrators to commit the said terrorist act,
  - f. together with shared intent,
    - i. each bearing individual criminal responsibility and participating as an accomplice to the terrorist act, and
    - ii. each aiding and abetting the co-perpetrators of the felony,
  - g. agreed with the co-perpetrators to perform, and then performed, acts preparatory to the offence, and acts to shield the co-perpetrators and themselves from justice, which would falsely blame others in a fictional fundamentalist group so as to add to the state of terror, as follows:
    - i. as preparatory to the offence, by identifying and then using a 22-year old Palestinian man named Ahmad ABU ADASS in order to create a false

claim of responsibility from him on video for the forthcoming offence on behalf of a group called '*Victory and Jihad in Greater Syria*'; and

- ii. as acts to shield the co-perpetrators and themselves from justice, by then ensuring the video, with the attached letter, of the false claim of responsibility would be broadcast on the television in Lebanon immediately after the said offence.

## **COUNT SEVEN**

### **Statement of Offence**

79. **Being an Accomplice to the felony of Intentional Homicide (of Rafik HARIRI) with premeditation by using explosive materials,**
- a. pursuant to Articles 188, 219(4) and (5), 547, and 549(1) and (7) of the Lebanese Criminal Code, and
  - b. Article 3(1)(a) of the Statute of the Special Tribunal for Lebanon.

### **Particulars of Offence**

80. **HUSSEIN HASSAN ONEISSI and ASSAD HASSAN SABRA,**
- a. between not later than the sixteenth day of January 2005 and the fourteenth day of February 2005,
  - b. knowing that others as co-perpetrators intended to, and on the fourteenth day of February 2005 then did,
  - c. commit with premeditation by using explosive materials the intentional homicide of the former Prime Minister, and leading political figure, Rafik HARIRI;
  - d. which the co-perpetrators agreed as two additional goals:
    - i. to blame falsely on others in a fictional fundamentalist group so to shield themselves from justice; and

- ii. to add to the state of terror, by raising in the mind of the population insecurity and fear of further indiscriminate public attack;
- e. **ONEISSI and SABRA**, knowing the intent of the said co-perpetrators to commit the said intentional homicide of Rafik HARIRI,
- f. together with shared intent,
  - i. each bearing individual criminal responsibility and participating as an accomplice to the intentional homicide of Rafik HARIRI, and
  - ii. each aiding and abetting the co-perpetrators of the felony,
- g. agreed with the co-perpetrators to perform, and then performed, acts preparatory to the offence, and acts to shield the co-perpetrators and themselves from justice, which would falsely blame others in a fictional fundamentalist group so as to add to the state of terror, as follows:
  - i. as preparatory to the offence, by identifying and then using a 22-year old Palestinian man named Ahmad ABU ADASS in order to create a false claim of responsibility from him on video for the forthcoming offence on behalf of a group called '*Victory and Jihad in Greater Syria*'; and
  - ii. as acts to shield the co-perpetrators and themselves from justice, by then ensuring the video, with the attached letter, of the false claim of responsibility would be broadcast on the television in Lebanon immediately after the said offence.

## COUNT EIGHT

### Statement of Offence

81. **Being an Accomplice to the felony of Intentional Homicide** (of 21 persons in addition to the Intentional Homicide of Rafik HARIRI) **with premeditation by using explosive materials,**

- a. pursuant to Articles 188, 189, 219(4) and (5), 547 and 549(1) and (7) of the Lebanese Criminal Code, and
- b. Article 3(1)(a) of the Statute of the Special Tribunal for Lebanon.

**Particulars of Offence**

**82. HUSSEIN HASSAN ONEISSI and ASSAD HASSAN SABRA,**

- a. between not later than the sixteenth day of January 2005 and the fourteenth day of February 2005,
- b. knowing that others as co-perpetrators intended to, and on the fourteenth day of February 2005 then did,
- c. commit with premeditation by using explosive materials the intentional homicide of the former Prime Minister, and leading political figure, Rafik HARIRI,
- d. which in addition, as shown by the large quantity of explosive materials used, they intended, or foresaw and accepted the risk, that this act would kill others in the vicinity of the explosion,
- e. and who thereby committed the intentional homicide of 21 others,
- f. which the said co-perpetrators agreed as two additional goals:
  - i. to blame falsely on others in a fictional fundamentalist group so to shield themselves from justice; and
  - ii. to add to the state of terror, by raising in the mind of the population insecurity and fear of further indiscriminate public attack;
- g. **ONEISSI and SABRA**, knowing the intent of the said co-perpetrators to kill others in addition to killing Rafik HARIRI,
- h. together with shared intent,
  - i. each bearing individual criminal responsibility and participating as an accomplice to the intentional homicide of 21 others, and

- ii. each aiding and abetting the co-perpetrators of the felony,
- i. agreed with the said co-perpetrators to perform, and then performed, acts preparatory to the offence, and acts to shield the co-perpetrators and themselves from justice, which would falsely blame others in a fictional fundamentalist group so as to add to the state of terror, as follows:
  - i. as preparatory to the offence, by identifying and then using a 22-year old Palestinian man named Ahmad ABU ADASS in order to create a false claim of responsibility from him on video for the forthcoming offence on behalf of a group called '*Victory and Jihad in Greater Syria*'; and
  - ii. as acts to shield the co-perpetrators and themselves from justice, by then ensuring the video, with the attached letter, of the false claim of responsibility would be broadcast on the television in Lebanon immediately after the said offence.

## COUNT NINE

### Statement of Offence

83. **Being an Accomplice to the felony of Attempted Intentional Homicide** (of 231 persons in addition to the Intentional Homicide of Rafik HARIRI) **with premeditation by using explosive materials,**
- a. pursuant to Articles 188, 189, 200, 219(4) and (5), 547 and 549(1) and (7) of the Lebanese Criminal Code, and
  - b. Article 3(1)(a) of the Statute of the Special Tribunal for Lebanon.

### Particulars of Offence

84. **HUSSEIN HASSAN ONEISSI and ASSAD HASSAN SABRA,**
- a. between not later than the sixteenth day of January 2005 and the fourteenth day of February 2005,

- b. knowing that others as co-perpetrators intended to, and on the fourteenth day of February 2005 then did,
- c. commit with premeditation by using explosive materials the intentional homicide of the former Prime Minister, and leading political figure, Rafik HARIRI,
- d. which in addition, as shown by the large quantity of explosive materials used, they intended, or foresaw and accepted the risk, that this act would attempt to kill others in the vicinity of the explosion,
- e. and who thereby committed the attempted intentional homicide of 231 others,
- f. which the said co-perpetrators agreed as two additional goals:
  - i. to blame falsely on others in a fictional fundamentalist group so to shield themselves from justice; and
  - ii. to add to the state of terror, by raising in the mind of the population insecurity and fear of further indiscriminate public attack;
- g. **ONEISSI and SABRA**, knowing the intent of the said co-perpetrators to attempt to kill others in addition to killing Rafik HARIRI,
- h. together with shared intent,
  - i. each bearing individual criminal responsibility and participating as an accomplice to the attempted intentional homicide of 231 others, and
  - ii. each aiding and abetting the co-perpetrators of the felony,
- i. agreed with the said co-perpetrators to perform, and then performed, acts preparatory to the offence, and acts to shield the co-perpetrators and themselves from justice, which would falsely blame others in a fictional fundamentalist group so as to add to the state of terror, as follows:
  - i. as preparatory to the offence, by identifying and then using a 22-year old Palestinian man named Ahmad ABU ADASS in order to create a false claim of responsibility from him on video for the forthcoming offence on behalf of a group called '*Victory and Jihad in Greater Syria*'; and



- ii. as acts to shield the co-perpetrators and themselves from justice, by then ensuring the video, with the attached letter, of the false claim of responsibility would be broadcast on the television in Lebanon immediately after the said offence.

[Redacted]  
Original signed

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D.A. Bellemare, MSM QC  
The Prosecutor

This 10th day of June 2011,  
Leidschendam, The Netherlands

9384
Word Count



### **Schedule A**

Below is an alphabetical list of 21 other persons intentionally or foreseeably killed as a direct consequence of the public explosion on 14 February 2005 intended to kill the former Prime Minister Rafik HARIRI, and who Counts 4 and 8 plead were each and collectively subject to intentional homicide with premeditation.

**In addition to Rafik HARIRI, eight members of Rafik HARIRI's motor convoy were killed, (following in alphabetical order):**

1. Yahya Mustafa Al-Arab [REDACTED]  
[REDACTED]; died 14 February 2005,  
cause of death - burns due to an explosion.
2. Omar Ahmad Al-Masri [REDACTED]  
[REDACTED] died 14 February 2005, cause of death - (not provided on death certificate).
3. Mazen Adnan Al-Zahabi, [REDACTED]  
[REDACTED]; died 14 February 2005,  
cause of death - burns to more than 90% of the body due to an explosion.
4. Mohammed Saadeddine Darwish, [REDACTED]  
[REDACTED]; died 14 February 2005,  
cause of death - heart attack due to explosion of 14 February 2005 and burns to entire body.
5. Bassel Farid Fuleihan, [REDACTED]  
[REDACTED] Mr. Fuleihan was a Member of Parliament who was travelling with Mr. HARIRI. He initially survived the explosion but received third degree burns to 96% of his body. He was flown to Paris for emergency treatment. He remained in hospital in a coma for 60 days before he died on 18 April 2005.
6. Mohammed Riyadh Hussein Ghalayeen, [REDACTED]  
[REDACTED]; died 14 February 2005, cause of death - burns due to an explosion.

7. **Talal Nabih Nasser,** [REDACTED]  
[REDACTED] died 14 February 2005, cause of death - burns due to an explosion.

8. **Ziad Mohammed Tarraf,** [REDACTED]  
[REDACTED]; died 14 February 2005, cause of death - burns due to an explosion.

**In addition, thirteen public bystanders were also killed** (following in alphabetical order):

9. **Joseph Emile Aoun,** [REDACTED]  
[REDACTED] died 14 February 2005, cause of death - crushed and disfigured in explosion.

10. **Zahi Halim Abu Rjeily,** [REDACTED]  
[REDACTED] died 15 February 2005, cause of death - blockage of the respiratory tract as a result of the heavy accumulation of debris due to an explosion in the St. Georges area.

11. **Mahmoud Saleh Al-Hamad Al-Mohammed,** [REDACTED]  
[REDACTED]  
[REDACTED] died 14 February 2005, cause of death - explosion leading to death.

12. **Māhmoud Saleh Al-Khalaf,** [REDACTED]  
[REDACTED] died 14 February 2005, cause of death - explosion leading to death.

13. **Sobhi Mohammed Al-Khodr,** [REDACTED]  
[REDACTED] died 14 February 2005.

14. **Rima Mohammed Raif Bazzi,** [REDACTED]  
[REDACTED] died 14 February 2005, cause of death - multiple injuries caused by the St. George's explosion.

15. **Abdo Tawfik Bou Farah,** [REDACTED]  
[REDACTED] died 14

February 2005, cause of death - explosion of the brain as a result of shattering of the skull due to a bomb explosion.

16. Yamama Kamel **Damen**, [REDACTED]  
[REDACTED] died 14 February 2005,  
cause of death - burns due to an explosion.

17. Abd Al-Hamid Mohammed **Ghalayeeni**, [REDACTED]  
[REDACTED] died 14 February  
2005, cause of death - injuries due to an explosion.

18. Rawad Hussein Suleiman **Haidar**, [REDACTED]  
[REDACTED] died 14 February 2005,  
cause of death - cardiac and respiratory arrest due to an explosion.

19. Farhan Ahmad **Issa**, [REDACTED]

20. Alaa Hassan **Osfour**, [REDACTED]  
[REDACTED] died 14 February 2005,  
cause of death - burns due to an explosion.

21. Haitham Khaled **Othman**, [REDACTED]  
[REDACTED] died 15 February  
2005, cause of death - [illegible]... explosion.

**Schedule B**

Below is an alphabetical list of 231 persons<sup>7</sup> intentionally or foreseeably injured as a direct consequence of the public explosion intended to kill the former Prime Minister Rafik HARIRI and who Counts 5 and 9 plead were each and collectively subject to attempted intentional homicide with premeditation.

	Last Name	First Name(s)	Father's Name
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[REDACTED]

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<sup>7</sup> This figure and the listed names are subject to change, as further evidence is gathered.

Case name: *In the matter of El Sayed*

Before: **Appeals Chamber**

Title: **Decision on Partial Appeal by Mr El Sayed of  
Pre-Trial Judge's Decision of 12 May 2011**

Short title: **"El Sayed Decision AC"**





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

## BEFORE THE APPEALS CHAMBER

Case No.: **CH/AC/2011/01**  
Before: **Judge Antonio Cassese, Presiding**  
**Judge Ralph Riachy**  
**Judge Sir David Baragwanath, Judge Rapporteur**  
**Judge Afif Chamsedinne**  
**Judge Kjell Erik Björnberg**  
Registrar: **Mr. Herman von Hebel**  
Date: **19 July 2011**  
Original language: **English**  
Type of document: **Public**  
[Case Name: ***In the matter of El Sayed***]

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### DECISION ON PARTIAL APPEAL BY MR. EL SAYED OF PRE-TRIAL JUDGE'S DECISION OF 12 MAY 2011

---

**Counsel:**

Mr. Akram Azoury

**Office of the Prosecutor:**

Mr. Daniel A. Bellemare, MSM, Q.C.

Mr. Daryl A. Mundis

Mr. Ekkehard Withopf

Mr. David Kinnecome

Ms. Marie-Sophie Poulin

**Head of the Defence Office:**

Mr. François Roux



## HEADNOTE<sup>1</sup>

*The Appellant was detained by the Lebanese authorities for more than three and a half years as part of the investigation into the 2005 assassination of former Prime Minister Rafiq Hariri. Following the establishment of the Special Tribunal for Lebanon, and on the application of the Tribunal's Prosecutor, the Appellant was released without charge by order of the Pre-Trial Judge. He applied to the Tribunal for disclosure of documents in its possession to enable him to bring proceedings before national courts against persons allegedly responsible for false allegations against him. The Appeals Chamber previously upheld a decision of the Pre-Trial Judge that the Appellant has standing to make the application and that the Tribunal has jurisdiction to entertain it. It confirmed the existence of a generally expressed right to such disclosure and remanded the case for further consideration by the Pre-Trial Judge. The Appellant now challenges on appeal the decision of the Pre-Trial Judge that three categories of documents were exempt from disclosure, namely (1) correspondence between the Lebanese authorities and the United Nations International Independent Investigation Commission ("UNIIC" or "Commission"); (2) internal memoranda of the UNIIC; and (3) the notes of investigators.*

*The issues on appeal are:*

*(1) What is the nature of the right of access claimed by Mr. El Sayed to some or all of the investigatory materials in the three categories?*

*(2) Did the Pre-Trial Judge err in categorically excluding these three sets of documents from disclosure to Mr. El Sayed?*

*(3) What relief if any should be ordered?*

*(1) The Appeals Chamber holds that, under international law, the Applicant's claim to the documents is supported by (i) the right of access to justice coupled with (ii) a right of access to information held by a governing authority. However, the streams of authority tending to support a claim to disclosure do not without more give rise to an*

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<sup>1</sup> 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.

*actionable right to information. The claim must first be evaluated against competing interests.*

*In this case such competing interests include the principle of good administration of justice, in particular the need to safeguard the secrecy of an investigation that is still continuing. These competing interests may also include the right to privacy and confidentiality and the need for husbanding finite resources in circumstances where no more is known of the facts than has been disclosed by the Prosecutor. The application should be granted only if necessary to avoid a real risk that, if it is declined, the Applicant will suffer an injustice that clearly outweighs the opposing interests.*

*The fact of long detention, together with the acknowledgement made by the Prosecutor at the end of the period, demonstrate a real possibility that access to information is required in the present case to avoid an injustice, and that the interests in allowing the claim outweigh the costs of that course. But it is permitted only to the extent required to enable the Appellant to pursue remedies before other courts, as he asserted he intended to do in his application to the Tribunal.*

*(2) Although the present application falls outside the literal scope of the Tribunal's Rules of Procedure and Evidence, those Rules are still relevant and guide the Chamber's analysis. Under those Rules, limitations on the right of disclosure include Rule 111, which grants exception from disclosure for:*

*[r]eports, memoranda, or other internal documents prepared by a Party, its assistants or representatives in connection with the investigation or preparation of a case [...]. For purposes of the Prosecutor, this includes reports, memoranda, or other internal documents prepared by the UNHCR or its assistants or representatives in connection with its investigative work.*

*The Rule is confined to what has been created by the Party, its agents and the UNHCR and its agents acting as such. It has no application to statements of witnesses, which are not the Party's work product, but the product of the person interviewed.*

*The Appeals Chamber agrees with the Pre-Trial Judge that categories (1), (2) and (3) generally fall within the scope of Rule 111. But the proper employment of those exclusions depends on the correct classification of individual documents. Proper*

*categorisation depends not on a document's title, but on its content, function, purpose and source.*

*(3) Having sampled in camera examples of the challenged documents, the Appeals Chamber notes possible errors in categorisation. It therefore refers the documents classified under categories 1, 2 and 3 back to the Pre-Trial Judge with directions to ensure their appropriate and expeditious categorisation in the light of its decision.*

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## **LIST OF ABBREVIATIONS**

<b>ECHR</b>	European Court of Human Rights
<b>IACHR</b>	Inter-American Court of Human Rights
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICJ</b>	International Court of Justice
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>RPE</b>	Rules of Procedure and Evidence
<b>SCSL</b>	Special Court for Sierra Leone
<b>STL</b>	Special Tribunal for Lebanon
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNIIC</b>	United Nations International Independent Investigation Commission

## INTRODUCTION

1. The ultimate issue on appeal is whether, in considering the appellant's application for information, the Pre-Trial Judge should have considered individual documents rather than simply endorsing three challenged categories employed by the Prosecutor. We conclude that the approach taken so far is inadequate in the circumstances and therefore allow the appeal. An essential preliminary issue is whether the Special Tribunal for Lebanon ("STL" or "Tribunal") should grant an application for access to documents in its possession, so they may be used by the applicant for the purpose of intended proceedings. If so, on what basis and to what extent? Our answer is "yes", within the constraints outlined in this decision.

2. On 30 August 2005, Jamil El Sayed ("Mr. El Sayed" or "Appellant") was detained in connection with the attack of 14 February 2004 that killed Prime Minister Rafiq Hariri and twenty-two others (the "Hariri case").<sup>2</sup> On 3 September 2005, a Lebanese Investigating Judge issued an arrest warrant for Mr. El Sayed, continuing his detention.<sup>3</sup> That detention did not end until 29 April 2009, nineteen days after the STL assumed authority over him and three others held by the Lebanese authorities in connection with the Hariri case.<sup>4</sup> He was never charged with a crime.

3. On 17 March 2010, Mr. El Sayed applied to the STL for access to investigative materials related to his detention and release. He asserts he will use this material to pursue remedies in national courts.<sup>5</sup> This Chamber on 10 November 2010 confirmed

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2 *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 ("El Sayed Decision of 10 November 2010"), para. 4.

3 *In re: Application of El Sayed*, Submissions on the Jurisdiction of the Pre-Trial Judge to Rule on the Application Dated 17 March 2010 and Whether General Jamil El Sayed Has Standing Before the Special Tribunal for Lebanon, CH/PTJ/2010/01, 12 May 2010 ("Applicant's Submission of 12 May 2010"), paras 10-11.

4 El Sayed Decision of 10 November 2010, *supra* note 2, at paras 5, 7.

5 *Id.* at para. 8. The application is "to obtain the release to General Jamil El Sayed personally and directly of all the evidence related to the crimes committed against him and held exclusively by the Special Tribunal for Lebanon (STL) in order that he shall have an effective and efficacious remedy, by becoming a civil party [*partie civile*] against the perpetrators before the various national courts that are competent in the matter." *In re: Application of El Sayed*, Public redacted version of Memo number 112 Application: Request for release of evidentiary material related to the crimes of libellous denunciations and arbitrary detention, 17 March 2010 ("Application of El Sayed"), at 1 (unofficial translation).

The term "*partie civile*" is not confined to civil litigation, but refers to a particular procedure in civil law

the preliminary decision of the Pre-Trial Judge that the STL has jurisdiction to consider Mr. El Sayed's application and that Mr. El Sayed has standing to bring his application before this Tribunal. It remanded the matter to the Pre-Trial Judge to consider Mr. El Sayed's request on the merits.<sup>6</sup>

4. The Pre-Trial Judge ordered the Prosecutor to disclose to Mr. El Sayed some hundreds of documents.<sup>7</sup> But he determined that under Rule 111 of the STL's Rules of Procedure and Evidence ("Rules" or "RPE") three categories of documents were exempt from disclosure: correspondence between the Lebanese authorities and the United Nations International Independent Investigation Commission ("UNIIC" or "Commission"); internal memoranda of the UNIIC; and the notes of investigators.<sup>8</sup> That Rule is part of a group of rules concerning disclosure. It is reproduced at paragraph 76 below.

5. Mr. El Sayed appealed against these three categorical exclusions.<sup>9</sup> He asks this Chamber to declare that he has a right to documents within these three categories. Although he does not challenge the Pre-Trial Judge's determination that his right to documents is not absolute, he urges that any restrictions must be applied on a document-by-document basis.<sup>10</sup>

6. The Prosecutor did not cross-appeal against the order for partial disclosure. But in order to determine the appeal we must first identify the nature of the right claimed by the Appellant.

7. The issues on appeal are thus:

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countries (including under Lebanese law) where a private person is involved in a criminal trial in order to obtain reparations for a crime committed against him.

6 El Sayed Decision of 10 November 2010, *supra* note 2, at disposition.

7 *In re: Application of El Sayed*, Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, CH/PTJ/2011/08, 12 May 2011 ("El Sayed Decision of 12 May 2011"), disposition.

8 *Id.* at paras 33, 36.

9 *In re: Application of El Sayed*, Partial Appeal of the Pre-Trial Judge's Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed of 12 May 2011, CH/PTJ/2010/01, 20 May 2011 ("Partial Appeal of El Sayed").

10 *Id.* at 8; see also *id.* at paras 9, 16.



- (1) What is the nature of the right of access claimed by Mr. El Sayed to some or all of the investigatory materials in the three categories?
- (2) Did the Pre-Trial Judge err in categorically excluding these three sets of documents from disclosure to Mr. El Sayed?
- (3) What relief if any should be ordered?

## **PROCEDURAL HISTORY**

### **I. The Detention, Release, and Subsequent Application of Mr. El Sayed**

8. According to Mr. El Sayed, his detention on 29 August 2005 was at the request of the UNIIIC.<sup>11</sup> That Commission had been established by the Security Council to assist the Lebanese authorities in their investigation of the Hariri assassination.<sup>12</sup> After four days, on 3 September 2005, Mr. El Sayed was brought before a Lebanese Investigating Judge, who issued an arrest warrant against him.<sup>13</sup> Mr. El Sayed claims, however, that the Investigating Judge did not undertake his own investigation but continued the detention on the basis of the UNIIIC's request.<sup>14</sup> Meanwhile, the UNIIIC allegedly informed Mr. El Sayed on 21 September 2005 that it had concluded its investigation involving him.<sup>15</sup> Mr. El Sayed submitted multiple requests for release to the Lebanese authorities, the UNIIIC, and the UN Security Council over the ensuing months, but his detention continued for more than three and a half years.<sup>16</sup>

9. The STL commenced its operations on 1 March 2009. On 27 March 2009, by order of the Pre-Trial Judge, the STL requested Lebanon to defer to it within

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11 Applicant's Submission of 12 May 2010, *supra* note 3, at para. 9.

12 S/RES/1595 (2005), at para. 1.

13 Applicant's Submission of 12 May 2010, *supra* note 3, at paras 10-11.

14 *Id.* at paras 12-13.

15 *Id.* at para. 14.

16 *Id.* at para. 16.

fourteen days the investigation of the Hariri case.<sup>17</sup> From 10 April 2009 the STL had legal authority over those detained in Lebanon in connection with the Hariri case, including Mr. El Sayed.<sup>18</sup>

10. On 27 April 2009, the Prosecutor informed the Pre-Trial Judge that he had reviewed all material then available to him and had concluded there was insufficient evidence to support an indictment of Mr. El Sayed and the three other detainees. He requested that the Pre-Trial Judge order their immediate release. On the order of the Pre-Trial Judge, the Lebanese authorities released Mr. El Sayed on 29 April 2009.<sup>19</sup>

11. Mr. El Sayed applied to the President of the STL for access to investigative materials related to his detention and release.<sup>20</sup> The President assigned the matter to the Pre-Trial Judge.<sup>21</sup> The Pre-Trial Judge received written and oral submissions from Mr. El Sayed and from the Prosecutor, who opposed the disclosure of investigatory materials.<sup>22</sup>

12. On 17 September 2010, the Pre-Trial Judge ruled that the STL had jurisdiction to consider the application and that Mr. El Sayed had standing to bring the application before the Tribunal.<sup>23</sup> The Pre-Trial Judge also held there to be a right of an accused to access documents in his criminal file, and he concluded this right applied to Mr. El Sayed, despite his release from detention and the absence of any formal charge against him, because the allegations of criminal conduct, even though never formalised, had significant repercussions upon him.<sup>24</sup> The Pre-Trial Judge noted, however, that such right of access to one's criminal file is not absolute and could

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17 *In re: Application of El Sayed*, Order on Conditions of Detention, CH/PRES/2009/01/rev, 21 April 2009, at para. 3.

18 *El Sayed Decision* of 10 November 2010, *supra* note 2, at para. 5.

19 *Id.* at paras 6-7.

20 See *Application of El Sayed*, *supra* note 5.

21 See *In re: Application of El Sayed*, Order Assigning Matter to Pre-Trial Judge, CH/PRES/2010/01, 15 April 2010.

22 *El Sayed Decision* of 10 November 2010, *supra* note 2, at paras 8-13.

23 *In re: Application of El Sayed*, Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed Dated 17 March 2010 and Whether Mr El Sayed Has Standing Before the Tribunal, CH/PTJ/2010/005, 17 September 2010 ("El Sayed Decision of 17 September 2010"), paras 36, 42.

24 *Id.* at paras 43-52.

be limited by well-founded concerns that disclosure could compromise continuing investigations, the safety of third parties (particularly witnesses), and national and international security.<sup>25</sup>

## **II. The Appeal on Jurisdiction and Standing**

13. The Prosecutor appealed against the Pre-Trial Judge's preliminary decision.<sup>26</sup> After considering written submissions from the Prosecutor and Mr. El Sayed, this Chamber held that the STL does have jurisdiction over Mr. El Sayed's request and that Mr. El Sayed has standing to bring his application before the Tribunal.<sup>27</sup> We accepted that in general terms there is a right of access to one's criminal file, which in a particular case may be to all, part, or none of it.<sup>28</sup> But we did not decide specifically what the nature and extent of such right might be in respect of information held by the STL's Prosecutor. We remanded the matter to the Pre-Trial Judge to consider the application on its merits.<sup>29</sup>

14. The Pre-Trial Judge received submissions from Mr. El Sayed and the Prosecutor, and he held a public hearing at which Mr. El Sayed, the Prosecutor, and the Head of the Defence Office were heard.<sup>30</sup> The Pre-Trial Judge also received *ex parte* from the Prosecutor all the materials identified by the Prosecutor as related to the detention of Mr. El Sayed in connection with the Hariri case. In addition, the Prosecutor submitted *ex parte* an inventory of that material, identifying which materials he believed could be fully disclosed to Mr. El Sayed and, for the rest, his grounds for withholding all or part of each document from Mr. El Sayed.<sup>31</sup> The

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<sup>25</sup> *Id.* at paras 53-54.

<sup>26</sup> See *In re: Application of El Sayed*, Appeal of the "Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed Dated 17 March 2010 and Whether Mr El Sayed Has Standing Before the Tribunal" and Urgent Request for Suspensive Effect, OTP/AC/2010/01, 28 September 2010.

<sup>27</sup> El Sayed Decision of 10 November 2010, *supra* note 2, at paras 19-33, 57, & 65.

<sup>28</sup> *Id.* at para. 64.

<sup>29</sup> *Id.* at disposition.

<sup>30</sup> El Sayed Decision of 12 May 2011, *supra* note 7, at para. 6.

<sup>31</sup> *Id.* at paras 7-12.

Pre-Trial Judge also held a closed and *ex parte* hearing with the Prosecutor to seek clarifications regarding some of these documents.<sup>32</sup>

### III. The Pre-Trial Judge's Decision of 12 May 2011

15. On 12 May 2011, the Pre-Trial Judge issued a decision ordering the Prosecutor to disclose some but not all the documents originally identified by the Prosecutor as related to the investigation and detention of Mr. El Sayed.<sup>33</sup> The Judge accepted the Prosecutor's classification of these documents into seven categories: (1) correspondence between the UNHCR and the Lebanese authorities; (2) internal memoranda; (3) investigators' notes; (4) witness statements and transcripts of witness and suspect interviews; (5) documents originating from Mr. El Sayed or his counsel; (6) Mr. El Sayed's own statements and transcripts; and (7) other documents.<sup>34</sup>

16. The Judge held that documents within categories (4), (5), and (6) should generally be disclosed to Mr. El Sayed.<sup>35</sup> He also held that some documents in category (7) should be disclosed.<sup>36</sup> As for categories (1), (2), and (3), the Judge concluded that those documents were inherently confidential, were exempt from disclosure under Rule 111, and also did not form part of Mr. El Sayed's criminal file. He therefore held that the Prosecutor was not obligated to disclose the documents in categories (1), (2), and (3). The Pre-Trial Judge noted, however, that the Prosecutor was willing to disclose voluntarily a few documents within these categories.<sup>37</sup>

17. Although the Prosecutor has made further submissions to the Pre-Trial Judge regarding documents within categories (4), (5), (6) and (7), and although the Pre-Trial Judge continues to oversee the disclosure of documents in those categories, it is unnecessary for us to relate the details of those continuing proceedings as they do not fall within the scope of the present and narrowly framed "Partial appeal" against the

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32 See STL Media Advisory, 19 April 2011, <http://www.stl-tsl.org/sid/261>.

33 See El Sayed Decision of 12 May 2011, *supra* note 7, at disposition.

34 *Id.* at para. 29.

35 *Id.* at paras 40, 47.

36 *Id.* at para. 54.

37 *Id.* at paras 33-38.

Pre-Trial Judge's decision of 12 May 2011. Mr. El Sayed asks this Chamber to reverse that decision only to the extent it held categories (1), (2), and (3) generally exempt from disclosure. He seeks a ruling that he has a right of access to documents within these three categories, subject to the other limits (confidentiality of investigations, safety of witnesses, and national or international security) identified by the Pre-Trial Judge.<sup>38</sup> We have noted that the Prosecutor did not cross-appeal against the decision.

## **PRELIMINARY CONSIDERATIONS**

### **I. Admissibility of the Appeal**

18. In our decision of 10 November 2010 we recorded that our jurisdiction to consider that appeal inhered in the nature of our obligation to deal with a situation, not foreseen by the Rules, in which it is alleged that a jurisdictional error has been committed and injustice might result if there were such error and it were left uncorrected.<sup>39</sup> The Tribunal has sole access to the relevant documents and it alone can resolve issues of access to them.

19. In the present circumstances, we are asked to consider a narrow question of law: whether and on what basis Mr. El Sayed is entitled to access certain categories of documents. For reasons later developed the current proceedings are almost entirely outside the literal scope of our Rules, which are directed to criminal trials.<sup>40</sup> But just as our jurisdiction over the present application is to be inferred from our Statute, so its procedures are guided by analogy from the Rules. Rule 126 requires most interlocutory appeals (meaning any appeal before full and final judgment) to first be certified by the Pre-Trial Judge or Trial Chamber. This is not in fact an interlocutory appeal because it potentially deals finally with certain parts of the application. And so the Pre-Trial Judge has not certified the present appeal as "involv[ing] an issue that would significantly affect the fair and expeditious conduct of the proceedings

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38 Partial Appeal of El Sayed, *supra* note 9, at 8.

39 El Sayed Decision of 10 November 2010, *supra* note 2, at para. 54.

40 See below paras 27-30.

or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.”<sup>41</sup>

20. But because the appeal does not deal with the whole of Mr. El Sayed’s application, we would normally exercise discretion, by analogy with Rule 126, to defer consideration of the appeal until all aspects of disclosure have been determined by the Pre-Trial Judge. Nevertheless we have decided to deal with it now. Although the current proceedings fall outside the literal scope of the Rules, we wish to maintain focus on the fairness and efficiency of proceedings. In addition, the present appeal would satisfy the certification standard if certification had been sought. The categorical exclusion of three sets of documents at this stage might wrongly remove certain documents from the subsequent levels of review currently being conducted by the Pre-Trial Judge. Further, it may take months for the Pre-Trial Judge to conclude those additional levels of review and for the disclosure process to fully conclude. After all that time has passed, if this Chamber then found that certain categories of documents were wrongly withheld at the first stage of review, much of the process would have to be repeated, causing additional delay. Given that far more than a year has already passed since Mr. El Sayed first submitted his request for documents to this Tribunal, further delay is unjustified, particularly as this narrow legal issue can be resolved discretely without distracting the Pre-Trial Judge from his task of completing the disclosure process. We are satisfied that these reasons render the present circumstances exceptional. To ensure a fair and expeditious resolution of the dispute requires us to deal with the merits of the appeal at this stage.

21. However we emphasise that, because we are not seized of any factual appeal, we make no factual findings in this judgment. In particular we make no comment on whether or not Mr. El Sayed’s contemplated claim could have merit. Our present task is simply to review the legality of the approach taken by the Pre-Trial Judge to the three disputed categories of documents. We have the file of the Pre-Trial Judge and have examined certain of the documents for which the Prosecutor has claimed confidentiality. Our comments upon those documents are not to be read as entailing any adjudication upon their status but as provisional observations, made to assist the

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41 Rule 126(C) STL RPE.

parties and the Pre-Trial Judge to understand our reasons for referring the present issues back to him for reconsideration and to make necessary determinations.

## II. Standard of Review

22. The Appeals Chamber will only reverse a decision if the Pre-Trial Judge or Trial Chamber committed a specific error of law or fact invalidating the decision,<sup>42</sup> or weighed relevant considerations or irrelevant considerations in an unreasonable manner. These criteria are the same used and well-established by the Appeals Chambers of both the International Criminal Tribunal for the former Yugoslavia (“ICTY”)<sup>43</sup> and the International Criminal Tribunal for Rwanda (“ICTR”).<sup>44</sup>

## III. Submissions on Appeal

23. In his Notice of Partial Appeal<sup>45</sup> the Appellant contended that the decision of 12 May 2011:

- (1) wrongly limited the right of access recognised in the prior decisions of the Pre-Trial Judge and of this Chamber;<sup>46</sup>
- (2) misapplied Rule 111 of the RPE;<sup>47</sup>

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42 See Article 26 STLSt; Rule 176 STL RPE.

43 See, e.g., ICTY, *Stakić*, Appeal Judgment, IT-97-24-A, 22 March 2006, para. 7; *Kvočka et al.*, Appeal Judgment, IT-98-30/1-A, 28 February 2005, para. 14; *Vasiljević*, Appeal Judgment, IT-98-32-A, 25 February 2004, paras 4-12; *Kunarac et al.*, Appeal Judgment, IT-96-23&IT-96-23/1-A, 12 June 2002, paras 35-48; *Kupreškić et al.*, Appeal Judgment, IT-95-16-A, 23 October 2001, para. 29; *Mucić et al.*, Appeal Judgment, IT-96-21-A, 20 February 2001, paras 434-435; *Furundžija*, Appeal Judgment, IT-95-17/1-A, 21 July 2000, paras 34-40; *Tadić*, Appeal Judgment, IT-94-1-A, 15 July 1999, para. 64; Article 25 ICTYSt.

44 See ICTR, *Kajelijeli*, Appeal Judgment, ICTR-98-44A-A, 23 May 2005, para. 5; *Semanza*, Appeal Judgment, ICTR-97-20-A, 20 May 2005, paras 7-8; *Musema*, Appeal Judgment, ICTR-96-13-A, 16 November 2001, para. 15; *Akayesu*, Appeal Judgment, ICTR-96-4-A, 1 June 2001, para. 178; *Kayishema*, Appeal Judgment, ICTR-95-1-A, 1 June 2001, para. 177; *Ruzindana*, Appeal Judgment, ICTR-95-1-A, 1 June 2001, para. 320; Article 24 ICTRSt.

45 See Partial Appeal of El Sayed, *supra* note 9.

46 *Id.* at para. 9.

47 *Id.* at paras 12-14.

- (3) wrongly failed to address each document individually.<sup>48</sup>
24. The Prosecutor submitted that the decision:
- (1) properly applied the established jurisprudence as to disclosure;<sup>49</sup>
  - (2) correctly applied Rule 111;<sup>50</sup>
  - (3) was not required to adopt a document-by-document approach but was right to deal with the documents by categories;<sup>51</sup>
  - (4) characterised correctly the relationship between the UNHCR and the Lebanese authorities.<sup>52</sup>
25. He further submitted that the Appellant was engaged in a fishing expedition.<sup>53</sup>
26. The Appellant submitted in reply<sup>54</sup> that the Prosecutor's submissions:
- (1) distorted the effect of the decision of 17 December 2010 by wrongly treating it as limited to the rights of an accused person rather than as extensive;<sup>55</sup>
  - (2) erred in suggesting that the Pre-Trial Judge has separately examined the challenged documents;<sup>56</sup>

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48 *Id.* at paras 16-18.

49 Prosecution's Response to "Partial Appeal of the Pre-Trial Judge's Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed of 12 May 2011", OTP/AC/2011/01, 10 June 2011, at para. 17.

50 *Id.* at paras 8-24

51 *Id.* at paras 25-26.

52 *Id.* at n.32

53 *Id.* at para. 23.

54 Réplique à "Prosecution's Response to 'Partial Appeal of the Pre-Trial Judge's Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed of 12 May 2011'", OTP/AC/2011/01, 24 June 2011.

55 *Id.* at paras 15-19.

56 *Id.* at paras 20-25.



(3) wrongly suggested that the Appellant was engaged in a fishing expedition and in that misplaced the burden of proof;<sup>57</sup>

(4) erred in contending for confidentiality in respect of the correspondence between the UNIIC and the Lebanese authorities.<sup>58</sup>

#### IV. Nature of the Application

27. In our decision of 10 November 2010, we identified as the Tribunal's primary jurisdiction the prosecution of the perpetrators of the attack on the former Prime Minister Rafiq Hariri.<sup>59</sup> But we concluded it also possesses an ancillary inherent jurisdiction to entertain the present application.<sup>60</sup> As this is not a criminal matter falling under our primary mandate, we pause to explain the framework under which we analyse this application.

28. Mr. El Sayed's application arises from arrest and lengthy detention, related to suspicion of his involvement in a crime, and which resulted in substantial consequences for Mr. El Sayed. We accept, however, the Prosecutor's submission that the present application is not a criminal proceeding, but a civil or administrative one to secure discovery for the purpose of other judicial proceedings.<sup>61</sup> In sum, we are considering a civil or administrative application that arises from and could possibly bear further on a continuing criminal process.

29. Regardless of the characterisation of the application, what is required of judges in exercising criminal jurisdiction must apply equally in other forms of adjudication they undertake, *mutatis mutandis*.

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<sup>57</sup> *Id.* at paras 27-33.

<sup>58</sup> *Id.* at paras 34-48.

<sup>59</sup> El Sayed Decision of 10 November 2010, *supra* note 2, at para. 51.

<sup>60</sup> *Id.* at paras 53-54.

<sup>61</sup> We endorse the New Zealand Supreme Court's classification as civil of a similar application made by a television company, to search the criminal record of the trial of French accused who had been convicted of bombing the *Rainbow Warrior* in Auckland Harbour. See *Mafart and Prieur v. Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18, paras 28-40.

30. Thus we are guided in procedural matters, among other things, by the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious outcome. This direction is stated in Article 28 of our Statute<sup>62</sup> and is repeated at Rule 3(A) of our Rules of Procedure and Evidence.<sup>63</sup> The Prosecutor submits that, because there is currently no live criminal proceeding against Mr. El Sayed, the Tribunal's disclosure rules are of no relevance to this case. We agree that the Rules focus on the Tribunal's express criminal jurisdiction rather than on its inherent jurisdiction to deal with the present application and appeal. But the Rules give effect to the object and purpose of our Statute and are thus still germane to the exercise of the Tribunal's inherent jurisdiction. We therefore look to the Rules for guidance on how to apply the relevant principles in the matter before us. Indeed, insofar as the Rules protect information against disclosure in criminal proceedings, despite the criminal penalties at stake for the defendant, they must *a fortiori* protect that information in civil proceedings where the stakes are almost inevitably lower.

31. Finally, in our decision of 16 February 2011, we held that an accused is entitled to the application of whichever of the law of Lebanon or international criminal law accords him better protection.<sup>64</sup> We adopt that principle by analogy in the present case.

32. We turn to apply these considerations to the three questions raised by Mr. El Sayed's appeal, mentioned at paragraph 7.

62 Article 28(2) of the STL Statute states that, when adopting Rules of Procedure and Evidence, 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."

63 Rule 3(A) STL RPE provides:

The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights[, (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.

64 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I, 16 February 2011 ("Interlocutory Decision on the Applicable Law"), para. 211.

## DISCUSSION

### **I. Is Mr. El-Sayed entitled to documents in the possession of the Tribunal?**

33. In our decision of 10 November 2010, we recognized the existence of a general right to access one's criminal file, which it was then unnecessary to define.<sup>65</sup> The Prosecutor has not cross-appealed from the decision of the Pre-Trial Judge of 12 May 2011 as to the nature of that right. There being no pleaded issue on the point, and since we agree with the general approach of the Pre-Trial Judge, we have not called for further submissions or directed oral argument to assist our elaboration upon the principles that in this instance give rise to a right to information. In his 17 September 2010 decision, the Pre-Trial Judge compared Mr. El-Sayed's request to that of a criminal defendant seeking access to his criminal file. We rely on broader principles of international law to reach the same result.

34. We consider Mr. El Sayed's request for information under both international and Lebanese law. We determine that, taking into account Mr. El Sayed's legitimate interest in accessing these documents, namely their use in a court of law to bring claims against those allegedly responsible for his unlawful detention, Mr. El Sayed has a valid claim for documents. We separately consider whether, and how, that claim should be vindicated under the circumstances of this case. Upon a balancing of factors, we conclude that with certain exceptions Mr. El Sayed has a right to documents held by the Tribunal. But for the reasons later given we find it necessary to refer the file back to the Pre-Trial Judge for further consideration.

### **A. International Law**

35. Overarching the work of this Tribunal is the principle of the rule of law.<sup>66</sup> At base the rule of law entails the recognition of essential human rights and just

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<sup>65</sup> El Sayed Decision of 10 November 2010, *supra* note 2, at para. 64.

<sup>66</sup> See P. Sales, "Three Challenges to the Rule of Law in the Modern English Legal System", in R. Ekins (ed.), *Modern Challenges to the Rule of Law* (Wellington: LexisNexis, 2011), at 190; see also, e.g., P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467; M.H. Kramer, *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007), at 101-186; T. Bingham, *The Rule of Law* (London: Allen Lane, 2010); P. Sales, "The General and the Particular: Parliament

procedures for their enforcement. Other critical elements include fair trial guarantees and the dignity of the individual vis-à-vis the state.

36. Thus our Statute states that “[t]he accused shall be entitled to a fair and public hearing,”<sup>67</sup> and it expressly obligates the Tribunal to safeguard specific rights for both accused individuals<sup>68</sup> and suspects questioned by the Prosecutor.<sup>69</sup> Our Statute further requires that the judges be independent in the performance of their functions and of high moral character, impartiality and integrity, with extensive judicial experience.<sup>70</sup>

37. The rule of law also imports the legal equality of all individuals,<sup>71</sup> which in turn limits the authority of the State to what is necessary for the protection of the people. In the past the citizen was treated as subordinate to the sovereign, as was expressed in the old notion “the king can do no wrong”.<sup>72</sup> That proposition is progressively

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and the Courts under the Scheme of the European Convention on Human Rights”, in M. Andenas & D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (Oxford: Oxford University Press, 2009), at 163-167; L. Fuller, *The Morality of Law: Revised Edition* (New Haven: Yale University Press, 1969); J. Raz, “The Rule of Law and Its Virtue”, 93 *Law Quarterly Review* (1977) 195.

67 Article 16(2) STLSt.

68 Article 16(4) STLSt:

In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
- (b) To have adequate time and facilities for the preparation of his or her defence and to communicate without hindrance with counsel of his or her own choosing;
- (c) To be tried without undue delay; ...
- (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; [and]
- (f) To examine all evidence to be used against him or her during the trial in accordance with the Rules of Procedure and Evidence of the Special Tribunal[.]

69 Suspects questioned by the Prosecutor have the right not to incriminate themselves; to be informed that there are grounds to believe they committed a crime within the jurisdiction of the Tribunal; to remain silent; to have legal assistance, paid for by the Tribunal if necessary; to have an interpreter; and to be questioned in the presence of an attorney. Article 15 STLSt.

70 Article 9 STLSt.

71 In Italy the Constitutional Court has applied the principle of equality in order to reject Prime Minister Berlusconi’s claim to be the only citizen exempt from the criminal law: Italy, Constitutional Court, *Constitutionality of “Lodo Alfano”*, Judgment n. 262, 19 October 2009.

72 Albeit limited by the King’s obligation to protect his subjects, reciprocal to their duty of fealty to the Crown: U.K., *Calvin’s Case* (1608) 7 Coke’s Reports 1a, 77 ER 377.

being reversed as the true significance of the 1948 Universal Declaration of Human Rights and the two UN Covenants of 1966 on human rights as well as all the other post-War conventions and their call to uphold inherent human dignity is increasingly appreciated. Certain state privileges may remain justifiable as needed to perform legitimate functions in the public interest, subject however to full compliance with the legal imperatives on human rights laid down in customary international law and all the relevant treaties. There is increasing recognition that citizens are not to be treated as inferior to the state but must be fully respected in their right to human dignity and equality. The rise of democracy, with the ascendancy of the citizen, has converted state agencies, including politicians and judges, into servants rather than masters of the people.<sup>73</sup> Their powers, including the authorisation of use of force to detain, are nowadays conferred in order to be performed *on behalf of* the citizenry and not as its master.<sup>74</sup>

38. When considering what information should be the subject of a court order for disclosure, “*The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.*”<sup>75</sup> It is the court’s task to devise procedures that will achieve that result by properly balancing the competing claims of a litigant to full disclosure and of the state to public interest immunity.<sup>76</sup>

39. In the context of the overarching principle of the rule of law, we note two streams of international jurisprudence that would support Mr. El Sayed’s present

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73 Among other developments, this is demonstrated by the higher standards of conduct expected of public sector parties in litigation. See, e.g., U.K., *R (Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 [50], [2002] All ER (D) 450 (Laws LJ): “[T]here is – of course – a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide.”

74 See generally J. Waldron, “Are Sovereigns Entitled to the Benefit of the International Rule of Law?”, 22(2) *European Journal of International Law* (2011) 315, 316-317. Waldron considers that the Rule of Law comprises, among other things, “a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences or ideology; [... and] a principle of legal equality, which ensures that the law is the same for everyone, that everyone has access to the courts, and that no one is above the law.”

75 U.K., *Tweed v. Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650 [3] (Lord Bingham) (emphasis added).

76 See New Zealand, *CREEDNZ Inc. v. Governor-General* [1981] 1 NZLR 172, 182 (CA); U.K., *R (Al-Sweady) v. Secretary of State for Defence (No 2)* [2009] EWHC 2387 (Admin).

claim for access to documents: the right of access to justice, and what has been called the “right” to information held by a public authority.

### **1. Access to Justice**

40. That the claim pursued by the present application is related to the right of access to justice was emphasised by the President in the reasons for his Order of 15 April 2010 assigning Mr. El Sayed’s application to the Pre-Trial Judge. As he observed:

The right of access to justice is regarded by the whole international community as essential and indeed crucial to any democratic society. It is therefore warranted to hold that the customary rule prescribing it has acquired the status of a peremptory norm (*jus cogens*). Such status denotes that an international norm has achieved such prominence in the international community that States and other international legal subjects may not derogate from it either in their international dealings or in their own national legislation – unless such derogations are strictly allowed by the norm itself.<sup>77</sup>

41. In support of this observation, the President referenced the major international human rights instruments as well as jurisprudence from regional human rights courts.<sup>78</sup>

42. The right of access to justice, to be meaningful, must extend to the means to secure a proper remedy. Here, to withhold information from Mr. El Sayed could block his effective access to justice before domestic courts.

43. So the courts will strive to ensure that the right to justice receives practical effect. An example of their approach is the form of legal claim, recognised in the common law of England and now evolving widely, of the equitable bill of discovery. When a person has been harmed by an unidentified wrongdoer, the bill of discovery allows that person to seek identifying information about the wrongdoer from third

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<sup>77</sup> Order Assigning Matter to Pre-Trial Judge, *supra* note 21, at para. 29.

<sup>78</sup> *Id.* at paras 29-33.

parties who are implicated, however innocently, in the harmful conduct.<sup>79</sup> It has been applied in recent times in *R (on the application of Binyan Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*.<sup>80</sup>

44. Whether recognised by international human rights case law or that of domestic courts,<sup>81</sup> the effective right of access to justice is fundamental. As we must uphold the highest international standards of justice, this right of access must inform our consideration of Mr. El Sayed's claim. The right of access does not however justify discovery of documents for purposes other than those asserted by Mr. El Sayed, namely the pursuit of legal claims against the individuals allegedly responsible for his detention.

## 2. Freedom of Information

45. The principle of entitlement to access information held by a public authority is now well-advanced internationally.<sup>82</sup> In strict legal terms it is a "claim", to be evaluated against competing claims, rather than an actionable "legal right"; it becomes

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79 U.K., *Norwich Pharmacal v. Customs & Excise Commissioners* [1974] 1 AC 133; U.K., *R (on the application of Binyan Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579 and 2653, on appeal [2010] EWCA Civ 65 & 158, [2010] 3 WLR 554; Canada, *Glaxo Wellcome PLC v. The Minister of National Revenue* [1998] 4 FC 439; R.F. Barron, "Existence and Nature of Cause of Action for Equitable Bill of Discovery", 37 ALR 5th 645 (1996); U.S., *Pressed Steel Car Co. v. Union Pacific Railroad Co.*, 240 F. 135 (S.D.N.Y. 1917) (per Learned Hand, J); U.S., *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933).

80 U.K., *R (on the application of Binyan Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579 and 2653, on appeal [2010] EWCA Civ 65 & 158, [2010] 3 WLR 554. There, the applicant faced capital charges in the United States and sought information from the U.K. government to assist in his defence. The English Divisional Court applied the bill of discovery procedure to require the U.K. government to disclose to assist his defence confidential information concerning its implication in torture employed upon him by U.S. personnel seeking admissions of involvement in terrorism.

81 In addition to the common law bill of discovery, see the domestic case law cited in the President's Order Assigning Matter to Pre-Trial Judge, *supra* note 21, at para. 27.

82 "FOI is now becoming widely recognized in international law. Numerous treaties, agreements and statements by international and regional bodies oblige or encourage governments to adopt laws. Cases are starting to emerge in international forums. Nearly 70 countries around the world have now adopted comprehensive Freedom of Information Acts to facilitate access to records held by government bodies and another fifty have pending efforts. [...] About half of the countries that have a constitutional right have adopted a national FOI law." D. Banisar, "Freedom of Information Around the World 2006" (2008), at 6, 17, available at [http://www.freedominfo.org/documents/global\\_survey2006.pdf](http://www.freedominfo.org/documents/global_survey2006.pdf). See also surveys collected below at note 88 and T. Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd edn. (Paris: United Nations Educational Scientific and Cultural Organization, 2008), at 3.

a legal right only when the court accepts that the claim is legally enforceable. But, since in ordinary parlance it is normally if more loosely called a “right”, we use the term “right” to describe such claim. So does Article 19 of the Universal Declaration of Human Rights (“UDHR”), which provides: “Everyone has the right to freedom of opinion and expression”, which includes “freedom [...] to seek, receive and impart information and ideas [...]”. Article 19(2) of the 1966 United Nations International Covenant on Civil and Political Rights (“ICCPR”) provides that freedom of expression “shall include freedom to *seek, receive and impart information* and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, or through any other media of his choice.” Likewise, the Arab Charter of Human Rights (2004), which came into effect in 2008, states in Article 32:

1 The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.

2 Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.<sup>83</sup>

46. The Commission established under the African Charter on Human and People’s Rights adopted in 2002 the Declaration of Principles of Freedom of Expression in Africa which provides for both freedom of expression<sup>84</sup> and freedom of information.<sup>85</sup> Article 10(1) of the 1950 European Convention on Human Rights

83 It has been signed by Lebanon, Algeria, Bahrain, Egypt, Libya, Jordan, Kuwait, Morocco, Palestine, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen. It has been ratified by Algeria, Bahrain, Libya, Jordan, Palestine, Qatar, Saudi Arabia, Syria, the United Arab Emirates and Yemen.

84 Article I of the Declaration provides:

1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.

2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

85 Article IV of the Declaration provides:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.



provides that the right to freedom of expression “shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” And Article 13 of the Organisation of American States’ American Convention on Human Rights has been held by the Inter-American Court of Human Rights to establish a broad freedom of information right, subject to appropriate restrictions.<sup>86</sup>

47. Sweden was the first state to enact freedom of information legislation in 1766; that right to information is currently enshrined in “Regeringsformen”, the Swedish Instrument of Government, which is part of the Swedish Constitution.<sup>87</sup> Today 115 states have adopted some form of freedom of information principle by either constitutional provisions, statute or regulations.<sup>88</sup> These states are representative,

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2. The right to information shall be guaranteed by law in accordance with the following principles:  
➤ everyone has the right to access information held by public bodies[...]

86 See IACHR, *Claude-Reyes v. Chile*, Series C, No. 151 (19 September 2006), para. 77.

87 Article 1 of “Regeringsformen” (“Instrument of Government”), creates the starting point not only for freedom of information in general terms, but also for the basic right for all citizens of access to all material kept by all public organs. Basically, all such material must be made available and disclosed when asked for. However, this right is not without exceptions. Under certain general conditions set out in the Constitution, this right might be restricted by legislation taken by the parliament. The basic law on those restrictions is “Offentlighets- och sekretesslagen”, the Act on Publicity and Secrecy, of 2009.

The restrictions on disclosure in Offentlighets- och sekretesslagen are based on the different kinds of interest that might be harmed or damaged in case of disclosure. This may include the risk of endangering investigation of crimes and the protection of personal information on individuals.

A party, not only in court cases but also in other kinds of cases before public organs, is basically entitled to have access to all material in the case, although in very special circumstances there may be certain restrictions (see Chapter 18 Article 1). If the criminal investigation is closed without a trial, a former suspect may be regarded as a party and as entitled to take part of information in the investigation (Regeringsrätten – The Swedish Supreme Administrative Court decision 2001-06-07 in case 2808-00, published in RÅ 2001 ref. 27). In short, the case was as follows. On basis of an allegation the police started a preliminary investigation on economic crime against a person, T.K. However, the prosecutor decided not to conduct a formal criminal investigation against T.K. The allegation of the crime originated from an ongoing civil case in which T.K. was involved. T.K. claimed that he needed to have access to the material the police had gathered in order to be able to guard his rights in ongoing and forthcoming civil processes. The Supreme Administrative Court noted that the material dealt with by the police and the prosecutor constituted a case in the meaning of the law and that T.K. should be regarded as a party in this case. Thus he had the qualified right under the law to get access to the material in question. Referring to the connection between the closed criminal investigation and the ongoing civil process and from the resulting need to get access to the material, the Court found that he had motive strong enough to support his claim for access to the material.

88 A collection of sources suggest there are up to 115 countries with national laws, decrees, or constitutional provisions recognizing freedom of information, while another twenty-two have draft laws in progress. See Banisar, “Freedom of Information Around the World”, *supra* note 82; Open Society Justice Initiative, “Transparency & Silence: a Survey of Access to Information Laws and Practices in Fourteen Countries” (2006), *available at*

among others, of civil and common law and Islamic traditions.<sup>89</sup> Additional states have draft legislation on freedom of information which is currently within the legislative process.

48. However, the right to information may need to be reconciled with other interests, such as the principle of good administration of justice, in particular the need to safeguard the secrecy of an investigation. These other interests may also include the right to confidentiality and to privacy, also laid down in the ICCPR at Article 17 (1), which provides that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” Whenever there may arise a conflict among these interests, it falls to courts to strike a balance between them, in light of the general principles of international law on human rights.

49. The international sea-change is of such dimensions as to demand recognition that freedom of information has become a general principle of law. Its justification is summarised in the Swedish Instrument of Government and was spelt out by the New Zealand Committee on Official Information, which concluded that “*It rests on the democratic principles of encouraging participation in public affairs and ensuring the accountability of those in office; it also derives from concern for the interests*

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[http://www.soros.org/initiatives/justice/focus/foi/articles\\_publications/publications/transparency\\_20060928](http://www.soros.org/initiatives/justice/focus/foi/articles_publications/publications/transparency_20060928); D. Banisar, “Legal Protections and Barriers on the Right to Information, State Secrets and Protection of Sources in OSCE Participating States” (May 2007), available at <https://www.privacyinternational.org/foi/OSCE-access-analysis.pdf> (study commissioned by the Representative of the Freedom of the Media for the Organization for Security and Cooperation in Europe); R. Vleugels, “Overview of all FOI Laws” (2010), <http://right2info.org/resources/publications/Fringe%20Special%20-%20Overview%20FOIA%20-%20sep%2020%202010.pdf>; Right2Info, Constitutional Provisions, Laws and Regulations Relevant to the Right of Information, <http://right2info.org/laws> (last visited July 14, 2011). In addition to the national laws, decrees and constitutional provisions collected by these sources, see Cameroon, Const. art. 9 sec. 1 & art. 19; Cape Verde, Const. arts. 20 & 43; Dem. Rep. Congo, Const. art. 24; Congo, Const. art. 19; El Salvador, Ley de Acceso a la Información Pública, Decreto N. 534 (Dec. 2010); Eritrea, Const. art. 19 sec. 3; Ghana, Const. art. 21 sec. 1(f); Guinea-Bissau, Const. art. 43; Kazakhstan, Const. art. 18 sec. 3 & art. 20 sec. 2; Kenya, Const. ch. 5 para. 79; Madagascar, Const. art. 11; Malta, Freedom of Information Act, Ch. 496 (Act XVI 2008); Mongolia, Const. art. 16 sec. 17; Nepal, Const. art. 27; Nicaragua, Const. arts. 66 & 67; Rwanda, Const. art. 34; St. Vincent and the Grenadines, Freedom of Information Act (Act No. 27 of 2003); Seychelles, Const. art. 28; Venezuela, Const. art. 28.

89 See the broad geographic range of countries surveyed in sources cited in notes 82 and 88 above.

of individuals.”<sup>90</sup> Thus the evolution and application of freedom of information as a general principle of international law should occur on the basis that:

[...] the *presumption of non-disclosure is no longer helpful, or indeed valid*  
[...] *the presumption henceforth should be that information is to be made available unless there is good reason to withhold it.*<sup>91</sup>

### 3. Competing Interests

50. Under neither rubric (access to justice or freedom of information) is the right to obtain information from public authorities absolute. Limiting the rights to information under both of these streams is the public interest in confidentiality of certain classes of information.<sup>92</sup> For the principle of freedom of information in particular, there is a need to balance the legitimate and well-founded interests of the state as a whole; of individuals and organisations (including those of privacy); and of effective government and administration. That is why:

[i]n no country where access to official information has become an issue has the case been made for complete openness. Few dispute that there are good reasons for withholding some information and for protecting it.<sup>93</sup>

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90 New Zealand, Committee on Official Information, *Towards Open Government 1: General Report* (Wellington: 1980) (“*Towards Open Government*”), para. 20 (emphasis added).

91 *Id.* at paras 54-55 (emphasis in original).

92 See above paragraph 48. But an accused individual’s right of fair trial trumps all other rights and if, despite whatever safeguards may be available, the withholding of information would render a trial unfair, the accused must be discharged. Rule 116(C) STL RPE; U.K., *R v. A (No. 2)* [2001] UKHL 25, [2002] 1 AC 45 [38] (Steyn, LJ); S. Stapleton, “Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation”, 31 *N.Y.U. Journal of International Law & Policy* (1999) 535, at 568; cf. ECHR, *Chahal v. United Kingdom*, 15 November 1996, paras 31-32, Reports of Judgments and Decisions, 1996-V.

93 *Towards Open Government*, *supra* note 90, at para. 33.

In both contexts, in order to do justice both to the individual and to the wider community, the law must devise procedures that will protect certain classes of information for legitimate public interest reasons.<sup>94</sup>

51. Similarly, any claim Mr. El Sayed has to information held by this Tribunal must be properly weighed against well-founded contrary interests that may be asserted by the Prosecution on behalf of the larger community. It must also be subject to the condition that the use of information obtained on disclosure be limited to the asserted purposes of Mr. El Sayed's claim, which establish a legitimate interest in the documents.

### ***B. The Law of Lebanon***

52. We have noted that the Pre-Trial Judge relied upon an accused person's entitlement to access his criminal file or *dossier* to conduct his defence. He reasoned that Mr. El Sayed should have had access to the file (minus materials which should remain confidential); and that such entitlement survived his release from detention. An opposing argument is that, under the law of Lebanon, he never acquired such right of access, which is triggered only on indictment or discharge.

53. The Lebanese courts have to date construed the Lebanese Code of criminal procedure as heavily restricting a suspect's access to the criminal file during investigation, and allowing full access at the trial stage to an accused. A general principle has been applied to the investigation phase: that of confidentiality or secrecy,<sup>95</sup> which entails exempting from disclosure all investigative material. In general, access to the file has been given only once the suspect is discharged (at the end of the investigation)<sup>96</sup> or at the trial stage and not before.

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94 See generally D. Feldman, "Disclosure of Information, Torture and the 'Special Relationship'", 69(3) *Cambridge Law Journal* (2010) 430.

95 Article 53 of the Lebanese Code of criminal procedure provides: "The investigation shall remain confidential until such time as the case is referred to the trial court, except for matters pertaining to the indictment [sic] decision. Anyone who breaches the confidentiality of the investigation shall be liable to prosecution before the Single Judge in whose area of jurisdiction the act complained of occurred; he shall be punishable by imprisonment of between one month and one year and by a fine of between one hundred thousand and one million Lebanese pounds or by either of these two penalties." An English version of the Lebanese Code of criminal procedure can be found on the Tribunal's website (see <http://www.stl-tsl.org/sid/49>).

96 Article 122 of the Code of criminal procedure provides that: "If the Investigating Judge decides to stay the

54. Provisions describing the access to the criminal file are found throughout the Lebanese Code of criminal procedure. At the investigation phase, Article 76 of the Code requires that the defendant be informed of the charges against him, meaning that the Investigating Judge must summarise the facts and inform the defendant of the evidence in his possession or of the suspicions against him.<sup>97</sup> If the defendant requests counsel, Article 78 of the Code requires that, before the defendant is questioned by the Investigating Judge, his counsel be “informed” of the investigative measures taken by that Judge.<sup>98</sup> Such information does not, however, extend to giving him access to witness statements. Therefore, a Judge may construe these provisions as heavily restricting access to one’s criminal file.

55. When the indictment is issued by the Indictment Chamber, the whole file is transferred to the criminal court and made public.<sup>99</sup> Under Lebanese law, at the trial phase, there are no defined exceptions to the disclosure of the criminal file. The accused is entitled to access all the elements contained in it. We do not need to consider whether they include information on witnesses, or even information excluded from disclosure under international tribunals’ rules of procedure and jurisprudence.

56. In sum, prior to any charges being brought against an accused, the confidentiality surrounding an investigation has been treated as absolute. A defendant at that stage is

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prosecution of the defendant, he shall base his decision on either a legal or factual ground. [...]” The word “stay” in this context refers to a discharge of the accused by the investigating judge and not to a temporary stay of proceedings. The procedure under Lebanese law corresponds to a “non-lieu”. A “non-lieu” is translated as a discharge (the Council of Europe French-English Legal dictionary).

97 Article 76 provides:

When the defendant appears before him for the first time, the Investigating Judge shall inform him of the charges against him, summarizing the facts and informing him of the evidence in his possession or of the suspicions against him so that he can refute them and mount a defence. The Investigating Judge is not required to provide him with a legal characterization of the facts. The Investigating Judge shall inform him of his rights, particularly the right to the assistance of an advocate during the questioning. If the Investigating Judge fails to inform the defendant of the charges against him, as set out above, or to inform him of his right to the assistance of an advocate, the results of the questioning shall be inadmissible as evidence.

98 Article 78 of the Code of criminal procedure provides: “[...] If the defendant chooses an advocate to defend him, the Investigating Judge may not question him or proceed with the investigative measures unless the advocate is present and is informed of all the investigative acts except for the witnesses’ statements, on pain of nullity of the questioning and of the subsequent measures. [...]”

99 Article 239 of the Lebanese Code of criminal procedure can be found in Section III titled “The trial”. It provides that: “All parties are entitled to examine the case file and to have a copy thereof.”

merely a suspect, and has few rights regarding information or access to a file. As soon as a defendant becomes an accused, in order to ensure that all his defence rights as well as the principle of equality of arms are preserved, he is provided with essentially all the information gathered by the judges or the judiciary police and supporting the charges brought against him. Likewise, if he is discharged, he is entitled to a copy of the whole file.

57. We have recorded that, at the time of his transfer to this Tribunal, Mr. El Sayed was detained and an arrest warrant had been issued by the Lebanese Investigating Judge who was still conducting the investigation against him. He was neither indicted nor discharged. It is therefore arguable that, at the time of his release by this Tribunal, Mr. El Sayed would not have been entitled to have access to the whole of his criminal file in Lebanon.<sup>100</sup>

58. Nonetheless, Lebanese law might allow such a request on a different basis, such as the right to access information provided for by reference in the Lebanese Constitution independently of, although not necessarily unrelated to, the rights of a criminal suspect or accused.

59. In the decision of 16 February 2010 we held that:

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.

It follows that the Preamble and all the texts to which it refers [...] have constitutional status. All these principles become therefore constitutional principles on the basis of the Lebanese Constitution itself.<sup>101</sup>

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<sup>100</sup> See Lebanese Code of criminal procedure, Arts. 76 & 78.

<sup>101</sup> See Interlocutory Decision on the Applicable Law, *supra* note 64, at footnote 232.

60. The Preamble refers expressly to two human rights instruments: the UDHR and the ICCPR.<sup>102</sup> Both instruments guarantee, as a component of the right to free expression, the right to “seek, receive and impart information.”<sup>103</sup>

61. On such approach, it is warranted to regard freedom of information, as provided for in the UDHR and the ICCPR, as a constitutional value under Lebanese law. However, the scope of any resulting legal right, and any restrictions that may apply to it, have not yet been clearly defined either by Lebanese legislation or by case law. The enshrining of freedom of information in the Lebanese Constitution gives added weight to the international law to which we now turn.

### C. *Application to the Present Case*

62. Under international law, both the concept of effective access to justice and the general principle of freedom of information point to a potentially valid claim on the part of Mr. El Sayed to access documents held by this Tribunal. It is a separate question, however, whether that is a claim we should recognize and vindicate in this instance. There are multiple considerations.

63. First, the weight of the applicant’s entitlement to information falls along a continuum: the greater the personal stake, the stronger the claim, albeit still to be weighed against other concerns for confidentiality. In cases like *R (on the application of Binyan Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*,<sup>104</sup> *Commissioner of Police v. Ombudsman*,<sup>105</sup> and *United States v. Moussaoui*,<sup>106</sup> the

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102 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 no. 2/2001, 10 May 2001, published in *Al-majless al-doustouri* (2001-2005) [Constitutional Council review (2001-2005)], at 150.

103 UDHR art. 19; see also ICCPR art. 19(2). These provisions are reproduced in paragraph 45 above.

104 See footnote 80 above.

105 [1988] 1 NZLR 385.

106 382 F.3d 453 (4th Cir. 2004).

applicant seeking information from a public authority was facing criminal charges and required access to information in order to prepare his defence. Here by contrast Mr. El Sayed is no longer in detention and has never been charged.

64. Next is the fact, peculiar to *ad hoc* tribunals, of limited resources. In *Rwamakuba v. Prosecutor*<sup>107</sup> the Rwanda tribunal struggled with the need to fund, for the violation of an accused's right to legal assistance, minor compensation which is greatly exceeded by the resources required to deal with the present claim. The case indicates the need for a sense of reality. The task of wrestling with issues removed from the Tribunal's statutory functions must not be permitted too readily to divert its finite resources. Yet an absolute barrier to such process would be unjust to a claimant with a legitimate grievance.

65. Then there is the question of the legitimacy of the asserted legal interest. A bare assertion of a person released from detention that his arrest and custody were wrongful may not be sufficient to justify extraordinary measures. For example, an acquittal following a trial may be for reasons unrelated to an accused person's actual innocence. This is why in some national jurisdictions the state will not reimburse an acquitted defendant's legal costs unless it can also be shown that the prosecution was unreasonable.<sup>108</sup> Likewise, the fact of Mr. El Sayed's eventual release does not of itself mean his original detention was unreasonable or that he is therefore entitled to a remedy before a domestic court, even though it could be an element of a claim for such remedy.

66. The only material before us in this regard is the concession made by the Prosecutor that:

“information gathered to date in relation to the possible involvement of the four detained persons in the attack against Rafiq Hariri has not proved

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107 Decision on Appeal Against Decision of Appropriate Remedy, ICTR-98-44C-A, 13 September 2007.

108 The New Zealand Law Commission, for instance, has argued that acquittal does not of itself require the State to compensate the accused for the costs of his or her defence: a judgment of acquittal may be for reasons unrelated to an accused's actual innocence, much less to the reasonableness of the prosecutor's decision to bring the charges in the first place. New Zealand, Law Commission, *Report 60: Costs in Criminal Cases* (Wellington: May 2000) at para. 10, available at [http://www.lawcom.govt.nz/sites/default/files/publications/2000/05/Publication\\_68\\_290\\_R60.pdf](http://www.lawcom.govt.nz/sites/default/files/publications/2000/05/Publication_68_290_R60.pdf). Different approaches have been adopted in other jurisdictions.



sufficiently credible to warrant the filing of an indictment against any of them”. [...] “[t]he assessment that has been made is based on several considerations, including inconsistencies in potentially key witnesses’ statements, and a lack of corroborative evidence to support these statements. Some witnesses also modified their statements and one potentially key witness expressly retracted his original incriminating statement.” The Prosecutor, without mentioning any specific name, added that the investigation was ongoing and that the Submission should not be understood as prejudging any future action.<sup>109</sup>

This is not an admission of innocence, but neither is it an assertion of guilt; rather it provides the reasons why, at the time of the release, charges were not pursued.

67. In considering whether Mr. El Sayed’s claim for documents should be granted, we must achieve a rational and proportionate resolution of these competing factors.<sup>110</sup> In particular, we must balance that claim for information against the principle of secrecy of an investigation that is still continuing and the need for husbanding of resources in circumstances where we know no more of the facts than has been disclosed by the Prosecutor. We have emphasised that the streams of authority tending to support a claim to disclosure do not without more give rise to an actionable right to information: countervailing considerations of confidentiality, both for investigation purposes as well as other reasons, must be overcome. Mere acquittal or withdrawal of charges does not as such give rise to such a right. And the test to be formulated must not allow over-ready distraction from the primary mandate of the Tribunal. We have therefore determined that the application should not be granted as of right. *Rather it should be granted only if necessary to avoid a real risk that, if it is declined, the applicant will suffer an injustice that clearly outweighs the opposing interests. Nor should it be granted beyond the extent required for that purpose.*

68. We conclude that the fact of detention for nearly four years, together with the acknowledgement made by the Prosecutor at the end of the period, demonstrate a real possibility that access to information is required to avoid an injustice, and that

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<sup>109</sup> Order Assigning Matter to Pre-Trial Judge, *supra* note 21, at para. 5 (quoting Submission of the Prosecutor to the Pre-Trial Judge Under Rule 17 of the Rules of Procedure and Evidence, CH/PTJ/2009/004, 27 April 2009, para. 29).

<sup>110</sup> Cf. U.K., *R (on the application of Cart) v. The Upper Tribunal* [2011] UKSC 29.

the interests in allowing the claim outweigh the costs of that course. But it should be permitted only to the extent required to enable Mr. El Sayed to make the claim he states in his application to the President, subject to appropriate conditions set by the Pre-Trial Judge.<sup>111</sup> Use for any other purpose would not be justified and would be improper.<sup>112</sup>

69. Within this context, we turn to consider the specific challenges made by the Appellant to the decision of the Pre-Trial Judge: was he right to determine that all documents in three categories defined by the Prosecutor should be withheld from disclosure?

## **II. Did the Pre-Trial Judge err in categorically excluding these three sets of documents from disclosure to Mr. El Sayed?**

70. We have noted at paragraph 16 that the Pre-Trial Judge concluded that the documents in categories (1), (2), and (3) were inherently confidential, were exempt from disclosure under Rule 111, and also did not form part of Mr. El Sayed's criminal file. He therefore held that the Prosecutor was not obligated to disclose the documents in categories (1), (2), and (3).

### ***A. The Appeals Chamber's Approach***

71. The primary responsibility for correct classification of documents falls on the Prosecutor. The Prosecutor's submission that the Appellant's challenge to the classification of the documents is a "fishing expedition" misapprehends that fact. When there are grounds for belief that the Prosecutor has misapprehended that responsibility it is the right of the Appellant to advance that challenge before this Tribunal.<sup>113</sup> The ultimate responsibility for ensuring compliance with the law is that of the judiciary. Public interest privilege "does not represent a surrender of judicial

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<sup>111</sup> See above note 5.

<sup>112</sup> See the rationale for such a finding in U.K., *Riddick v. Thames Board Mills Ltd.* [1977] 1 QB 881.

<sup>113</sup> See sources cited below at note 117.

control over access to the courts [...] it is essential that the courts continue critically to examine instances of its invocation.”<sup>114</sup>

72. The legal characterisation of a document for the purpose of judicial proceedings involves its assessment against the applicable legal provisions. This process can be relatively simple when the document’s characterisation is addressed explicitly in those legal provisions. The process is more complicated when the legal provisions do not clearly define the contours of the concept and its legal consequences. Such is the case for documents covered by Rule 111, which employs general and undetermined concepts such as “[r]eports, memoranda, or other internal documents prepared by a Party [...]”.<sup>115</sup> Where concepts are left undefined by legal texts, it is the task of the judges to establish criteria for their definition and to make an evaluation.<sup>116</sup> The content of the documents in question, their function and purpose, as well as their source or author are all relevant to the evaluation.

73. For example, it is not enough to accept that a document is an investigator’s note simply because the title of this document says so. The classification of a record as “internal document”, because it is the work product of a Party and thus subject to the protection of Rule 111, hinges on an assessment not just of the document’s title, but also of its actual content, function, purpose and source.

74. This does not mean that judges must always review material withheld from disclosure on a document-by-document basis. There have been competing arguments on whether the court may accept the categorical approach asserted by the Prosecutor or whether it should examine the material document by document.<sup>117</sup> What is always

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<sup>114</sup> See U.S., *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010).

<sup>115</sup> See below paragraph 76.

<sup>116</sup> As Donald Harris distilled from the reasoning of Jeremy Bentham, “it is impossible to *define* a legal concept, and [...] the task of legal writers should be rather to *describe* the use of a word [stating a concept] in the particular legal rules in which it occurs.” D. Harris, “The Concept of Possession in English Law”, in A.G. Guest (eds), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) at 69-70 (emphasis in original) (citing H.L.A. Hart, “Definition and Theory in Jurisprudence”, 70 *Law Quarterly Review* (1954) 37, at 41 (citing in turn chapter 5 of J. Bentham, *A Fragment on Government* (Cambridge: Cambridge University Press, 1988))).

<sup>117</sup> The ICTY relies on the Prosecutor to determine whether evidence is relevant or exculpatory: “Rule 66(B) imposes on the Prosecutor the responsibility of making the initial determination of materiality of evidence within its possession and if disputed, requires the Defence to specifically identify evidence material to the preparation of the Defence that is being withheld by the Prosecutor.” J. Jones & S. Powles, *International*

essential is that the judge be satisfied that – whatever the exact method used – the material in question is properly categorised. Much will depend on the actual circumstances of the case. Where there is a large amount of material for consideration, the alternative to unacceptable rubber-stamping is for the judge to establish a suitable sampling process and to examine at least specimens of the materials. If such sampling indicated the methodology employed by the disclosing party was reliable, depending on all the circumstances of the case it could be appropriate to decide not to proceed further. If, however, an initial examination revealed errors, further review by the judge would be required.

75. In the present case, after a cursory review by this Chamber of the material said to fall within categories (1), (2) and (3), it appears that misclassification of certain documents may have occurred. For that reason and because we are uncertain of the Pre-Trial Judge’s approach to reviewing the documents classified in these categories by the Prosecutor, we remand this application to the Pre-Trial Judge for a more thorough review of the classification. We first expand on our analysis.

## **B. Rule 111**

### **1. The Provisions of the Rule**

76. Rule 111 is situated in the disclosure section. It grants an exception from the disclosure obligation. It provides:

Reports, memoranda, or other internal documents prepared by a Party, its assistants or representatives in connection with the investigation or preparation

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*Criminal Practice*, 3rd edn. (Oxford: Oxford University Press, 2003) at 653. However, if there are errors in the Prosecutor’s judgement, the ICTY allows the court to intervene: “The Chamber does not intervene in the exercise of this discretion by the Prosecution, unless it is shown that the Prosecution abused its discretion. [...] The issue of what evidence might be exculpatory evidence is primarily a facts-based judgement made by and under the responsibility of the Prosecution.” V. Toichilovsky, *Charges, Evidence, and Legal Assistance in International Jurisdictions* (Nijmegen: Wolf Legal Publishers, 2005) at 64 (citing ICTY, *Brđanin*, Decision on Appellant’s Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, IT-99-36-A, 7 December 2004, para. 264). Similar approaches to the disclosure of documents appear in national courts as well. See U.S., *Bevis v. Dept. of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986). Applying the Freedom of Information Act, the court ruled that the FBI had to perform an internal document-by-document review in order for the court to properly exempt the documents based on category: “Although the [agency] need not justify its withholding on a document-by-document basis in court, the [agency] must itself review each document to determine the category in which it properly belongs.”

of a case are not subject to disclosure or notification under the Rules. For purposes of the Prosecutor, this includes reports, memoranda, or other internal documents prepared by the UNIIC or its assistants or representatives in connection with its investigative work.

Similar rules have been adopted by the ICTY,<sup>118</sup> ICTR,<sup>119</sup> International Criminal Court (“ICC”)<sup>120</sup> and Special Court for Sierra Leone (“SCSL”).<sup>121</sup>

77. This Rule excludes from the disclosure obligation two categories of documents: (i) internal documents prepared by a Party, its assistants or representatives, including reports and memoranda, and (ii) internal documents of the UNIIC, its assistants or representatives including reports and memoranda as well.

78. While the language of the Rule is expressed generally, it is confined to what has been created by the Party, its agents and the UNIIC and its agents acting as such. As will appear, it has no application to statements of witnesses, which are not the Party’s work product; *they are the product of the person interviewed*. The distinction has been overlooked in some of the jurisprudence of other courts to which we now turn.

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118 Rule 70(A) of the ICTY RPE provides: “Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.”

119 Rule 70(A) of the ICTR RPE provides: “Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.”

120 Rule 81(1) of the ICC RPE provides: “Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.”

121 Rule 70(A) of the SCSL RPE provides: “Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.”

## 2. International and Domestic Case Law

79. A review of the jurisprudence of other international courts and tribunals shows that internal documents, otherwise known as internal work product, are generally exempted from the disclosure obligation, subject to certain conditions.

80. An early discussion of its purpose is that of the Supreme Court of the United States in *Hickman v. Taylor*, in which it considered that work product is “written statements, private memoranda, and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties.”<sup>122</sup>

81. Turning to international courts,<sup>123</sup> the Trial Chamber of the ICTY in the *Blagojević* case observed that the rule:

[...] aims to protect work product from disclosure, as it is in the public interest that information related to the internal preparation of a case, including legal theories, strategies and investigations, shall be privileged and not subject to disclosure to the opposing party.<sup>124</sup>

The Chamber concluded that notes taken by the Prosecution in preparation of a potential plea with another accused who might testify in the case against Mr.

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<sup>122</sup> 329 U.S. 495, 510 (1947). The policy rationale for this work product exception was stated as follows:

Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories, and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways -- aptly though roughly termed by the Circuit Court of Appeals in this case as the “work product of the lawyer.” Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

<sup>123</sup> For an overview of the notion of work product, see ICTR, *Nahimana et al.*, Public Redacted Version of the Decision on Motions Relating to the Appellant Hassan Ngeze’s and the Prosecution’s Request for Leave to Present Additional Evidence of Witnesses ABC1 and EB, ICTR-99-52-A, 27 November 2006, paras 11-12, 14.

<sup>124</sup> ICTY, *Blagojević et al.*, Decision on Vidoje Blagojević’s Expedited Motion to Compel the Prosecution to Disclose Its Notes from Plea Discussions with the Accused Nikolić and Request for an Expedited Open Session Hearing, IT-02-60-T, 13 June 2003, at p. 6.

Blagojević were exempt from disclosure “as they are internal documents made by the Prosecution in connection with the preparation of the case.”<sup>125</sup>

82. More recently in the *Lubanga* case,<sup>126</sup> the ICC helpfully explained that the material covered by its equivalent rule “includes, inter alia, the legal research undertaken by a party and its development of legal theories, the possible case strategies considered by a party, and its development of potential avenues of investigation.”

83. However, beyond such general explanation international courts have rightly avoided trying to define the concept and instead have offered examples of its operation. But problems have arisen. In a later phase of the *Lubanga* case, the ICC Trial Chamber earlier this year listed as examples of internal documents or “internal work product”:

- *all preliminary examination reports*;
- information related to the preparation of a case, such as internal memoranda, legal research, case hypotheses, and investigation or trial strategies;
- information related to the prosecution’s objectives and techniques of investigation;
- analyses and conclusions derived from evidence collected by the OTP;
- *investigator’s interview notes* that are reflected in the witness statements or audio-video recording of the statement;
- investigator’s subjective opinions or conclusions that are recorded in the investigator’s interview notes; and
- internal correspondence.<sup>127</sup>

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<sup>125</sup> *Ibid.*

<sup>126</sup> ICC, *Lubanga Dyilo*, Redacted Decision on the “Prosecution’s request for Non-Disclosure of the Identity of Twenty-Five Individuals Providing Tu Quoque Information” of 5 December 2008, ICC-01/04-01/06, 2 June 2009 (“*Lubanga*, Decision on non-Disclosure”), para. 31.

<sup>127</sup> See ICC, *Lubanga Dyilo*, Redacted Decision on the Prosecution’s Disclosure Obligations Arising Out of an Issue Concerning Witness DRC-OTP-WWW-0031, ICC-01/04-01/06, 20 January 2011 (“*Lubanga*, Decision on Disclosure Obligations”), paras 19, 31-32 (emphasis added).

But “preliminary examination reports” and “investigator’s interview notes” may well contain information from interviewees. That information is *the product of the person interviewed*, not work product of the interviewer, and does not in our opinion fall within Rule 111.

84. A similar case is that of “screening notes”. The ICC defined screening notes as “the result of preliminary procedure, conducted prior to taking a statement, during which the individual is assessed so that a decision can be made as to whether or not a statement is to be taken.” These pre-interview assessments are, according to that Court, a stage precedent to an interview ending with a formal statement. Accordingly, it accepted the ICC Prosecutor’s argument that only that final statement is subject to disclosure.<sup>128</sup>

85. However, we prefer the conclusion that it does not matter if the prosecution intended to convert the original record of a witness interview into a more formal document to be signed by the witness. The experience of the courts has been that all stages of the preparation of a witness’s formal statement can be important, whether to exhibit consistency or the reverse. The prosecution may not, by labelling the record of an interview “investigators’ notes” or “internal memorandum”, exempt witness statements from disclosure under Rule 111. It may indeed bear on credibility and thus be doubly in contention for disclosure, under Rule 113 as well.<sup>129</sup>

86. Additionally, international tribunals have considered that internal assessment on various individuals and work processes,<sup>130</sup> “conclusions and recommendations made by the investigators of the Office of the Prosecutor at the end of the interviews with the relevant witnesses,”<sup>131</sup> and internal memoranda, correspondence, handwritten

128 ICC, *Bemba Gombo*, Public Redacted Version of Decision on the Defence Request for Disclosure of Pre-Interview Assessments and the Consequences of Non-Disclosure (ICC-01/05-01/08-750-Conf), ICC-01/05-01/08, 9 April 2010 (“*Bemba*, Disclosure Decision”), paras 19, 31-32.

129 See paragraph 97 below.

130 ICC, *Katanga et al.*, Public Redacted Version of the “Eighth Decision on Redactions”, ICC-01/04-01/07-568, 9 June 2008, paras 31-37.

131 ICC, *Katanga et al.*, Public Redacted Version of the Corrigendum to the Third Decision on the Prosecution Request for Authorisation to Redact Materials Related to the Statements of Witnesses 7, 8, 9, 12 and 14, ICC-01/04-01/07-249, 5 March 2008, para. 48; see also ICC, *Katanga et al.*, Public Redacted Version of the Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witness 166 and 233,



questionnaires and notes of meetings<sup>132</sup> are not subject to disclosure. For the reasons just discussed, this general formulation is in our opinion insufficiently rigorous.

87. We do not agree with the conclusions of the Trial Chamber of the ICC that “investigator’s interview notes that are reflected in the witness statements”<sup>133</sup> and “screening notes...[or] pre-interview assessments [that] are a stage precedent to an interview when a formal statement is taken”<sup>134</sup> constitute internal work product that need not be disclosed by the Prosecutor unless it includes exculpatory evidence not otherwise contained in material provided to the defence.<sup>135</sup> This runs the risk that an investigator may sanitize the original account of the witness. That kind of conduct can be a major reason for miscarriage of justice. Both the Trial Chamber and the opposing party are entitled to know how the *witness’s* version has evolved.

88. We therefore disagree with the ICC Trial Chamber’s conclusion in *Lubanga* that “all preliminary examination reports,” “investigator’s interview notes that are reflected in the witness statements or audio-video recording of the statement,” and “investigator’s subjective opinions or conclusions that are recorded in the investigator’s notes” may be exempted from disclosure.<sup>136</sup>

89. In *Prosecutor v. Norman*, the SCSL examined the meaning of a witness statement. While that term was defined in a rule of the SCSL Rules of Procedure and Evidence, for which the STL has no equivalent rule, the following statement by that court is directly pertinent:

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ICC-01/04-01/07-361, 3 April 2008, paras 50-53.

132 ICTR, *Nahimana*, Decision on the Prosecutor’s Ex Parte Application to Exclude Certain Documents from Defence Inspection of Microfiche Material, ICTR-99-52-T, 25 October 2002, at p. 3.

133 *Lubanga*, Decision on Disclosure Obligations, *supra* note 127, at para. 17.

134 *Bemba*, Disclosure Decision, *supra* note 128, at para. 31.

135 We also do not agree with the Special Court for Sierra Leone’s acquiescence to the prosecution’s destruction of “rough notes containing both disclosable and non-disclosable material” after the notes were formalized into written witness statements. SCSL, *Brima*, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators Notes Pursuant to Rules 66 and/or 68, SCSL-04-16-T, 4 May 2005 (“*Brima*, Disclosure Decision”), paras 17-18.

136 *Lubanga*, Decision on Disclosure Obligations, *supra* note 127, at paras 16-17.

The Defence has strenuously argued that a statement made or recorded in the third person rather than in the first person cannot properly be classified as a witness statement, and further, that interview notes do not amount to statements within the meaning of Rule 66 of the Rules.

In this regard, the Chamber would like to refer to the definition of a statement in Black's Law Dictionary, which defines a statement as:

1. Evidence. A verbal assertion or non-verbal conduct intended as an assertion. 2. A formal and exact presentation of facts. 3. *Criminal Procedure*. An account of a person's (usu. a suspect's) knowledge of a crime, taken by the police pursuant to their investigation of the offence.

Indeed, the Chamber observes that nowhere in the rules is a witness statement defined. It is worth noting that the Appeals Chamber of [the] ICTY has considered that the usual meaning to be ascribed to a witness statement is 'an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime.' (emphasis added) The Tribunals have also considered that transcribed trial testimony, radio interviews, unsigned witness declarations and records of questions put to witnesses and answers given, constitute witness statements.<sup>137</sup>

We agree with that broader appraisal.

90. Furthermore, it may be that the documents in question are copies of original statements contained in other documents. If so, the duplicate documents could perhaps be classified as irrelevant, provided the originals are treated correctly. But while "irrelevance" may be another ground for withholding disclosure – a question not currently before us – that does not change the document's proper classification as internal work product or not.

91. We will return to this topic in the analysis below. It is sufficient for present purposes to say that an "internal document" is an in-house product of a Party created for its own internal use. We emphasise that the language of Rule 111 makes clear that

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<sup>137</sup> SCSL, *Hinga Norman*, Decision on Disclosure of Witness Statements and Cross-Examination, SCSL-04-14-PT, 16 July 2004, paras 8-10.

the Rule's protection is confined to the internal product *of the Party* or those whose conduct is fairly attributable to the Party or analogous to that of the Party.

**C. Application of Rule 111 to the Present Case**

**1. Category 1: Correspondence between the UNIIIC and the Lebanese Authorities**

92. Rule 111 by its terms covers the internal documents “prepared by the UNIIIC or its assistants or representatives in connection with its investigative work.” We readily conclude that correspondence exchanged between the UNIIIC and the Lebanese Prosecutor-General constitutes such “internal” documents, to the extent the correspondence pertains to the coordination of a unitary criminal investigation.

93. The UN Security Council created the UNIIIC to assist the Lebanese authorities.<sup>138</sup> In creating the UNIIIC, the Security Council called for the “full cooperation of the Lebanese authorities” in the UNIIIC’s investigation.<sup>139</sup> Subsequently, in Resolution 1636, the UN Security Council referenced a *unitary* investigation into the 14 February 2005 attack,<sup>140</sup> while acknowledging the investigatory work of both the UNIIIC and the Lebanese authorities on this matter. In sum, the UNIIIC was established to conduct a single investigation in mutual cooperation with the Lebanese authorities. As such, correspondence between the two bodies related to this unitary investigation should be presumptively considered internal documents prepared in connection with the investigation of a case and thus exempt from disclosure under Rule 111.<sup>141</sup>

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138 See S/RES/1595 (2005), at para. 1; S/RES/1636 (2005), at para. 5.

139 See S/RES/1595 (2005), at para. 3; S/RES/1636 (2005), at para. 7; *Memorandum of Understanding Between the Government of Lebanon and the UN Regarding the Modalities of Cooperation with the United Nations International Independent Investigation Commission*, S/2005/393 (2005), Annex, at para. 2.

140 S/RES/1636 (2005), at para. 4.

141 See U.S., *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007). The court in *Fort* ruled that correspondence between state investigators and federal investigators counted as internal correspondence, as all were “government agents” working on a case involving the same defendant and the same crime. See also U.S., *United States v. Cherry*, 876 F. Supp. 547 (S.D.N.Y. 1995) (ruling that documents transferred by state investigators to federal investigators were protected internal correspondence if the federal investigation was an “outgrowth” of the state investigation); U.S., *United States v. Green*, 144 F.R.D. 631 (W.D.N.Y. 1992) (holding that documents from local investigators that are in federal possession are non-disclosable internal memoranda, if they are part of a joint investigation). We look to the United States in this instance, as the U.S. federal system often results in

94. The conclusion would be different for documents emanating directly from the UNIIC whose purpose was not to pursue investigation or in-house discussion but that were operative documents, having effect outside the context of the UNIIC, that is, outside the internal management of the unitary investigation. Examples would be search warrants or other similar documents issued by the UNIIC to affect persons beyond its own ranks.

## **2. Categories 2 and 3: Internal Memoranda of the UNIIC and Investigators' Notes**

95. We understand the second category described by the Prosecutor and employed by the Pre-Trial Judge, that of internal memoranda of the UNIIC, to encompass documents such as research material and internal analysis of strategies or investigation methods. These coincide with the core concept of traditional "work product" as described above in Part II(B) of the Discussion. Therefore, internal memoranda of the UNIIC containing legal analysis, research, or investigatory strategies fall outside the disclosure obligation, pursuant to Rule 111.

96. With regard to category 3, we understand "investigators' notes" to refer to those documents that contain the *thoughts and original work* of investigators, often in unpolished or incomplete form. They therefore likewise fall within Rule 111.

## **3. The Relevance of Rule 113**

97. Rule 113 requires the Prosecutor to disclose to the Defence:

[...] any information in his possession or actual knowledge, which may reasonably suggest the innocence or guilt of the accused or affect the credibility of the Prosecutor's evidence.

That is the effect of the international jurisprudence: there has been general acceptance that, although characterised as internal, a document may nonetheless be subject to disclosure *to an accused* if it suggests the innocence or mitigates the guilt of the

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multi-sovereign criminal investigations.

accused or if it affects the credibility of the Prosecutor's evidence.<sup>142</sup> Similarly, a screening note, or a pre-interview assessment, not otherwise included in witness statements or other evidence already subject to disclosure,<sup>143</sup> is itself subject to disclosure if it contains exculpatory evidence or information that is material to the preparation of the defence case.<sup>144</sup>

98. Because the submissions do not extend to the confidential materials we have seen, the following opinion expressed in this context, like that of our decision of 16 February 2011, may require revisiting in the light of a particular ruling on specific facts. If the Pre-Trial Judge is in doubt as to the proper characterisation of a disputed document, the appropriate course may be for him, under the inherent power to do justice, to issue on the point a "closed decision" – one setting out confidential reasons not provided to the party seeking disclosure. Any ultimate decision by the Appeals Chamber would, however, be an open decision.<sup>145</sup>

99. Each of Rules 111 and 113 contains an expression of important public policy.

100. That of Rule 111 is predominantly to allow uninhibited discussion among those representing one Party when considering what decisions to make. The high interest of freedom of expression to be found across the jurisprudence is an expression of this point. Candour is vital to quality. The major focus of Rule 111 material is on *opinion*.

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142 ICTY, *Haradinaj et al.*, Order on Disclosure of Memorandum and on Interviews with a Prosecution Source and Witness, IT-04-84-PT, 13 December 2006, at p. 4. This is similarly provided for under Rule 113 of the STL Rules of Procedure and Evidence.

143 See examples mentioned above, listed in the *Lubanga* case at paragraph 83.

144 See *Bemba*, Disclosure Decision, *supra* note 128, para. 33. See also *Brima*, Disclosure Decision, *supra* note 135, para. 16, where the Court considered that investigators' notes of an internal nature not containing a statement made by a witness are not subject to disclosure.

145 The issue in the present litigation is what information may be disclosed. Procedures en route to that decision may properly employ the closed decision procedure and the use of special counsel. But once the disclosure decision is made, use of such procedure in substantive proceedings is impermissible. Nor would the STL facilitate the use of such procedures either in its own proceedings or in criminal proceedings employing materials which it has disclosed, save in accordance with the policies of its own Rules. These include Rule 116(C), requiring protection of the accused's right to a fair trial or withdrawal of charges. See U.K., *Al Rawi v. The Security Service* [2011] UKSC 34; compare *Home Office v. Tariq* [2011] UKSC 35.

101. Rule 113, by contrast, is concerned essentially with *fact*. It is exculpatory fact that forms the essential policy of Rule 113. There is therefore in general a complementarity between the two Rules.

102. There is however the possibility that Rule 111 discussion will be expressed (i) in such a categorical manner; (ii) by a decision maker; (iii) in such circumstances as to suggest that what occurs “in-house” is properly to be categorized as admission of *fact*. At that point the Rule 111 shield disappears and is replaced by the Rule 113 obligation (subject of course to its limitations laid down in Rules 116 to 118).

103. A further point is whether “guilt or innocence” in Rule 113 refers not only to the crime alleged by Mr. El Sayed that others have made false evidence, but also to the original suspicion of Mr. El Sayed’s implication in the assassination (a matter that is not at present germane to the adjudicatory power of this Tribunal, in view of the 2009 statement by the Prosecutor that he was not preferring any charge against Mr. El Sayed for that assassination).

104. Such distinction is one without difference. These are opposite sides of the same coin. Mr. El Sayed’s assertion is of innocence on his part of assassination; that is part of his assertion of criminality on the part of the alleged “false witnesses”.

105. In short, if in the course of discourse of persons whose conduct is attributable to a Party in terms of Rule 111 there is (i) unambiguous acceptance; (ii) by a decision maker; (iii) which is fairly to be characterised as a decision as to relevant guilt or innocence, the Rule 111 discussion is lifted into the Rule 113 category and must be disclosed unless any of Rules 116 to 118 applies.

#### **4. Proper Categorisation of Documents**

106. Although we agree with the Pre-Trial Judge that categories (1), (2) and (3) generally fall under the scope of Rule 111, the proper employment of those exclusions depends on the proper classification of individual documents.

107. We have noted that a cursory screening of some of the documents classified by the Prosecutor as falling within these three categories suggested that the categories

may not always have been employed properly by the Prosecutor. We thus return all the documents in these three categories to the Pre-Trial Judge to re-assess, pursuant to our comments above at paragraph 74, and to require further review and correction by the Prosecutor if necessary.

108. We have emphasised that documents that are not purely *internal* may not be classified as “internal documents”. They would include any correspondence that was also sent to counsel for Mr. El Sayed. Similarly, operative documents that are addressed to external actors, such as search warrants or arrest warrants, do not constitute “internal documents”.

109. Furthermore, statements from witnesses recorded in direct or indirect speech, including identification of relevant persons, contained within documents labelled “internal memoranda” and “investigators notes”, are not covered by Rule 111. The task of securing statements no doubt involves preparation and effort by the investigator. But we repeat that the resulting statement is, to the extent of the statement component, that *of the interviewee* and does not fall within Rule 111. That is, the words of a witness are not the Party’s work product; *they are the product of the witness*. Of course, this does not apply, for instance, to any additional comment by the investigators contained in the same document – in such a case, redaction might be appropriate.

110. As a last note, the discussion above of course does not prevent the Prosecutor from pleading, and the Pre-Trial Judge from accepting, reasons for non-disclosure of particular documents other than the protection for confidentiality enshrined in Rule 111. The Appeals Chamber was not seized of these additional grounds for non-disclosure.

### **III. What relief if any should be ordered?**

111. In summary, the Appeals Chamber considers it must apply the following principles:

112. The principle of freedom of information, while applicable to the present case, must be evaluated against the other important principles of proper administration

of justice including the need to safeguard the secrecy of an investigation that is still continuing, the right to privacy and confidentiality and the need to husband finite resources in circumstances where no more is known of the facts than has been disclosed by the Prosecutor.

113. In addition, Mr. El Sayed's claim touches on the right of access to justice. He may need documents solely within the custody of the Tribunal in order to pursue domestic remedies and thus to render his right of access to domestic courts effective.

114. Rule 111 is of direct application in this case, as granting Mr. El Sayed access to information may have a direct effect on the criminal investigation of which this Tribunal is seized. Therefore, subject to the potentially overriding operation of Rule 113, we apply Rule 111 directly.

115. To the extent that any information held by the Prosecutor and falling within Rule 111 "may reasonably suggest the innocence or guilt of [Mr. El Sayed] or affect the credibility of [any of] the Prosecutor's evidence [which might tend to suggest that he was implicated in the conspiracy to kill Rafiq Hariri]" it should be disclosed to Mr. El Sayed unless there is a basis other than Rule 111 to withhold it.

116. The three categories identified by the Pre-Trial Judge are, in theory, covered by the non-disclosure exception of Rule 111, in particular the correspondence between the UNHCR and the Lebanese authorities. It is for the Prosecutor to properly categorise documents in the first instance. However, the Pre-Trial Judge must be satisfied that the documents in question are properly categorised.

117. Proper categorisation depends not on a document's title, but on its content, function, purpose and source. We have noted possible errors in categorisation. It is therefore for the Pre-Trial Judge to determine the most appropriate process for ensuring the accuracy of the Prosecutor's categorisation.<sup>146</sup>

118. Finally, we note that the proper application of Rule 111 is only the first step in the review being undertaken by the Pre-Trial Judge. Even if a document did not fall under Rule 111, there may be other grounds justifying its non-disclosure, such as

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<sup>146</sup> See paragraph 74.



those mentioned in the Pre-Trial Judge's decisions of both 17 September 2010 and 12 May 2011.

119. The application of both freedom of information and the right of access to justice is dependent on Mr. El Sayed's claim stated in his application to the President, namely his intention to use these documents to pursue remedies in other courts. This is the reason we have concluded he should be granted access to these documents, and it is the only appropriate use to which these documents may be put.

120. With these clarifications, we refer the documents classified under Categories 1, 2 and 3 back to the Pre-Trial Judge with directions to ensure their appropriate and expeditious categorisation in the light of this decision.

## **DISPOSITION**

**FOR THESE REASONS;**

**THE APPEALS CHAMBER**, deciding unanimously;

**DECLARES** the appeal admissible;

**RULES** that the appeal be allowed; and

**REFERS** the case back to the Pre-Trial Judge with directions to ensure that the classifications of documents under Categories 1, 2 and 3 are made appropriately and expeditiously in the light of this decision.

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

Filed this 19th day of July 2011,

Leidschendam, The Netherlands

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Judge Antonio Cassese  
President



Case name: ***The Prosecutor v. Ayyash et al.***

Before: **Pre-Trial Judge**

Title: **Decision on Languages in the Case of *Ayyash et al.***

Short title: **“Decision on Languages”**





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

## THE PRE-TRIAL JUDGE

Case No.:	<b>STL-11-01/I/PTJ</b>
The Pre-Trial Judge:	<b>Judge Daniel Fransen</b>
The Registrar:	<b>Mr. Herman von Hebel</b>
Date:	<b>16 September 2011</b>
Original language:	<b>English</b>
Type of document:	<b>Public</b>
[Case Name:	<b><i>The Prosecutor v. Ayyash et al.</i></b> ]

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## DECISION ON LANGUAGES IN THE CASE OF *AYYASH ET AL.*

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**Office of the Prosecutor:**

Mr. Daniel A. Bellemare, MSM, Q.C.

**Defence Office:**

Mr. François Roux

## I. Introduction and Competence

1. On 28 June 2011, the Pre-Trial Judge of the Special Tribunal for Lebanon (the “Tribunal”) confirmed an indictment in the case of *Ayyash et al.*<sup>1</sup> (the “Indictment”).<sup>2</sup>
2. On 27 July 2011, the Pre-Trial Judge issued an Order Requesting Submissions on Working Languages (the “27 July 2011 Order”).<sup>3</sup> The Pre-Trial Judge considered that the timely determination of the working language(s) would serve the interests of justice by providing the Prosecutor, the Defence Office, the Defence, the Registrar (notably including the Victims Participation Unit), as well as the victims participating in the proceedings and their representatives, with a desirable degree of clarity and certainty.
3. In the 27 July 2011 Order, the Pre-Trial Judge therefore requested the Prosecutor, the Defence Office, and the Registrar (including the Victims Participation Unit) to submit concise written observations by 8 August 2011, expressing their views on the modalities to be applied to working languages generally, and on several points in particular. Those several particular points were:
  - (1) The determination of one or more working languages;
  - (2) The determination of a language regime applicable to disclosure;
  - (3) The language regime and modalities applicable to written and oral submissions by the Parties and the victims; and
  - (4) The language regime applicable to the transcripts of oral hearings.
4. On 5 August 2011, the Defence Office filed its observations (the “Defence Office’s Submission”).<sup>4</sup> On 8 August 2011, the Prosecutor and the Registrar both

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1 Case No. STL-11-01-I/PTJ, Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi & Assad Hassan Sabra (“*Ayyash et al.*”).

2 Case No. STL-11-01/I, Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra, 28 June 2011 (“Decision on Confirmation”).

3 Case No. STL-11-01-I, Order Requesting Submissions on Working Languages, 27 June 2011.

4 Case No. STL-11-01/I/PTJ, *Observations du Bureau de la Défense relatives aux langues de travail*,

filed their own observations (the “Prosecutor’s Submission” and the “Registrar’s Submission” respectively).<sup>5</sup>

## **II. Background**

5. Article 14 of the Statute of the Tribunal (the “Statute”) provides that “[t]he official languages of the Special Tribunal shall be Arabic, French and English”, and that “[i]n any given case proceedings, the Pre-Trial Judge or a Chamber may decide that one or two of the languages may be used as working languages as appropriate.”

6. Rule 10(A) of the Rules of Procedure and Evidence of the Tribunal (the “Rules”) also recognises the three official languages of the Tribunal, while Rule 10(B) of the Rules requires that as early in the proceedings as possible, the Pre-Trial Judge or a Chamber, after consulting with the Parties and the legal representatives of victims participating in the proceedings (“Victims’ Representatives”), shall decide what language(s) shall be used as working language(s) in the case.

## **III. Preliminary Observations**

7. Before making a determination of the language modalities applicable in this case, the Pre-Trial Judge will first address two preliminary issues.

### **a. The Appropriate Chamber**

8. The first preliminary matter concerns the identification of the appropriate Chamber to make a decision on working language(s). Pursuant to Rule 10(B) of the Rules, it is for either the Pre-Trial Judge or “a Chamber” to decide what language(s) shall be used as working language(s). In light of the imperative to decide the matter as early in the proceedings as possible, the Pre-Trial Judge considers that he is competent and mandated to pronounce on the matter of working languages at this

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5 August 2011.

5 Case No. STL-11-01/I/PTJ: The Prosecutor’s Observations on Working Language Modalities, 8 August 2011; Registry Submission on Working Languages, 8 August 2011.



stage of proceedings. This is without prejudice to any future order or decision which the Trial or Appeals Chambers may issue.

## **b. Consultation**

9. The second preliminary matter concerns the obligation incumbent on the Pre-Trial Judge, pursuant to Rule 10(B) of the Rules, to consult with the Parties and the Victims' Representatives before deciding what language(s) shall be used as working language(s). In the absence — at this stage of proceedings — of any accused appearing before the Tribunal, there exists no defence *qua* party.<sup>6</sup> Neither have the Victims' Representatives been appointed.

10. It may seem opportune to apply this Rule regarding consultation to the letter and await these appointments in order to consult them. However, as the Registrar points out, the choice of working language(s) “requires a delicate equilibrium to be struck between the rights of the accused”, the duty to ensure a fair and expeditious trial, and the need to manage the Tribunal's finite resources responsibly.<sup>7</sup> There are thus several countervailing interests which, in the view of the Pre-Trial Judge, warrant a more liberal approach.

11. The Prosecution submits that “a prompt decision on the working language issue” would serve the interests of justice, provide the parties with certainty and clarity, facilitate judicial economy, and allow the various organs of the Tribunal sufficient time to allocate their limited resources.<sup>8</sup> Waiting for the appointment of Defence Counsel and Victims' Representatives may cause unnecessary delays.<sup>9</sup>

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6 Rule 2 of the Rules defines “Party” as “[t]he Prosecutor or the Defence”; “Defence” is defined as “[t]he accused and/or the accused's counsel.”

7 Registrar's Submission, para. 3. The same observation was made by a Trial Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) when considering a request for the translation of materials into Kinyarwanda, the language of the accused: “*En dégageant des principes applicables à la présente espèce, la Chambre s'est efforcée d'opérer un équilibre entre le droit général de toute personne accusée à un procès équitable ... et des considérations d'économie judiciaire liées à l'organisation du Tribunal et à celle des services de traduction.*” Case No. ICTR-95-1-B-I, *Procureur c. Mika Muhimana*, 6 November 2001, para. 12.

8 Prosecutor's Submission, para. 9.

9 Prosecutor's Submission, para. 9.

12. Subject to some reservations, the Defence Office considered that it was entitled to respond to questions of a general interest to defence teams.<sup>10</sup> The Defence Office moreover considered that the questions raised in the 27 July 2011 Order are related to the fairness of the proceedings as well as the rights of the accused, and submitted its observations accordingly.<sup>11</sup> Regarding the requirement for consultation with the Parties, the Defence Office points out that it cannot be likened in any way to a party to the proceedings<sup>12</sup>, before paraphrasing Rule 10(B) of the Rules in saying that the Pre-Trial Judge or Chamber must consult the Parties before determining the working languages.<sup>13</sup>

13. The Pre-Trial Judge notes that, as mentioned above, Rule 10(B) of the Rules requires the working language(s) to be determined “[a]s early in the proceedings as possible”. Pursuant to Rule 77(E) of the Rules, the Pre-Trial Judge may *proprio motu* and in the interests of justice issue such orders as may be necessary for the preparation or conduct of the proceedings, while Rule 89(B) of the Rules requires the Pre-Trial Judge to ensure that the proceedings are not unduly delayed.

14. The Pre-Trial Judge considers that, at this stage of proceedings, it is his duty to ensure that all necessary measures for the expeditious preparation of the trial are taken, including the determination of working language(s) and their modalities. Such a determination will provide, in a timely manner, the Office of the Prosecutor, the Defence Office, future Defence Counsel, future Victims’ Representatives and the Registry with a degree of clarity and certainty during the pre-trial phase.

15. In the absence of such clarity, the Prosecutor would *inter alia* not be in a position to meet its language-related obligations in a timely manner, and the Registry

<sup>10</sup> Defence Office’s Submission, para. 3.

<sup>11</sup> Defence Office’s Submission, para. 3. The Defence Office expressly submits that the Defence itself, and not the Defence Office, must nevertheless be afforded the opportunity to be heard on this matter in due course (“*Dès lors, il reviendra au Juge de la mise en état de consulter également les accusés et/ou les conseils des accusés avant de déterminer la ou les langues de travail à employer en l’espèce*”), Defence Office’s Submission, paras 4, 6.

<sup>12</sup> “*En aucun cas, le Bureau de la Défense ne peut être assimilé à une partie à la procédure*”, Defence Office’s Submission, para. 4.

<sup>13</sup> Cf. note 11 *supra*.

would remain without guidance as to how best to manage the Language Services Section's resources. Furthermore, the Victims Participation Unit would not be able to implement a tailored recruitment strategy reflecting language exigencies, and the Defence Office would be unable to foresee any possible consequences of one or another language regime for the purposes of its assigning Defence Counsel.

16. Further procrastination in determining the working language(s) at this stage of proceedings may also adversely affect the efficient preparation and conduct of the trial in a manner consistent with the interests of justice. Article 16(4)(a) of the Statute recognises the accused's rights to be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him, and to have adequate time and facilities for the preparation of his defence. By implication, these rights are assured when the accused is presented with the case against him in a language which he understands. They are also assured when pre-trial and trial proceedings are managed in such a way as to ensure the timely preparation of these materials in the appropriate languages.

17. In light of the foregoing, the Pre-Trial Judge decides that in order to provide clarity and certainty to the Parties and Victims' Representatives, and to ensure an expeditious and fair trial that is neither unduly delayed nor inconsistent with the rights of the accused, the determination of the working language(s) must be made at this stage of proceedings. This decision shall not, however, prevent any accused or their representatives at trial, or the Victims' Representatives once appointed, from moving the Trial Chamber to reconsider the determination of the working language(s) made in this Decision. Neither shall this Decision be read as limiting in any way the inherent discretion of the Trial and Appeals Chambers to regulate their own proceedings *proprio motu* or at the request of a Party.

#### **IV. Applicable Law**

18. Article 14 of the Statute having already been cited above, it is convenient to restate the other applicable provisions of the Statute and the Rules.

19. Article 16(4) of the Statute provides as follows:

In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
- (b) To have adequate time and facilities for the preparation of his or her defence and to communicate without hindrance with counsel of his or her own choosing;
- (c) To be tried without undue delay;
- (d) Subject to the provisions of article 22 [(Trials *in absentia*)], to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require and without payment by him or her in any such case if he or she does not have sufficient means to pay for it [...];
- (g) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Tribunal.

20. Rule 10 of the Rules on Official and Working Languages provides that:

- (A) The official languages of the Tribunal shall be Arabic, English and French. Unless otherwise ordered by the Pre-Trial Judge or Chamber, any participant in oral proceedings before the Tribunal may use any one of the official languages.
- (B) As early in the proceedings as possible, the Pre-Trial Judge or a Chamber, after consulting with the Parties and the legal representatives of victims participating in the proceedings, shall decide what language(s) shall be used as working language(s) in the case.
- (C) An accused shall have the right to use his own language during proceedings before the Pre-Trial Judge or a Chamber.
- (D) Other persons appearing before the Pre-Trial Judge or a Chamber, other than as counsel, who do not have sufficient knowledge of the official languages, may

use their own language, subject to the authorisation of the Pre-Trial Judge or a Chamber.

- (E) Decisions on any written or oral submission shall be rendered in English or French. Judgements, sentences, decisions on jurisdiction and other decisions which the Pre-Trial Judge or a Chamber decides address fundamental issues shall be translated into Arabic.

21. Rule 58 of the Rules on the Appointment, Qualifications and Duties of Counsel:

(A)(ii) a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Head of Defence Office that he has written and oral proficiency in English or French.

(B) In the performance of their duties, counsel shall be subject to the relevant provisions of the Statute, the Rules, Practice Directions, the Rules of Detention, the Host State Agreement, the Code of Professional Conduct for Counsel and the codes of practice and ethics governing their profession, as well as, if applicable, the Directive on the Assignment of Defence Counsel adopted by the Head of Defence Office and approved by the Plenary.

22. Rule 59 of the Rules on Assignment of Counsel:

(D) A suspect or accused has the right to be represented by any counsel properly admitted to the list, except insofar as such representation would not ensure the combined language abilities required for fair and expeditious proceedings.

23. Rule 89 of the Rules on Functions after Review of the Indictment:

(B) The Pre-Trial Judge shall ensure that the proceedings are not unduly delayed. He shall take any measures necessary to prepare the case for a fair and expeditious trial.

24. Rule 110(A) of the Rules on Disclosure by the Prosecutor:

[T]he Prosecutor shall make available to the Defence in a language which the accused understands:

(i) copies of the supporting material which accompanied the indictment when confirmation was sought as well as all statements obtained by the Prosecutor from the accused;

25. Rule 110(A)(ii) of the Rules also requires the Prosecutor to provide copies of certain witness statements, depositions and transcripts, all in a language that the accused understands.

26. Reference must also be had to Article 18 (on General Principles) of the Directive on the Assignment of Defence Counsel<sup>14</sup>, which provides:

(E) The Head of the Defence Office may decide to deny a suspect's or accused's request for the assignment of a counsel, where:

(iii) the assignment would not create sufficient combined language capacity to provide effective representation for the accused;

## V. Discussion

27. While neither the Statute nor the Rules provide a precise definition of the term “working language”, it can nevertheless be safely concluded that the working language(s) of the Tribunal are those in which it conducts its judicial proceedings in a particular case. The Pre-Trial Judge will thus examine the languages to be used in the case of *Ayyash et al.*

28. The Prosecutor submits that, since each of the four individuals charged in the indictment is Arabic-speaking and it is highly likely that the language of the accused will be Arabic<sup>15</sup>, the working languages in the case of *Ayyash et al.* should not be French, but rather English<sup>16</sup> and, implicitly, Arabic. This is because “a vast majority of the evidentiary ... material is in Arabic or English”<sup>17</sup> and “less than 1% of its evidentiary holdings are in French”<sup>18</sup>. The Prosecutor advises that preparation

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<sup>14</sup> Amended on 10 November 2010.

<sup>15</sup> Prosecutor's Submission, para. 2.

<sup>16</sup> Prosecutor's Submission, para. 4.

<sup>17</sup> Prosecutor's Submission, para. 11.

<sup>18</sup> Prosecutor's Submission, para. 15.

of this material in both Arabic and English is already under way.<sup>19</sup> Translation of this significant amount of material into French would therefore cause unnecessary delays to trial preparation, and incur unnecessary expense.<sup>20</sup> Consequently, and in the absence of either an obligation or an order to the contrary, the Prosecutor has not requested translation of the material supporting the Indictment into French, a decision it describes as prudent<sup>21</sup> in light of the limited resources of the Tribunal, and the translation burden under which it is already operating.<sup>22</sup>

29. The Defence Office makes emphasises that any determination must aim to ensure respect for the rights of the accused provided for in Article 16 of the Statute in a concrete and effective manner.<sup>23</sup>

30. The Registrar recommends that “a modular regime be adopted, with English being chosen as the working language”.<sup>24</sup> The Registrar makes mention of the particularities of Arabic in substantiating why it ought not to be chosen as the working language.<sup>25</sup>

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19 Prosecutor’s Submission, para. 16. The Prosecutor estimates that, as of 5 August 2011, there remained 351 documents — amounting to 5,135 pages — to be translated, “mostly from English into Arabic”. One 80-minute audio interview was awaiting transcription.

20 Prosecutor’s Submission, para. 15.

21 Prosecutor’s Submission, para. 15.

22 Prosecutor’s Submission, paras 15, 17. The Prosecutor does, however, point out that admitted exhibits and expert reports “should ultimately exist in all three official languages” because they “represent important legacy information”, Prosecutor’s Submission, para.18.

23 Defence Office’s Submission, para. 6: “*Enfin, le Bureau de la Défense considère que toute décision rendue par le Juge de la mise en état sur la question de la ou des langues de travail doit viser à assurer le respect des droits de l’accusé visés à l’article 16 du Statut, et ce, d’une manière non pas théorique ou illusoire, mais concrète et effective.*”

24 Registrar’s Submission, para. 11.

25 Registrar’s Submission, para. 15. The Registrar avers that legal Arabic is “not stabilized” and regional language variations complicate translation. Furthermore, referenced texts and terminological resources in Arabic are limited. The use of Arabic as a working language could therefore delay proceedings and generate uncertainty (or, in the words of the Registrar, it could amount to “opening the door to difficulties”).

31. The Pre-Trial Judge considers that, as it has been held by other international criminal tribunals, excessive requirements for translation can lead to delays and thereby undermine the conduct of a trial within a reasonable period.<sup>26</sup>

32. In light of the foregoing, the Pre-Trial Judge finds that while the three official languages of the Tribunal — Arabic, English and French — enjoy equal status, considerations of time and resource limitations nevertheless justify the adoption of a practical approach to the modalities of language use. These will vary as a function of the different types of contexts in which proceedings are conducted. These contexts are examined below.

**a. The languages to be used during oral proceedings**

33. To date, Arabic, English and French have all been used in oral proceedings, which is consistent with the requirements of Rules 10(A) and (C) of the Rules, cited above.

34. The Defence Office submits that this practice should be maintained<sup>27</sup>, while the Prosecutor avers that a decision on working language(s) would not limit the ability of any party to make oral pleadings in a language of their choice in any event.<sup>28</sup>

35. The Registry reaffirms its capacity to continue to provide simultaneous interpretation in all three official languages of the Tribunal.<sup>29</sup>

36. The Pre-Trial Judge notes that the modalities for oral proceedings are enshrined in the Statute and Rules of the Tribunal. Consequently, any participant in

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<sup>26</sup> *Prosecutor v. Duch*, Case No. 002/14-08-2006, Order on Translation Rights and Obligations of the parties, 20 June 2008, Extraordinary Chambers in the Courts of Cambodia (“ECCC”), para. A(3); *Prosecutor v. Muhimana*, case No. ICTR-95-1-B-I, *Décision relative à la requête de la défense aux fins de traductions des documents de l’accusation et des actes de procédure en Kinyarwanda, langue de l’accusé, et en français, langue de son conseil*, 6 November 2001, ICTR, para. 12; *Prosecutor v. Delalić et al.*, Case no. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996, International Criminal Tribunal for the Former Yugoslavia (“ICTY”).

<sup>27</sup> Defence Office’s Submission, para. 27.

<sup>28</sup> Prosecutor’s Submission, para. 21.

<sup>29</sup> Registrar’s Submission, para. 18(a).



oral proceedings before the Tribunal may use any of the official languages<sup>30</sup>, and an accused shall have the right to use his own language.<sup>31</sup>

**b. The languages to be used for decisions and filings**

37. To date, English and French have been the languages used in all decisions, orders, written submissions and filings, with the Registry having assured the translation of these documents into the other language, as well as into Arabic. This has been the practice notwithstanding the absence of any express obligation in the Rules to that effect.<sup>32</sup>

38. The Defence Office submits that this practice should be maintained<sup>33</sup>, as does the Registrar, who “strongly advocates that this trend be continued” as it “increases the significance and value of the Tribunal’s archival legacy.”<sup>34</sup>

39. With respect to judgements, sentences and decisions on fundamental issues in particular, the Prosecutor interprets Rule 10(E) of the Rules as requiring their translation into the three official languages and notes that the Chambers are free to order the translation of specific documents where necessary.<sup>35</sup>

40. The Prosecutor submits that as a general point and in order to avoid delay, written pleadings should be limited to English, and the translation of written pleadings of the Parties should not be required.<sup>36</sup> Allowing the filing of written pleadings in

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30 Rule 10(A) of the Rules.

31 Rule 10(C) of the Rules. In the event that an accused is unrepresented or self-representing, he or she shall equally be entitled to file submissions in any of the Tribunal’s three official languages.

32 The Practice Direction on ‘Filing of Documents Before the Special Tribunal for Lebanon’ of 15 January 2010 provides that documents shall be filed in one of the working languages of the Tribunal, as determined pursuant to Rule 10 of the Rules.

33 Defence Office’s Submission, para. 27.

34 Registrar’s Submission, para. 8(d).

35 Prosecutor’s Submission, para. 30.

36 Prosecutor’s Submission, para. 23.

Arabic would effectively delay proceedings as translations would necessarily be required. Filings in Arabic should therefore be limited.<sup>37</sup>

41. Consistent with his recommendation that English be the working language, the Registrar submits that written submissions should be filed in English as a matter of course, save authorisation by the Pre-Trial Judge or Chamber to the contrary, with translations prepared only upon being ordered by the Pre-Trial Judge or Trial Chamber.<sup>38</sup> This approach would have the added benefit of encouraging oral submissions.<sup>39</sup>

i. Documents emanating from Chambers

42. The Pre-Trial Judge considers that the practice, to date, of the translation into the three official languages of the Tribunal of decisions and orders issued in English or French is commendable. This practice should be continued to the extent that the Registry retains sufficient resources. However, should the Registry become overburdened, and following written notice from the Registry to the Pre-Trial Judge or Chamber to that effect, the Pre-Trial Judge or relevant Chamber will thereafter identify those decisions that require translation.

ii. Written submissions of the Parties and Victims' Representatives

43. With regard to the Prosecutor's position that written proceedings should be limited to English, the Pre-Trial Judge considers that making such a determination would be inappropriate. The principle of equality of arms "means that the Prosecution and the Defence must be equal before the Trial Chamber" and that "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when

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37 Prosecutor's Submission, para. 23. The Prosecutor recognises that "exceptions could be made for the translation of certain Rule 91 Documents" such as the Prosecutor's Pre-Trial Brief pursuant to Rule 91(G)(i), and filings from *amici curiae*.

38 Registrar's Submission, paras 12, 18(b).

39 Registrar's Submission, para. 12.

presenting its case”.<sup>40</sup> Furthermore, it is worth noting that the Office of the Prosecutor must be able to work equally in English and in French.<sup>41</sup>

44. The Pre-Trial Judge considers that written submissions from the Parties or Victims’ Representatives must be filed in either English or French. They can furthermore be filed by an unrepresented accused in Arabic. Owing to the limited resources of the Registry and the need to ensure the expeditious preparation of the trial, the following modalities shall apply to translations of filings:

- Filings in Arabic shall automatically be translated into English, and into French subject to prior authorisation from the Pre-Trial Judge or relevant Chamber, *proprio motu* or at the request of a Party or Victims’ Representative, showing good cause for the translation.
- Filings in either English or French shall only be translated into the other official languages of the Tribunal subject to prior authorisation from the Pre-Trial Judge or relevant Chamber, *proprio motu*, or at the request of a Party or Victims’ Representative, showing good cause for the translation.

45. Persons other than counsel may make written submissions in a language other than Arabic, English or French with leave of the Pre-Trial Judge or Trial Chamber.<sup>42</sup> The Registry shall ensure translation of the applicable submissions within a reasonable time accordingly.

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40 ICTY Case No. IT-94-1-A, *Prosecutor v. Duško Tadić*, Appeals Judgement, 15 July 1999, paras 48, 52.

41 Case No. ICTR-96-8-A, *Prosecutor v. Elie Ndayambaje*, (before a Bench of the Appeals Chamber) Decision on motion to appeal against the provisional release decision of Trial Chamber II of 21 October 2002, 10 January 2003. See also Case No. ICTR-99-50-A, *Prosecutor v. Bizimungu*, (also before a Bench of the Appeals Chamber) Decision on the application to appeal against the provisional release decision of Trial Chamber II of 4 November 2002, 13 December 2002. This finding was made within the context of the ICTR, the Statute of which provides that English and French are the working languages of the ICTR (*cf.* ICTR Statute, Article 31). Such a clear statement of a binary language regime is the customary approach in international criminal tribunals. The working languages of the International Criminal Court, for example, are also English and French pursuant to Article 50(2) of the Rome Statute and Rule 41(2) of the Court’s Rules of Procedure and Evidence. The same applies to the ICTY pursuant to Article 33 of its Statute.

42 Pursuant to Rule 10(D) of the Rules.

iii. Other materials

46. In addition to documents emanating from Chambers and written submissions from the Parties and Victims' Representatives, the Pre-Trial Judge is concerned that a further category of filings exists, whose provision in a single language may not be appropriate.

47. With respect to Rule 91(G) materials<sup>43</sup>, the Prosecutor points out that, contrary to the position of the Defence Office, there is no obligation incumbent upon him to provide translations of the materials required by Rule 91(G)(iii) of the Rules in particular (lists of exhibits and the exhibits themselves).<sup>44</sup> As a result, the Prosecutor proposes the disclosure of lists of exhibits in English, with disclosure being made in Arabic only where original or translated versions are already available.<sup>45</sup>

48. The Pre-Trial Judge considers that since Rule 91(G) materials constitute a significant portion of the preparation for trial. Save for materials governed by Rule 91(G)(iii)<sup>46</sup>, Rule 91(G) materials must be available in the three official languages of the Tribunal, and they must also be filed in the original language if not in one of those three official languages. Rule 91(G)(iii) materials must be filed in Arabic and English.

49. Materials pursuant to Rule 91(H) of the Rules (lists of witnesses and lists of exhibits to be provided by participating victims) shall be filed in either Arabic or English, and the Registrar shall ensure their translation into the other of these two languages.

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43 Rule 91(G): "The Pre-Trial Judge shall order the Prosecutor, within a time-limit set by him and not less than six weeks before the Pre-Trial Conference required by Rule 127, to file the following:" (i) the Prosecutor's pre-trial brief including a summary of the evidence for each count and any admissions by the Parties as well as a statement of matters that are not in dispute; (ii) the list of witnesses the Prosecutor intends to call; (iii) the list of exhibits the Prosecutor intends to offer stating, where possible, whether the Defence has any objection as to authenticity. The Prosecutor shall serve on the Defence copies of the exhibits so listed or provide to the Defence access to the exhibits.

44 Prosecutor's Submission, para. 18.

45 Prosecutor's Submission, para. 18.

46 These materials are governed by the Prosecutor's disclosure obligations; *cf.* sub-section (c) below.

50. Materials pursuant to Rule 91(I) of the Rules (the defence pre-trial brief) shall be filed in either English or French, and also in the original language if not in either English or French. They can furthermore be filed by an unrepresented accused in Arabic.

**c. The language(s) in which disclosure obligations may be met**

51. Rule 110(A) of the Rules requires the Prosecutor to make available to the Defence “in a language which the accused understands” several categories of documents, including: copies of the supporting material which accompanied the Indictment when its confirmation was sought; all statements obtained by the Prosecutor from the accused; and the statements of Prosecution witnesses. In addition, pursuant to Rule 113(A) of the Rules, the Prosecutor must disclose to the Defence “any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor’s evidence.”

52. The Defence Office submits that it is only once the accused appear before the Tribunal that the language for disclosure may be determined.<sup>47</sup>

53. The Prosecutor submits that the “most advisable regime” would be to disclose the material supporting the Indictment and other material subject to disclosure in English and Arabic, or the original language if not in either English or Arabic.<sup>48</sup> These two languages are proposed because Arabic is “the language that the accused are most likely to understand”<sup>49</sup>, and implicitly because the Prosecutor’s Office works in English. Therefore, in light of its obligations under Rule 110(A) of the Rules and the language that the accused are most likely to understand, the Prosecution has already

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47 Defence Office’s Submission, para. 16. The Defence Office also submits that the obligation to provide materials “in a language which the accused understands” applies equally to materials identified in Rules 110(B) (“any books, documents, photographs and tangible objects in the Prosecutor’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused”) and 113 (“Exculpatory Material”), (Defence Office’s Submission, para. 18).

48 Prosecutor’s Submission, para. 12.

49 Prosecutor’s Submission, para. 12.

requested the translation of all the supporting material into Arabic, a process which it says will also facilitate efficient victim participation.<sup>50</sup>

54. With respect to the disclosure of exculpatory material pursuant to Rule 113(A) of the Rules, the Prosecutor suggests that such material should be disclosed in its original language, together with translations if already available.<sup>51</sup> Such an approach is consistent, the Prosecutor avers, with “international standards”.<sup>52</sup>

55. With respect to the language(s) for disclosure, the Registrar declines to make submissions on factors beyond his control, but nevertheless expresses his office’s readiness to accommodate needs arising from the disclosure obligations incumbent on the Parties.<sup>53</sup>

56. Notwithstanding the position of the Defence Office, the Pre-Trial Judge considers that the scale of the task which is constituted by the disclosure obligations incumbent on the Prosecutor justifies a determination of the language modalities at this stage of proceedings. To delay the provision of guidance and clarity to the Prosecutor will only generate further delays in the future, which would be contrary to the purpose of the instant decision. The Pre-Trial Judge considers that — taking into account the rights of the accused together with the resource limitations of the Tribunal — the Prosecutor must disclose all the material supporting the Indictment and other material subject to disclosure:

- in the original language; and
- in English and Arabic in any event.

57. Disclosure in French nevertheless remains to be determined. In order to anticipate the eventuality that Defence Counsel for one or more accused is Francophone (and not Anglophone), the following measures should be taken as a minimum. Materials of fundamental importance shall either be submitted for

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<sup>50</sup> Prosecutor’s Submission, paras 13, 14.

<sup>51</sup> Prosecutor’s Submission, para. 19.

<sup>52</sup> Prosecutor’s Submission, para. 20. The Prosecutor refers to the jurisprudence of the ECCC and the ICTR.

<sup>53</sup> Registrar’s Submission, paras 16, 17.

translation into French in their entirety, or summaries thereof shall be prepared and submitted for translation into French. It is for the Pre-Trial Judge or Trial Chamber, *proprio motu* or at the request of a Party or Victims' Representative, to identify such materials of fundamental importance and order either their translation, or the translation of their summaries.

58. In order to enable the Pre-Trial Judge or Chamber to verify that this obligation is being met, the Prosecutor must provide the Pre-Trial and Trial Chamber with monthly updates on the status of the preparation of the summaries and other translations detailed above.<sup>54</sup>

59. With respect to the disclosure obligations incumbent on the Defence, the Pre-Trial Judge considers that the Defence shall meet these obligations in either English or French.<sup>55</sup>

60. Lastly, the Pre-Trial Judge notes that pursuant to Rule 113(B) of the Rules, victims participating in the proceedings shall have the same disclosure obligations with respect to exculpatory material as set out in Rule 113(A) of the Rules, cited above.<sup>56</sup> Consequently, the modalities determined above as being applicable to the Prosecutor in this regard apply *mutatis mutandis* to victims participating in the proceedings.<sup>57</sup>

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54 The Pre-Trial Judge notes that, pursuant to his request made during a confidential meeting held under the auspices of Rule 68 on 7 June 2011, the Prosecutor has already filed helpful regular reports on the status of translations of the materials supporting the Indictment.

55 Rule 112 of the Rules on 'Disclosure by the Defence' provides for the instance in which the Defence is under a disclosure obligation. Pursuant to Rule 112(A) of the Rules, the obligation arises "[a]t the end of the Prosecutor's case, following a Defence election to present its case, within the time-limit prescribed by the Pre-Trial Judge or the Trial Chamber, but not less than one week prior to the commencement of the Defence case."

56 Rule 112*bis* of the Rules on Disclosure by Victims Participating in the Proceedings (i.e. regarding material other than Rule 113(B) material and that is not exculpatory) provides that where the Trial Chamber grants a victim participating in the proceedings the right to call evidence, the Chamber shall decide on the corresponding disclosure obligations that shall be imposed. This would be the appropriate occasion on which to revisit the applicable language modalities.

57 Cf. para. 56, *supra*.

**d. The language regimes applicable to the accused and their counsel**

61. The Defence Office submits that while an accused is in principle free to choose his counsel according to Article 16(4)(d) of the Statute (cited above), this freedom is nevertheless fettered *inter alia* by Rule 58 of the Rules.<sup>58</sup>

62. The qualifications required of counsel for the Defence are detailed in Rule 58 of the Rules. Rule 58(A)(ii) of the Rules requires that Defence Counsel engaged by a suspect or accused has written and oral proficiency in English or French. Article 18(E)(iii) of the Directive on the Assignment of Defence Counsel provides that the Head of the Defence Office may decide to deny a suspect's or accused's request for the assignment of a counsel, where "the assignment would not create sufficient combined language capacity to provide effective representation for the accused."

63. Furthermore, whenever the interests of justice so demand, the Head of Defence Office must assign counsel to a suspect or an accused who lacks the means to remunerate such counsel. Accordingly, Rule 59(D) of the Rules requires the Head of the Defence Office to maintain a list of counsel who fulfil certain requirements, *inter alia* that such Defence Counsel has written and oral proficiency in English or French. Article 18(E) of the Directive on the Assignment of Defence Counsel cited above applies *mutatis mutandis* to assigned counsel: that assignment must entail sufficient combined language capacity to provide effective representation for the accused.

64. In other words, the Rules provide that an accused has the right to be represented by any counsel properly admitted to the list of Defence Counsel except insofar as such representation would not ensure the combined language abilities required for fair and expeditious proceedings.<sup>59</sup>

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<sup>58</sup> Defence Office's Submission, para. 13.

<sup>59</sup> The content of Rule 59 of the Rules is repeated as Article 18(E)(iii) of the Directive on the Assignment of Defence Counsel, 20 March 2009, cited above.



65. The same limitations apply *mutatis mutandis* to the situation anticipated by Rule 105*bis* of the Rules: the absence of the accused from the proceedings before the Pre-Trial Judge.<sup>60</sup>

66. The Prosecutor submits that the determination of the working language(s) would affect the appointment of Defence Counsel, as has been the case in other international jurisdictions.<sup>61</sup>

67. Subject to these limitations, the Defence Office submits that Defence Counsel must receive all the materials necessary for the effective preparation of the defence of the accused in a language which they understand.<sup>62</sup> In the alternative, the Defence Office considers that Defence Counsel must — at a minimum — be assured receipt of ‘summaries of documents’<sup>63</sup> and translations of particular documents when specifically requested by Defence Counsel.<sup>64</sup>

68. The Pre-Trial Judge considers that the language regimes applicable to the accused and their counsel are determined by the relevant rules and regulations. Article 16(4)(b) of the Statute recognises the right of an accused to choose his own counsel, but the limitations on this right are expressed in the Rules. Rule 59(D) of the Rules requires an accused to select from counsel “properly admitted to the list”; such counsel being admitted when various requirements — including language proficiency — are met. It is not for the Pre-Trial Judge to set further conditions than the Rules already provide. Instead, the Pre-Trial Judge defers to the Head of the

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60 Rule 105*bis*(B): “After the Trial Chamber ensures that the requirements of Rule 106 have been met, the Pre-Trial Judge shall request the Head of the Defence Office to assign Counsel to the accused who fails to appoint one, pursuant to Rule 57(D)viii, and shall proceed with the preliminary proceedings, pursuant to Rules 89 to 97 of the Rules.” The Head of the Defence Office will appoint Counsel for proceedings *in absentia* from a list maintained pursuant to Rule 59(B) of the Rules; accession to the list is contingent on meeting the requirements of Rule 58(A) of the Rules (*cf.* Rule 59(B)(i)).

61 Prosecutor’s Submission, para. 10. The Prosecutor was referring to the appointment of Counsel in a case before the International Criminal Court (“ICC”), *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, in which the appointment of counsel was made conditional on several requirements including counsel’s ability to communicate with the accused in French.

62 Defence Office’s Submission, para. 19.

63 *Cf.* section (g) below. The Defence Office refers to “*résumés des pièces*”.

64 Defence Office’s Submission, paras 21, 24.

Defence Office who, taking note of this Decision, is empowered to assign counsel<sup>65</sup> from a list of qualified Defence Counsel that he is required to draw up and maintain<sup>66</sup>, who meet the criteria set forth in that Rule, and who will be sufficiently competent to contribute to the efficient conduct of proceedings.<sup>67</sup>

**e. The Language Regimes Applicable to Victims Participating in Proceedings**

69. The Registrar makes submissions on this matter because the Victims' Representatives are yet to be assigned, and are therefore absent at this stage of proceedings.<sup>68</sup>

70. The Prosecutor has proceeded with requests for the translation of all the materials supporting the Indictment into Arabic in part because it will facilitate efficient victim participation.<sup>69</sup>

71. For the purposes of this Decision, the Pre-Trial Judge considers that Legal representatives of victims participating in the proceedings are to be considered as counsel and, as such, must meet the requirements of Rules 58(A) and 59(B) and (D) of the Rules, *mutatis mutandis*. The analysis in the preceding sub-section on the language regimes applicable to the accused and their counsel therefore applies to Victims' Representatives.

72. The Pre-Trial Judge defers to the Head of the Victims Participation Unit who, pursuant to Rule 51(C) of the Rules, is required to draw up and maintain a list of highly qualified Victims' Representatives who meet the criteria set forth *inter alia* in Rule 59(B)(i)-(iii) of the Rules concerning the qualifications of Defence Counsel. The Head of the Victims Participation Unit is nevertheless invited to take note of this Decision when drawing up and maintaining this list, as well as when ensuring the

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65 Pursuant to Rule 59(A) of the Rules

66 Pursuant to Rule 59(B) of the Rules

67 Rule 57(D)(i) of the Rules.

68 Registrar's Submission, para. 6.

69 Prosecutor's Submission, paras 13, 14.

assignment and appointment of Victims' Representatives pursuant to Rule 51(C) of the Rules. Such representatives shall — once appointed — be entitled to move the Pre-Trial Judge or Trial Chamber to vary this determination.

73. One further matter arguably remains to be resolved: the language(s) which may be used by a victim participating in proceedings who is authorised to appear unrepresented.<sup>70</sup> The Pre-Trial Judge notes that this is a determination to be made by the Pre-Trial Judge or Chamber at such time as the question of such a victim being unrepresented arises, taking into account this Decision; it is therefore not made in this Decision.

**f. The language regime applicable to “other persons” appearing before the Tribunal.**

74. The Pre-Trial Judge notes that the language regime applicable to other persons appearing before the Tribunal is enshrined in its Rules.<sup>71</sup> Consequently, the Pre-Trial Judge notes that the determination of the working language and its modalities has no impact on those provisions and their effect.

**g. The language regime applicable to transcripts of oral proceedings**

75. The Defence Office submits that, given the importance of transcripts, Defence Counsel should be provided with versions of transcripts in the language of his choice.<sup>72</sup>

76. The Prosecutor avers that three language transcripts might be required, since real-time transcription in one language only (which for the Prosecutor would be

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70 While Rule 10(B) requires the Pre-Trial Judge to consult “the legal representatives of victims participating in the proceedings”, Rule 86(C) provides that “[u]nless authorized by the Pre-Trial Judge or a Chamber, as appropriate, a victim participating in the proceedings shall do so through a legal representative.” Rule 86(C) therefore anticipates circumstances in which victims —subject to being authorised— are not represented and might themselves appear.

71 Rule 10(D) of the Rules, cited above. While neither the Statute nor the Rules defines persons “other than as counsel”, the Pre-Trial Judge understands this to mean persons such as representatives of States or *amici curiae* who may appear before the Tribunal on an exceptional, *ad hoc* basis.

72 Defence Office's Submission, para. 29.

in English) would effectively transform the French and Arabic transcripts into “transcriptions of the audio files”, and their preparation could delay proceedings.<sup>73</sup> The Prosecutor furthermore suggests that there are no requirements in the Rules governing the preparation of transcripts in more than the working language(s).

77. The Registrar submits that the technological capabilities of the courtroom limit the preparation of real time transcripts to English or French only, and furthermore that the Registry can only produce a real time transcript in one language at a time.<sup>74</sup> The second transcript can be produced with a slight delay and is therefore not in real time.<sup>75</sup> In addition, and notwithstanding its “extensive and sustained” efforts, the Registry has been unable to procure software capable of real time Arabic transcripts of oral hearings.

78. Consistent with his recommendation that English be the working language, the Registrar submits that English be designated as the language for real time transcription.<sup>76</sup> This submission is supported by the increased degree of accuracy registered by real time transcriptions in English when compared to French, such that using English would increase the efficiency and reliability of transcripts in all three languages. Arabic and French transcripts would then be made available “within a reasonable time” thereafter.

79. In light of the above, the Pre-Trial Judge considers that it may be advisable for real time transcripts to be provided in English, with Arabic and French transcripts being made available within a reasonable time after the end of the hearing.<sup>77</sup> However, since resolving the language regime applicable to transcripts of oral

<sup>73</sup> Prosecutor’s Submission, para. 28.

<sup>74</sup> Registrar’s Submission, para. 20.

<sup>75</sup> Registrar’s Submission, para. 20.

<sup>76</sup> Registrar’s Submission, para. 22.

<sup>77</sup> The Pre-Trial Judge notes nevertheless that should an accused not be competent in one of the three official languages of the Tribunal, his entitlement to transcripts in his own language will remain to be determined. It has previously been held, before the ICTY, that “[t]he transcripts of the proceedings are provided in one or both of the working languages on request simply as an *aide-mémoire* for courtroom participants. As with motions and other similar documents, the Defence is not entitled to have the transcripts translated into the language of the accused”, *Prosecutor v. Delalić et al.*, Case no. IT-96-21-T, Decision on Defence application for forwarding the documents in the language of the Accused, 25 September 1996, para. 14.

proceedings would not contribute to the expeditious preparation of the trial at this stage of proceedings, the Pre-Trial Judge will not decide on that regime, and instead defers to the relevant Chamber to make that determination at the appropriate time.

**h. Supplementary requests for translation**

80. Notwithstanding the various language modalities determined above, the Parties and Victims' Representatives remain entitled at any time to move the Pre-Trial Judge or relevant Chamber, either to order the translation of specific documents by the Registry, or to order the preparation of summaries of specific documents by the relevant party for translation. Such order shall only be granted when the moving party shows good cause.<sup>78</sup>

**DISPOSITION**

**FOR THESE REASONS**

**THE PRE-TRIAL JUDGE,**

**PURSUANT TO RULES 10, 77(E), and 89(B);**

**WITHOUT PREJUDICE TO** any future orders or decisions which the Pre-Trial Judge or another Chamber may issue;

**WITHOUT PREJUDICE TO** any future motion by a Party or Victims' Representative requesting, with good cause, the translation of specific documents by the Registry, or the preparation of summaries of specific documents by the relevant party for translation by the Registry;

**MINDFUL** of articles 14 and 16 of the Statute, and Rules 58, 59, 88(G), 110 and 113 of the Rules;

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<sup>78</sup> The Pre-Trial Judge emphasises that summaries in whatever language will not have the force of formal pleadings or other materials required by the Rules, but will serve rather as an aide to francophone participants seeking to understand the case.

**CONSIDERS**, that participants in oral proceedings may use any of the three official languages of the Tribunal, save that an accused may use his own language;

**ORDERS** that written submissions by the Parties and Victims' Representatives shall be filed in either English or in French, save that an unrepresented accused may file his written submissions in Arabic;

**ORDERS** that all written submissions in Arabic shall be translated into English, and that these submissions shall only be translated into French subject to prior authorisation from the Pre-Trial Judge or relevant Chamber, *proprio motu*, or at the request of a Party or Victims' Representative showing good cause;

**ORDERS** that written submissions in either English or French shall only be translated into the other official languages of the Tribunal subject to prior authorisation from the Pre-Trial Judge or relevant Chamber, *proprio motu*, or at the request of a Party or Victims' Representative showing good cause;

**ORDERS** that written submissions filed by persons other than counsel may be made in a language other than an official language of the Tribunal with authorisation of the Pre-Trial Judge or Trial Chamber;

**ORDERS** that written submissions by persons other than counsel shall be translated into English, and that these submissions shall only be translated into Arabic and/or French subject to prior authorisation from the Pre-Trial Judge or relevant Chamber, *proprio motu*, or at the request of a Party or Victims' Representative, showing good cause;

**ORDERS** that materials filed by the Prosecutor pursuant to Rule 91(G) of the Rules, excluding materials governed by Rule 91(G)(iii) of the Rules, shall be filed in any of the three official languages of the Tribunal as well in their original language, and shall be translated into the other two official languages of the Tribunal;

**ORDERS** that materials filed by Victims' Representatives pursuant to Rule 91(H) of the Rules be filed in either English or Arabic and shall be translated into the other language as applicable;

**ORDERS** that materials filed by Defence pursuant to Rule 91(I) of the Rules shall be filed in either English or French, save that an unrepresented accused may file these materials in Arabic, and that in any event these materials shall also be filed in the original language if that language is not one of the official languages of the Tribunal;

**ORDERS** that materials subject to disclosure by the Defence shall be filed in English or French, and that in any event that these materials shall be filed in the original language if that language is neither English nor French;

**ORDERS** that materials subject to disclosure by the Prosecutor and the Victims' Representatives shall be filed in English and Arabic, and furthermore in the original language if that language is neither English nor Arabic;

**ORDERS** that materials of fundamental importance, as determined by the Pre-Trial Judge or Chamber — following an order to that effect by the Pre-Trial Judge or Chamber, *proprio motu*, or at the request of a Party or Victims' Representative — shall either be translated into French in their entirety, or they shall be summarised by the Prosecutor, and such summaries shall be translated into French; and

**ORDERS** the Prosecutor to provide the Pre-Trial Judge and Trial Chamber with monthly updates on the status of the preparation of the summaries and other translations.

Done in English.

Leidschendam, 16 September 2011.

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Daniel Fransen  
Pre-Trial Judge

Case name: *In the matter of El Sayed*

Before: Appeals Chamber

Title: **Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor against the Pre-Trial Judge's Decision of 2 September 2011 and Ordering the Disclosure of Documents**

Short title: **"Disclosure Decision AC"**







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

## BEFORE THE APPEALS CHAMBER

Case No.: **CH/AC/2011/02**  
Before: **Judge Antonio Cassese, Presiding**  
**Judge Ralph Riachy**  
**Judge Sir David Baragwanath, Judge Rapporteur**  
**Judge Afif Chamsedinne**  
**Judge Kjell Erik Björnberg**  
Registrar: **Mr. Herman von Hebel**  
Date: **7 October 2011**  
Original language: **English**  
Type of document: **Public with Confidential and *Ex Parte* Annexes**  
[Case Name: ***In the matter of El Sayed***]

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### **Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor Against the Pre-Trial Judge's Decision of 2 September 2011 and Ordering the Disclosure of Documents**

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**Counsel:**

Mr. Akram Azoury  
Mr. Antoine Korkmaz

**Office of the Prosecutor:**

Mr. Daniel A. Bellemare, MSM, Q.C.  
Mr. Daryl A. Mundis  
Mr. Ekkehard Withopf  
Mr. David Kinnecome  
Ms. Marie-Sophie Poulin

**Head of the Defence Office:**

Mr. François Roux

## HEADNOTE<sup>1</sup>

*Mr El Sayed was detained by the Lebanese authorities for more than three and a half years as part of the investigation into the 2005 assassination of former Prime Minister Rafiq Hariri. Following the establishment of the Special Tribunal for Lebanon, and on the application of the Tribunal's Prosecutor, the Appellant was released without charge by order of the Pre-Trial Judge. He applied to the Tribunal for disclosure of documents in its possession to enable him to bring proceedings before national courts against persons allegedly responsible for false allegations against him. In the ensuing litigation between Mr El Sayed and the Prosecutor, who is in possession of the documents in question but has disclosed only a limited portion of them thus far, the Pre-Trial Judge issued a decision on 2 September 2011 requiring the Prosecutor to disclose the statements of certain persons who had been interviewed during the mandate of the United Nations International Independent Investigation Commission ("UNIIC"). The Prosecutor has appealed the decision.*

*The Appeals Chamber is called upon to decide whether the Pre-Trial Judge erred in ordering disclosure because disclosure would either: (a) put the author of a document or another person at risk; or (b) impede the due conduct of forthcoming litigation.*

*By way of preliminary ruling, the Appeals Chamber finds that since the Pre-Trial Judge's order on disclosure "potentially deals finally with" Mr El Sayed's application, there is no need for certification by the Pre-Trial Judge and therefore the Appeal is properly before the Appeals Chamber. The Appeals Chamber observes that the definition of "false witnesses" used by Mr El Sayed is improper in relation to persons whose evidence the Tribunal has had no opportunity to appraise. Although they are not witnesses before the Tribunal, it is bound to consider their allegations of legitimate fear insofar as these may have an objective basis. That is because, upon Mr El Sayed's own request, the Tribunal has asserted jurisdiction over these statements.*

*During an ex parte meeting convened by the Judge Rapporteur, where counsel for the Prosecution and the Head of the Victims and Witnesses Unit ("VWU") were heard, the Prosecution agreed that it is the VWU that can speak authoritatively in relation to any need for protection of persons providing statements. In relation to*

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<sup>1</sup> 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.

*these persons the proper course is for the Prosecution to seize itself of the question of the risks, consult with the VWU and then present the Pre-Trial Judge with an informed position in relation to each.*

*The Appeals Chamber finds that the statements of certain interviewees must indeed be provided to Mr El Sayed swiftly, as ordered by the Pre-Trial Judge – a short delay being necessary only to consider whether the redactions proposed by the Prosecutor are not inconsistent or incomplete. As regards the statements of the other interviewees, the determination of whether they should be disclosed and, if so, what redactions would apply must be made by the Pre-Trial Judge after the Prosecutor has liaised with the VWU in order to reconsider the nature of the alleged risk and, if necessary, the methodology previously adopted to assess risk.*

*Mr El Sayed further (i) contends that the Prosecutor should be deemed no longer eligible to appear before the Tribunal and be replaced by an ad hoc opponent and (ii) claims monetary compensation for alleged abuse of process inflicted upon him by the Prosecutor. In the absence of such contentions at first instance, and there being no basis for asserting delay before the Appeals Chamber, this Chamber is not the proper forum for such a determination at this stage.*

## INTRODUCTION

1. The Prosecutor has filed an appeal<sup>2</sup> against the decision of the Pre-Trial Judge of 2 September 2011 which ordered him to disclose to Mr El Sayed and his counsel, on certain terms, some 133 documents.<sup>3</sup>

2 *In re: Application of El Sayed*, Urgent Prosecution's Appeal of the Pre-Trial Judge's Decision of 2 September 2011 and Request for Suspensive Effect Pending Appeal, Confidential and *ex parte*, OTP/AC/2011/02, 12 September 2011 ("Appeal").

3 *In re: Application of El Sayed*, Decision relating to the Prosecutor's second application for suspension of the Decision of 6 July 2011, CH/PTJ/2011/15, 2 September 2011. In his appeal, the Prosecutor asserts that the documents contain witness statements that would place the witnesses at unacceptable risk if disclosed. The Appeals Chamber temporarily suspended the Decision of 2 September 2011 (*In re: Application of El Sayed*, Order on Urgent Prosecution's Request for Suspensive Effect Pending Appeal, CH/AC/2011/01, 12 September 2011). On 13 September 2011, the Appeals Chamber issued a scheduling order requiring the Prosecution to submit a summary of the risks faced by each witness (*In re: Application of El Sayed*, Scheduling Order, CH/PRES/2011/02, 13 September 2011).

## DISCUSSION

### I. Is Certification of the Appeal Required?

2. The first question is whether the Appeals Chamber should decline to accept the Appeal without a certificate from the Pre-Trial Judge. Rule 126 of the Rules of Procedure and Evidence (“Rules”) deals with motions in criminal appeals that require such certification. While it does not in terms deal with motions in civil appeals, in our judgment of 19 July 2011 on Mr El Sayed’s application for disclosure of documents we held that in civil cases also we would normally require certification for “any appeal before full and final judgment;” but not for an appeal which “potentially deals finally with” the application.<sup>4</sup>

3. Mr El Sayed argues that the Prosecution’s Appeal is interlocutory and that, in the absence of certification to appeal pursuant to Rule 126 (C), the Appeals Chamber is not properly seized of the Appeal.<sup>5</sup>

4. On 15 August 2011 we rejected, for want of a certificate, an appeal by Mr El Sayed against an order of the Pre-Trial Judge of 21 July 2011 suspending the effect of his earlier decision of 6 July 2011 directing disclosure of certain documents. So, it may be asked, why should not the Prosecutor be required to obtain a certificate as a condition of being able to bring his present Appeal?

5. The answer is that the decision of the Pre-Trial Judge of 2 September 2011, ordering disclosure, “potentially deals finally with” Mr El Sayed’s application for disclosure: once the documents are disclosed there is nothing more to decide. His

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4 *In re: Application of El Sayed*, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, CH/AC/2011/01, 19 July 2011, paras 19 and 20.

5 *In re: Application of El Sayed*, Réplique à la sixième demande de suspension de Procureur, OTP/AC/2011/01, 9 September 2011, para. 4; Réplique à “Prosecution’s appeal of the Pre-Trial Judge’s Decision of 2 September 2011 and Request for the Suspensive Effect Pending Appeal” en application du “scheduling order” du 13 septembre 2011, OTP/AC/2011/01, 29 September 2011, paras 17 and 18 (“Reply”). Mr El Sayed has requested that the Appeals Chamber accept a rectified version of the title of his Reply (*In re: Application of El Sayed*, Rectification Reply to Prosecution’s Appeal of 12 September 2011 – Request for the Prosecutor to be Withdrawn and an Ad Hoc Opponent to be Appointed – Request for Damages for Abuse of Procedure, OTP/AC/2011/01, 29 September 2011), which we address in paras. 36 to 41 of this decision.

decision of 21 July 2011, by contrast, had no final effect. So a certificate was required to appeal against the latter but is not needed for the present appeal.

## II. Mr El Sayed's Threshold Objection to the Appeal

6. In his reply dated 29 September 2011 Mr El Sayed repeats the contention he has previously made, that the persons whose statements he seeks, and which this Chamber has confirmed are to be provided to him subject to the issue of risk discussed in this decision, are “false witnesses” (“*faux témoins*”) or “authors of defamatory allegations” (“*auteurs des dénonciations calomnieuses*”). He submits that the allegations of such “false witnesses” have wrongly served until now as a pretext for failure to give effect to the Tribunal’s decisions requiring release of the documents he seeks.<sup>6</sup>

7. He contends that the Appeal is fundamentally flawed because, on the true construction of Rule 133, it provides no protection to false witnesses. He further:

a) seeks to challenge the decision of the Pre-Trial Judge of 12 May 2011 as wrongly acknowledging an entitlement of the Prosecutor to communicate to “false witnesses” or “authors of defamatory allegations” confidential decisions of the Tribunal;<sup>7</sup> and

b) contends that the decision has, without justification, recognised an entitlement of “false witnesses” to protection under Rule 133.<sup>8</sup>

8. Mr El Sayed asserts that he has not been responsible for any threat; and that he will comply meticulously with the conditions of disclosure of the various documents referred to by the Pre-Trial Judge in his decision of 12 May 2011.<sup>9</sup>

9. Underlying these arguments is the advice of the Prosecutor to the Pre-Trial Judge that resulted in his decision of 29 April 2009 on the application of the

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6 Reply, para. 11(C)(iii).

7 *Id.*, para. 13(A).

8 *Id.*, para. 13(B).

9 *Id.*, para. 12.

Prosecutor that Mr El Sayed should be released from the detention to which he had been subjected for the previous three and a half years. In that decision the Pre-Trial Judge stated:

**D. – Analysis of the merits of the case**

33. In support of his Submission, the Prosecutor recalled that in order to apply for the provisional detention of a suspect, he must be in a position to indict within the timeframe set out in the Rules. However, the Prosecutor considered that the information available to him at this point in time did not enable him to indict the persons detained. He thus submitted that the question of whether provisional detention was necessary did not arise.

34. The Prosecutor stated that in arriving at this conclusion, he had:

i) thoroughly reviewed all relevant material and information available at this point in time, whether gathered by his Office, the Investigation Commission, or received from the Lebanese authorities;

ii) taken into account and reviewed the statements made by the persons detained and by others that relate to the detained persons and had assessed their credibility;

iii) reviewed relevant communications data and all other material, including physical evidence collected;

iv) reviewed the forensic assessments made;

v) reviewed the filings and decisions made in relation to motions for release filed by the detained persons and their counsel before the Lebanese authorities;

vi) taken account, in light of a review of all this information, of inconsistencies in the statements of key witnesses and of a lack of corroborative evidence to support these statements; and

vii) taken account of the fact that some witnesses had modified their statements and one key witness had expressly retracted his original statement incriminating the persons detained.

...

37. In assessing the reasonableness of the Prosecutor's conclusions in line with paragraph 27 of this order, **the Pre-Trial Judge notes the fact that the Prosecutor does not intend to indict the persons detained within the timeframe set out in Rule 63.** He also notes that, in arriving at this conclusion, the Prosecutor has based himself on the information listed above and, in particular, on the fact that he has reviewed the entire file anew, notably in light of the documents provided by the Lebanese authorities, that some witnesses have modified their statements and that a key witness has expressly retracted his original statement, which incriminated the persons detained. Finally, the Pre-Trial Judge notes the context in which the Submission is made, that is to say the detention of these persons in Lebanon since 30 August 2005.

38. Against this background, and given the succinct, but sufficient, information and considerations presented by the Prosecutor, the Pre-Trial Judge considers that the conclusions reached by the Prosecutor are not unreasonable to the point that he might have made a manifest error of judgment in exercising his discretionary power.

39. In conclusion, the Pre-Trial Judge notes that the persons detained cannot, **at this stage in the investigation**, be considered as either suspects or accused persons in the proceedings pending before the Tribunal. As a result, in application of the Rules, they do not meet the conditions *sine qua non* to be placed in provisional detention, or even to be released subject to conditions.<sup>10</sup>

(Emphasis added; internal citations omitted.)

10. The position taken by the Prosecutor and the Pre-Trial Judge will have been welcomed by Mr El Sayed. But while it released him from detention, and determined that he and his fellow detainees could not:

[...] at this stage in the investigation, be considered as either suspects or accused persons in the proceedings pending before the Tribunal,<sup>11</sup>

the decision was not couched either as a declaration of innocence on the part of Mr El Sayed or as one of guilt of "false witness" or "author of defamatory allegations"

10 STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, CH/PTJ/2009/06, 29 April 2009, paras. 33-34 and 37 to 39.

11 *Id.*, para. 39.



on the part of all or any of the witnesses. There has been no determination beyond the conclusions we have emphasised, including:

[...] the Prosecutor considered that the information available to him at this point in time did not enable him to indict the persons detained.<sup>12</sup>

11. In particular, at no point has there been any official determination as to the reliability of the evidence of the purported “false witnesses” – indeed, Mr El Sayed’s civil claim seeks to secure a judicial determination in this regard. The individuals who were interviewed during the mandate of the United Nations International Independent Investigation Commission (“UNIIC”) are not witnesses before the Tribunal, as their evidence has not been presented to the Trial Chamber.<sup>13</sup> The Tribunal’s jurisdiction is limited to the prosecution of people accused of the crimes listed in Article 1 of the Statute, and inherent jurisdiction over contempt, obstruction of justice and false testimony before the Tribunal itself. No provision in our Statute allows the Tribunal to assert jurisdiction over criminal offences which might have taken place before the creation of the Tribunal, other than those listed in Article 1 of the Statute.<sup>14</sup> For these reasons, and because we are not seized of the matter of the reliability of this material (and therefore have no access to the totality of the evidence in question), we can offer no comment on whether Mr El Sayed’s contentions are supportable. We are necessarily concerned with the personal safety of individuals who, although not giving testimony before the Tribunal, are closely linked with the material in possession of the Prosecutor and over which we have jurisdiction. Here our assertion of jurisdiction has been made specifically *upon request by Mr El Sayed*.

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12 *Id.*, para. 33.

13 Nonetheless, the Appeals Chamber recognises that the term “witness” is used by the parties in this litigation and can at times be used for consistency purposes.

14 An amendment of the Rules in October 2009 did add the possibility of contempt proceedings for false statements given to a party (i.e., Prosecutor or Defence), but simply could not have provided jurisdiction for statements made *before* the Tribunal itself came into existence. The inherent power of international tribunals to assert jurisdiction on contempt and false testimony occurring (only) in front of these courts has long been recognized by other international criminal tribunals. See, e.g., ICTY, *Prosecutor v. Simić et al.*, Judgment in the Matter of Contempt Allegations against an Accused and his Counsel, IT-95-9-R77, 30 June 2000; *Prosecutor v. Tadić*, Appeal Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, IT-94-1-A-AR77, 27 February 2001; *Prosecutor v. Aleksovski*, Judgment on Appeal by Anto Nobile against Finding of Contempt, IT-95-14/1-A, 30 May 2001; ICTR, *Prosecutor v. Ngirabatware*, Decision on Allegations of Contempt, ICTR-99-54-R77.1, 12 March 2010.

It follows that the Tribunal cannot shy away from taking responsibility for these individuals' fears insofar as they have an objective foundation. Such concerns for their personal safety may not be discarded merely because of untested allegations against the individuals concerned.

12. Furthermore, while Rules 115 and 133 apply mainly to witnesses before the court, protective measures can also be directed towards persons who would be put at risk by publication of the statement of another person, or whose legitimate claim to privacy would be threatened by such publication. This is a principle espoused by other international tribunals, which we confirm and follow.<sup>15</sup>

13. It follows that Mr El Sayed's threshold objection to the Appeal is unsustainable. The Appeals Chamber is therefore seized of the Appeal by the Prosecutor against the decision of 2 September 2011 to order disclosure of documents to Mr El Sayed.

14. We turn to consider the merits of the Appeal.

### III. The Merits of the Appeal: Procedure

15. On 21 September 2011, the Appeals Chamber received the Prosecutor's written confidential and *ex parte* submissions<sup>16</sup> pursuant to the Scheduling Order of 13 September 2011.<sup>17</sup> The Prosecutor's Submissions listed a number of persons whose statements were included in the disputed documents, and included the Prosecutor's assessment of the risks each person faced upon the disclosure of the documents.

16. To facilitate consideration and determination of the Appeal it was necessary for the Appeals Chamber to explore with the Prosecution on an *ex parte* basis the

15 See ICC Rule 87(3) (stating that measures may be granted to protect "the identity or the location of a victim, a witness or other person at risk"); ICTR, *Prosecutor v. Kamuhanda*, Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses, ICTR-99-54-T, 22 March 2001, para. 16; ICTY, *Prosecutor v. Gotovina et al.*, Decision on Defendant Ivan Čermak's Motion for Admission of Evidence of Two Witnesses Pursuant to Rule 92 bis and Decision on Defendant Ivan Čermak's Third Motion for Protective Measures for Witnesses IC-12 and IC-16, IT-06-90-T, 11 November 2009, para. 10.

16 In re: Application of El Sayed, Prosecution's Confidential and Ex Parte Submissions in Compliance with the President's Scheduling Order of 13 September 2011, OTP/AC/2011/03, 21 September 2011 ("Prosecutor's Submissions").

17 In re: *Application of El Sayed*, Scheduling Order, 13 September 2011, OTP/AC/2011/03.

Prosecutor's grounds for suspending the disclosure of the documents in relation to each of the persons interviewed during the UNIIC's mandate relevant to the present matter. The President accordingly appointed Judge Baragwanath as Judge Rapporteur to conduct an *ex parte* meeting with the Prosecution, to consult if necessary with the Victims and Witness Unit ("VWU") and to report to the members of the Appeals Chamber.

17. An *ex parte* meeting took place on 26 September 2011 in the courtroom of the Tribunal. Mr Daryl A. Mundis and Mr David Kinnecome represented the Prosecution. During that meeting the Judge and counsel spoke by speakerphone to the Head of the VWU. Following the meeting and the subsequent provision by the Prosecution of statements, the Judge posed further questions in writing, to which Prosecution counsel have responded. All these communications were recorded and form part of the record on appeal for future reference. The other Judges of the Appeals Chamber have of course had access to the documents and to the transcript of the meeting.

18. At the meeting on 26 September 2011, the issue was identified as whether the Pre-Trial Judge erred in ordering disclosure because disclosure would either:

- a) put the author of a document or another person at risk; or
- b) impede the due conduct of forthcoming litigation.

19. The Prosecutor's Submissions contained two lists. One list was prefaced by the statement:

Based on the [Prosecutor's] threat assessment, and depending on whether the Appeals Chamber seeks the assistance of VWU, redacted statements for the following witnesses can be immediately provided to the Registry for disclosure to Mr El Sayed.<sup>18</sup>

The other list was prefaced by the statement:

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<sup>18</sup> Prosecutor's Submissions, para. 95.

The Prosecution seeks interim non-disclosure of the statements of the following witnesses until protective measures are in place in connection with the *Ayyash et al.* proceedings.<sup>19</sup>

20. The Judge asked counsel whether the submissions should be read as an application for leave to withdraw the Appeal in relation to the persons listed at paragraph 95 of the Prosecutor’s Submissions. Counsel responded that “unless the Appeals Chamber decides to seek the assistance of VWU,” the Prosecution sought such leave.<sup>20</sup> Counsel were clearly uncomfortable about making any election and sought to pass the decision to the Appeals Chamber. The Judge pointed out that the Appeals Chamber has no background knowledge of the documents or their context; whereas the Prosecution has been seized of them for some years.

21. The Prosecutor recognised that it is the VWU which can speak authoritatively about risk;<sup>21</sup> yet the VWU had never been asked to comment save in relation to two persons, one of whom is not relevant to Mr El Sayed’s intimated claim to remedies in national courts.<sup>22</sup> The Judge asked:

[...] is it common ground now that ... the right course is for the Prosecution to seize itself of the question [of risks to all interviewees], to consult with VWU, then to go back to the Pre-Trial Judge with an informed position in relation to each?<sup>23</sup>

Counsel agreed.<sup>24</sup>

<sup>19</sup> Prosecutor’s Submissions, para. 96.

<sup>20</sup> *In re: Application of El Sayed*, Transcript of *ex parte* meeting of 26 September 2011 (“Transcript”), at 7.

<sup>21</sup> *Id.*, at 11:

Clearly within the structure of the Tribunal the primary ...organ responsible for making these types of threat assessments [is] the [VWU]... The [Office of the Prosecution] has a limited capability in order to conduct such threat assessments... [the VWU] we would submit...have superior capabilities and experience in dealing with threat assessments to victims or witnesses.

<sup>22</sup> *In re: Application of El Sayed*, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s decision of 12 May 2011, CH/AC/2011/01, 19 July 2011, para. 3 and fn. 5 (citing Mr El Sayed’s initial request for documents).

<sup>23</sup> Transcript, at 17.

<sup>24</sup> *Ibid.*

22. Rule 115 (A) empowers the Prosecutor, in exceptional circumstances, to order non-disclosure of the identity of witnesses and others who may be at risk until appropriate protective measures have been implemented. Rule 115 (B) states that the Pre-Trial Judge or Trial Chamber may consult the VWU. Rule 133 makes further provision for protective measures.

23. Mr El Sayed has contended that the Prosecution has engaged in a systematic process of delay in providing the information which he claims. However, the relatively short time-frame between the filing of the Appeal on 2 September and judgment today, coupled with the Prosecution's substantial success in this Appeal, mean that there is no basis for contending that the proceedings before the Appeals Chamber have been delayed. As to the proceedings before the Pre-Trial Judge, it is to be emphasised that the Rules do not detract from the obligation of the Prosecutor, among his many onerous tasks, to make the enquiries needed to determine which witnesses require protection and to place the relevant information before the Pre-Trial Judge. It is not the proper role of the Appeals Chamber to embark on a first instance risk assessment from which no appeal could be brought. A general threat assessment made on 3 May 2011 did not focus on individuals. From the Prosecution's Submissions there may be a question whether the Prosecution provided all relevant information to the Pre-Trial Judge. The Pre-Trial Judge has no other basis to assess the threats over individuals whose identity, status and relevance for the main case was only known to the Prosecution. Although the Prosecution states that it had contacted as many "witnesses" as possible last July, and that all of those successfully contacted had expressed fear at the disclosure of their statements,<sup>25</sup> it appears that the Prosecution undertook its first threat assessment specific to each individual only *after* the President required more detailed information in his scheduling order of 13 September 2011. The Prosecution now appears, as a result of this threat assessment, to have reconsidered the need for protective measures for a number of interviewees, as though it had not thoroughly considered the matter before, and it is obliged to acknowledge that some of them in fact do *not* oppose the disclosure of their statements. In addition, the VWU has yet to be consulted regarding any of the additional individuals not considered in the report it has prepared.

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25 Appeal, para. 20.

24. But this Appeal does not result from any substantive application at first instance for relief on the grounds of such conduct. It is a Prosecutor's appeal from a determination of the Pre-Trial Judge which it contends has been over-generous to Mr El Sayed; not an appeal from any decision dealing on its merits with a substantive claim by Mr El Sayed that he has suffered loss from an unlawful systemic process of delay. It follows from generally recognised principles of law that we can make no present determination of whether the Prosecution duly discharged its duty to provide all relevant and necessary information to the Pre-Trial Judge.<sup>26</sup> It might be for the Pre-Trial Judge to reach such a determination if called upon to do so.

25. However, we do emphasise that there must be no delay in bringing Mr El Sayed's application to conclusion. It is the duty of any court of law to both make its decision and to do so within a reasonable period.<sup>27</sup> That is especially the case where the Tribunal's Statute requires procedures which "reflect ... the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial."<sup>28</sup> The policy of expedition which the Statute requires specifically in criminal cases before the Tribunal is also required by analogy in its inherent civil jurisdiction. There is evidence which, if unanswered, might support an argument that the Prosecution has not acted with reasonable promptitude in identifying the nature of the risks to individuals and in putting the relevant material before the Pre-Trial

26 In *John v. Rees* [1970] Ch. 345 at 402, Sir Robert Megarry warned of the risk of acting on one side's contentions without hearing the other:

It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events. See also *Mahon v. Air New Zealand Ltd* [1984] AC 808 (PC).

27 The courts will impute to decision-makers a duty to act which is not stated in so many words. *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997. There the House of Lords ascribed to a Minister the obligation, albeit unexpressed in the statute, to give due consideration to bona fide complaints about the operation of a scheme for funding the supply of milk which if altered in favour of London suppliers would adversely affect suppliers in Cornwall. He was not permitted to evade or defer the political consequences by avoiding a decision.

28 Statute of the Special Tribunal for Lebanon, Article 28(2).

Judge in a timely fashion. Whether that is so, and whether in that event any remedy might be available to Mr El Sayed, are matters of which we are not currently seized. But we, and now the Pre-Trial Judge, are seized of a responsibility to ensure that prompt attention is given to the issues we have referred back to the Pre-Trial Judge.

#### **IV. Statements Where the Appeal is Clearly Not Arguable**

26. Among the persons listed in paragraph 95 of the Prosecutor's Submission are three, each of whom has stated he does not object to his statement(s) being disclosed to Mr El Sayed. Having read these statements and the redactions made by the Prosecutor and approved by the Pre-Trial Judge we are not satisfied that the Prosecutor can show any error in the decision of the Pre-Trial Judge as it affects them. That is because:

- a) there is no reason to fear risk to the persons; and
- b) it is not suggested that disclosure of the statements would impede the due conduct of forthcoming litigation.

27. It follows that in relation to their disclosure the Appeal is dismissed. It just remains for the Prosecutor to ensure that redactions of these documents (which he proposed in the first instance) are not inconsistent or incomplete. Our orders made under the final heading "Disposition" refer in relation to these statements to confidential and *ex parte* Annex A.

#### **V. The Other Statements**

28. While it is the obligation of any tribunal to perform its task in a timely manner, in doing so it must avoid injustice. As the Prosecutor accepts,<sup>29</sup> it is the VWU which can speak authoritatively about risk; yet the VWU has never been asked to comment save in relation to the two persons mentioned in paragraph 21 above, only one of whom (he is listed in paragraph 96 of the Prosecutor's Submissions, and in confidential and *ex parte* Annex B to this decision) is of relevance.

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<sup>29</sup> Transcript, at 11 (see para. 21 above).

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**A.    *The individual whose case has been the subject of VWU consultation***

29. In his case the original statements contain reference to names of various persons in respect of whom a second version seeks to redact information tending to identify them. But in several instances the redaction process was incomplete: it was possible to identify the person by reference to indicia other than the name; and indeed in one instance the redaction of the name is followed by disclosure of the name. If on a proper risk evaluation the person's identity should be suppressed, further redactions would be needed. We note that Mr El Sayed has seen information erroneously released in the Prosecution's initial notice of appeal. That does not relieve him from complying with the conditions imposed by the Pre-Trial Judge in his order of 2 September 2011 which suppresses that information.

30. Had the matter stopped there we would have allowed the Appeal on the simple ground that the decision was illogical. Either the names as well as other identifiers should be disclosed; or both names and other identifiers should be redacted. Further consideration by the Prosecutor in consultation with the VWU would be required as in the other cases to be mentioned in paragraph 32 of this decision. But as a result of the further enquiry referred to in paragraph 16 above the redaction process can be extended to remove the problem.

31. There is, however, a point that has arisen *after* the decision delivered by the Pre-Trial Judge. We have sighted a report providing fresh material suggestive of risk in relation to this interviewee. It is arguable that, through no fault of the Pre-Trial Judge, his decision in respect of this individual was made on a materially flawed factual basis. It follows that in relation to this person the Appeal must be allowed and the case be sent back to the Pre-Trial Judge for further consideration in the light of this new point. Our orders made under the final heading "Disposition" refer in relation to this statement to confidential and *ex parte* Annex B.

**B.    *The remaining individuals***

32. In all other cases we have also concluded, with reluctance, that we must send this matter back to the Pre-Trial Judge for further consideration. It is the obligation of any court of law to take account of all factors potentially significant to the decision;



the more so when personal safety is at stake. Our orders made under the final heading “Disposition” refer in relation to these statements to confidential and *ex parte* Annex C.

33. Given the concession by the Prosecution recorded at paragraph 21 above it is unnecessary for us to analyse the reason for intervention. It might be expressed as error on the part of the Prosecution in failing, when preparing its list of witnesses whose redacted statements “can be immediately provided [...] to Mr El Sayed,”<sup>30</sup> to give careful consideration to what contribution the VWU might be able to make to the process of risk evaluation and to ensure that the Pre-Trial Judge was in a position to evaluate the relevant risks. As a result the decision of the Pre-Trial Judge erred in law by failing to take account of all factors potentially significant to the decision, and that error affects the classifications in both paragraphs 95 and 96 of the Prosecutor’s Submissions (other than those listed in confidential and *ex parte* Annexes A and B, namely those listed in confidential and *ex parte* Annex C), going to whether either disclosure or non-disclosure in each instance is appropriate. (The name in confidential and *ex parte* Annex B must be kept confidential for the different reason stated at paragraph 31 above.) It is enough that the Prosecution agree that the case must be referred back to the Pre-Trial Judge for further consideration of the other cases.

34. It may be that on such reconsideration the Prosecutor will be able to demonstrate that the VWU is happy with the methodology adopted in making the risk assessment; or that in any event the VWU agrees with the Prosecutor’s assessment. In either case the error of law would be corrected. Our obligation is to ensure due process: both disclosure to Mr El Sayed of his entitlement and protection of individuals where that is justified.

35. The need to identify with precision whether there is relevant risk to any witness or other person may have been apparent since, at latest, the decision of the Pre-Trial Judge of 12 May 2011 ordering disclosure. It would be a matter of concern if a failure by the Prosecutor to follow due process added to the delays to date in resolving Mr El Sayed’s claim to information.

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30 Prosecutor’s Submissions, para. 95.

**VI. Mr El Sayed's Claims as to Application of Rules 60 and 60 *bis* and Indemnity in Respect of Abusive Procedure**

36. Mr El Sayed concludes his reply with contentions:

- a) the Prosecutor's conduct of the proceeding has constituted contempt of due process and obstruction of justice in various respects which should lead this Chamber to initiate investigation under Rule 60 *bis* (E);<sup>31</sup> in particular:
- b) as chief investigator for UNIIIC the Prosecutor delayed revealing a lack of credible evidence to keep Mr El Sayed in detention, thus prolonging his detention;<sup>32</sup>
- c) the Prosecutor has unnecessarily delayed these proceedings, thus infringing principles of fairness and due process and the duty to act in good faith;<sup>33</sup>
- d) he is in a conflict of interest because he wishes to avoid releasing information that would shed light on his conduct of the UNIIIC investigations and is partial to the witnesses whose statements are in issue, and is no longer eligible to appear before the Tribunal (Rule 60 (A) (iii));<sup>34</sup> and
- e) he should be required to indemnify Mr El Sayed by payment of two hundred thousand Euros.<sup>35</sup>

37. Such substantive contentions are not so directly related to Mr El Sayed's Reply to the Appeal that to entertain them in that context would "reflect the highest standards of...procedure, with a view to ensuring a fair and expeditious hearing" required by Article 28 of the Tribunal's Statute, either of the Appeal or of the contentions. Mr

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<sup>31</sup> Reply, paras 50-51.

<sup>32</sup> *Id.*, para. 39.

<sup>33</sup> *Id.*, paras 41 to 46.

<sup>34</sup> *Id.*, para. 53.

<sup>35</sup> *Id.*, para. 58.

El Sayed proposes that so much of the case as deals with such contentions should be argued not by the Prosecutor but by a separate *ad hoc* contradictor.<sup>36</sup> Such course would lead to confusion both of roles and of issues. For that reason we decline to permit the addition to the submission in reply of the paragraphs seeking to raise the contempt and indemnity issues, save insofar as may bear upon costs of the Appeal.

38. In classifying Mr El Sayed's document as a reply we rely both on his original description of it as "Réplique à 'Prosecution's Appeal of the Pre-Trials Judge's Decision of 2 September 2011 and Request for the Suspensive Effect Pending Appeal' en application du 'scheduling order' du 13 September 2011" and on the amendment of the description on 29 September 2011 to read "Reply to Prosecution's Appeal of 12 September 2011 – Request for the Prosecutor to be withdrawn and an *ad hoc* opponent to be appointed – Request for damages for abuse of procedure." The latter confirms that the document is to be treated as a reply.

39. At paragraphs 15 and 16 of the Reply Mr El Sayed has advanced a submission of lack of jurisdiction of the STL, further suggesting that the "false witnesses" should not be deemed witnesses for the purpose of Rule 133.

40. We have dealt at paragraph 11 with the contention of "false witnesses." If the contention contains an assertion of lack of jurisdiction of the Tribunal (we are not entirely clear whether it does), it is not open to a litigant who has himself elected to make an application to this very Tribunal. Neither issue is properly open to Mr El Sayed on this Appeal.

41. It follows that Mr El Sayed's procedural submission in reply – that the Prosecutor should be withdrawn and an *ad hoc* opponent to his claim should be appointed – cannot be advanced on this appeal since there is no substantive issue before us to which it could attach. Any such submission should be made to a Chamber of first instance – Pre-Trial Judge or Trial Chamber – before which any contentions of the kind referred to in paragraph 36 were advanced. We make no comment on

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36 *Id.*, para. 55.

the validity of such contentions or any others, whether under Rules 60 *bis*, 4<sup>37</sup> or otherwise.

42. We add that the scheme of the Tribunal's Statute is for a decision at first instance, either by the Pre-Trial Judge or by the Trial Chamber, followed by an appeal to this Chamber. While the literal language of the first sentence of Rule 60 *bis* (C) appears to allow a party to bring an allegation of contempt to the attention of any Chamber, Rule 60 *bis* (D), (E), (F) and (L) contemplate that the contempt enquiry is conducted by the Pre-Trial Judge or the Trial Chamber, whose decision is explicitly subject to appeal. Although the point has not been argued, and we do not determine it, it may prove that save in such exceptional cases as contempt in the face of the Appeals Chamber, such allegations should be made to the Chamber of first instance.

43. If giving alleged false statements to the UNHCR is a crime under Lebanese law – something upon which the Appeals Chamber offers no present comment – such offence might be prosecuted under domestic law.

44. We mention in conclusion that Mr El Sayed has also asserted that there can be no partial redaction of the challenged statements because that is inconsistent with his right to information about his accusers.<sup>38</sup>

45. The submission is unsustainable. The task of any court dealing with the complex and varying values which must be considered on such a claim is to evaluate them and make a principled judgment which gives each its due weight. The answer to this contention is to be found in our judgment of 19 July 2011. At paragraph 63 of that judgment we stated:

[...] the weight of the applicant's entitlement to information falls along a continuum: the greater the personal stake, the stronger the personal claim, albeit still to be weighed against other concerns for confidentiality.<sup>39</sup>

37 We note that Rule 4 allows parties to raise objections about non-compliance of the Rules by a party. There has as yet been no assertion that any specific Rule was breached in the instant proceedings.

38 Reply, paras 32 to 34.

39 *In re: Application of El Sayed*, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011, CH/AC/2011/01, 19 July 2011, para. 63.

## **DISPOSITION**

### **FOR THESE REASONS;**

#### **THE APPEALS CHAMBER**

**ACCEPTS** the Appeal as properly filed;

**DISMISSES** the Appeal in relation to the statements of the persons listed in confidential and ex parte Annex A;

**DIRECTS** that the Prosecutor make the redactions referred to in paragraph 27;

**ORDERS** therefore the disclosure of the statements of the persons listed in confidential and ex parte Annex A no later than 13 October 2011, after a final check of the consistency of redactions in keeping with the aims of the Pre-Trial Judge's instructions in his 12 May 2011 order;

**ALLOWS** the Appeal in relation to the statements of persons listed in confidential and ex parte Annexes B and C;

**SETS ASIDE** the Decision of 2 September 2011 in relation to the statements of the persons referred to in confidential and ex parte Annexes B and C;

**DIRECTS** the Pre-Trial Judge to issue a scheduling order with, inter alia, a time-frame for the Prosecutor to check, with the assistance of VWU if necessary, what redactions would be required to disclose the statements of the persons listed in confidential and ex parte Annexes B and C, which may include a list setting priorities for decisions to be made;

**DIRECTS** the Pre-Trial Judge to consider the Prosecutor's Submissions and to issue one or more comprehensive and reasoned decision(s) on the statements that should be disclosed upon redaction and the statements that may not be disclosed even upon redaction;

**DIRECTS** the Prosecution to give careful consideration to what contribution the VWU may be able to make to the process of risk evaluation in relation to the statements of such persons;

**CLARIFIES** that the dismissal in part of this Appeal in no way affects the limitations in the Pre-Trial Judge's decision of 2 September 2011 regarding how Mr El Sayed and his counsel may use these documents, and that the limitations and requirements established by the Pre-Trial Judge remain fully in force.

**DISMISSES** the applications by Mr El Sayed that the Appeals Chamber disqualify the Prosecutor under the Rules and require him to indemnify Mr El Sayed by a monetary payment.

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

Filed this 7th day of October 2011,

Leidschendam, the Netherlands

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Judge Antonio Cassese  
President



Case name: ***The Prosecutor v. Ayyash et al.***

Before: **Pre-Trial Judge**

Title: **Order to Seize the Trial Chamber  
pursuant to Rule 105 *bis* (A) of  
the Rules of Procedure and  
Evidence in Order to Determine  
Whether to Initiate Proceedings *In Absentia***

Short title: **“Rule 105 *bis* Order”**







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

## THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/I**  
The Pre-Trial Judge: **Mr Daniel Fransen**  
The Registrar: **Mr Herman von Hebel**  
Date: **17 October 2011**  
Original: **French**  
Type of document: **Public**  
[Case Name: ***The Prosecutor v. Ayyash et al.***]

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### **ORDER TO SEIZE THE TRIAL CHAMBER PURSUANT TO RULE 105 *BIS* (A) OF THE RULES OF PROCEDURE AND EVIDENCE IN ORDER TO DETERMINE WHETHER TO INITIATE PROCEEDINGS *IN ABSENTIA***

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**Office of the Prosecutor:**  
Mr Daniel A. Bellemare, QC

**Defence Office:**  
Mr François Roux

1. By way of the present Order, pursuant to Rule 105 *bis* (A) of the Rules of Procedure and Evidence (the “Rules”), the Pre-Trial Judge of the Special Tribunal for Lebanon (the “Tribunal”) seizes the Trial Chamber for the purpose of ruling on the question of determining whether it is appropriate to initiate proceedings *in absentia* against Messrs. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra.

2. After having reviewed the principal stages of the procedure (I), the applicable law to the case at hand (II) and the observations of the Head of Defence Office and the Prosecutor with regard to the determination of the period of time as set forth in Rule 105 *bis* (A) of the Rules (III), the Pre-Trial Judge will set out the grounds for this order (IV).

## **I. Procedural background**

3. On 28 June 2011, pursuant to Article 18 (1) of the Statute and Rules 68 and 74 (A) of the Rules, the Pre-Trial Judge issued a “Decision Relating to the Examination of the Indictment of 10 June 2011 Issued against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra”, according to which those persons were indicted in connection with the attack of 14 February 2005 against Mr Rafiq Hariri and other persons (respectively the “Decision on the Indictment”, the “Indictment” and the “Accused”).<sup>1</sup> The same day, the Pre-Trial Judge issued four arrest warrants including transfer and detention orders against the Accused (the “Arrest Warrants”).<sup>2</sup> In order to facilitate the arrest of the Accused, the Indictment, the Arrest Warrants and the Decision on the Indictment were kept confidential.

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1 Case No. STL-11-01/I, Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra, 28 June 2011.

2 Case No. STL-11-01/I, Warrant to Arrest Mr Salim Jamil Ayyash Including Transfer and Detention Order, 28 June 2011; Case No. STL-11-01/I, Warrant to Arrest Mr Mustafa Amine Badreddine Including Transfer and Detention Order, 28 June 2011; Warrant to Arrest Mr Hussein Hassan Oneissi Including Transfer and Detention Order, 28 June 2011; Case No.° STL-11-01/I, Warrant to Arrest Mr Assad Hassan Sabra Including Transfer and Detention Order, 28 June 2011.

4. On 30 June 2011, pursuant to Rules 76 (A) and 79 (D) of the Rules, the Registrar transmitted the Indictment together with the Arrest Warrants to the competent authorities of the Lebanese Republic, the State of which the Accused are nationals and in whose territory the Accused were last known to be residing. In the Arrest Warrants, the Pre-Trial Judge requested the competent authorities of the Lebanese Republic to search for and arrest the Accused, in any place where they might be found in the territory of the Lebanese Republic, to detain and transfer them to the Headquarters of the Tribunal. He also requested the competent authorities of the Lebanese Republic to execute the Arrest Warrants at the earliest opportunity and to serve them, together with the Indictment, to the Accused in person.

5. On 8 July 2011, upon request of the Prosecutor and pursuant to Rule 84 of the Rules, the Pre-Trial Judge issued international arrest warrants against the Accused intended for the competent authorities of all States and authorised the Prosecutor to request the International Criminal Police Organisation (“INTERPOL”) that it issue and circulate red notices relating to the Accused (the “International Arrest Warrants”).<sup>3</sup>

6. On 28 July 2011, upon request of the Prosecutor, the Pre-Trial Judge authorised that the names, aliases and other personal information, including photographs of the Accused as well as the charges laid against them, be rendered public.<sup>4</sup>

7. On 9 August 2011, the Public Prosecutor at the Lebanese Court of Cassation (the “Public Prosecutor”) transmitted to the Registrar a copy of a report indicating the measures taken by the authorities of the Lebanese Republic in order to execute the Arrest Warrants and noting that the Accused could not be arrested (the “Public Prosecutor’s Report of 9 August 2011”).

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3 Case No. STL-11-01/I, International Warrant to Arrest Mr Salim Jamil Ayyash Including Transfer and Detention Order, 8 July 2011; Case No. STL-11-01/I, International Warrant to Arrest Mr Mustafa Amine Badreddine Including Transfer and Detention Order, 8 July 2011; Case No. STL-11-01/I, International Warrant to Arrest Mr Hussein Hassan Oneissi Including Transfer and Detention Order, 8 July 2011; Case No. STL-11-01/I, International Warrant to Arrest Mr Assad Hassan Sabra Including Transfer and Detention Order, 8 July 2011.

4 Case No. STL-11-01/I, Order on the Prosecutor’s Motion for Variation of the Order for Non-disclosure of the Indictment, 28 July 2011.

8. On 11 August 2011, the President of the Tribunal publicly announced that the Indictment had not been served on the Accused and that they had not been arrested. In the same statement, he also invited the Accused to appear before the Tribunal, either in person or by video-link, and to appoint counsel responsible for representing them in the legal proceedings (the “President’s Statement of 11 August 2011”).<sup>5</sup>

9. On 16 August 2011, after consultation with the Prosecutor, the Pre-Trial Judge lifted the confidentiality of the Indictment, the Decision on the Indictment, the Arrest Warrants and the International Arrest Warrants.<sup>6</sup>

10. On 18 August 2011, pursuant to Rule 76 (E) of the Rules, taking note of the fact that the efforts undertaken by the authorities of the Lebanese Republic to execute the Arrest Warrants had not been successful<sup>7</sup> and that reasonable attempts had been made to serve the Indictment and the Arrest Warrants on the Accused,<sup>8</sup> the President of the Tribunal issued an order requesting in particular the Registrar to identify “alternative means” of service of the Indictment to Lebanon and, if appropriate, other countries, and calling upon the Accused to surrender to the jurisdiction of the Tribunal (the “President’s Order of 18 August 2011”). He also ordered the authorities of the Lebanese Republic to take all reasonable steps to provide notification to the public of the existence of the Indictment and to call upon the Accused to surrender to the Tribunal.<sup>9</sup>

11. On 31 August 2011, the Registrar sent a letter to the Public Prosecutor in which he provided him with the text of a wanted notice for the Accused in Arabic, English and French, so that it might be publicly advertised in the Lebanese media, in accordance with Rule 76 *bis* of the Rules (the “Registrar’s Letter of 31 August

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5 Statement of the President of the Special Tribunal for Lebanon, Antonio Cassese, 11 August 2011.

6 Case No. STL-11-01/I, Order on Lifting the Confidentiality of the Indictment Against Messrs. Ayyash, Badreddine, Oneissi and Sabra and Other Documents, 16 August 2011. Certain information nevertheless was kept confidential so as to protect the ongoing investigation and the security of the victims and witnesses.

7 Case No. STL-11-01/I/PRES, Order Pursuant to Rule 76 (E), 18 August 2011, paras 8 to 12.

8 *Ibid.*, paras 17 to 22.

9 *Ibid.*, para. 25.

2011”).<sup>10</sup> On 8 September 2011, the Registrar sent an additional letter to the Public Prosecutor in which he specified the means by which the wanted notice for the Accused should be publicly advertised, in particular in three Arabic, one French and one English-language newspaper (the “Registrar’s Letter of 8 September 2011”).<sup>11</sup>

12. On 15 September 2011, the text of an advertisement notifying the public of the identity of the Accused and of the charges laid against them was published in five Lebanese newspapers: three Arabic,<sup>12</sup> one English,<sup>13</sup> and one French,<sup>14</sup> as requested in the Registrar’s Letter of 8 September 2011.

13. On 21 September 2011, the President of the Tribunal transmitted to the Pre-Trial Judge the report forwarded to him by the Public Prosecutor on 19 September 2011 (the “Public Prosecutor’s Report of 19 September 2011”) on the subject of the measures undertaken pursuant to Rule 76 (A) and (B) of the Rules in order to serve the Indictment and the Arrest Warrants. In a memorandum included with that Report, the President of the Tribunal invited the Pre-Trial Judge to seize, as soon as he deemed it necessary, the Trial Chamber in order that it might determine what action should be taken with regard to the proceedings, in accordance with Rule 105 bis (A) of the Rules (“Internal Memorandum of the President of 21 September 2011”).<sup>15</sup>

14. On 23 September 2011, the Pre-Trial Judge sent a confidential letter to the Registrar inviting him to transmit to him, by 28 September 2011 at the latest, any pertinent information and documents relating to the public advertisement demonstrating the publication of the text of the advertisement in newspapers and/or its broadcast in the media, as set forth in Rule 76 bis of the Rules (the “Pre-Trial Judge’s Letter of 23 September 2011”).<sup>16</sup> In the same letter, the Pre-Trial Judge also

10 Letter from the Registrar to the Public Prosecutor, 31 August 2011.

11 Letter from the Registrar to the Public Prosecutor, 8 September 2011.

12 Cf. the following newspapers: *An Nahar*, *As Safir* and *Al Mustaqbal*.

13 Cf. the following newspaper: *The Daily Star*.

14 Cf. the following newspaper: *L’Orient le Jour*.

15 Internal memorandum from the President of the Tribunal to the Pre-Trial Judge, “Case No. STL-11-01/I, *Prosecutor v. Ayyash et al.* – Report from the Lebanese Prosecutor General”, 21 September 2011.

16 Letter from the Pre-Trial Judge to the Registrar, Application of Rules 76 bis and 105 bis of the Rules, 23

invited the Registrar to provide him with information – with supporting documents if possible – demonstrating the publication of the advertisement on the Tribunal website and the broadcast of the President’s Statement of 11 August 2011 and the President’s Order of 18 August 2011 in both the Lebanese and international media.

15. On 28 September 2011 and 12 October 2011, in reply to the Pre-Trial Judge’s Letter of 23 September 2011, the Registrar sent him two letters, together with summaries of the publications placed in the Lebanese and international press, excerpts of those publications and other documents (the “Registrar’s Report”).<sup>17</sup>

16. It should be noted that, to date, the Accused have not been arrested, nor have they appeared voluntarily before the Tribunal and that nor are they in any other way under its jurisdiction. Furthermore, the Pre-Trial Judge has no knowledge that the Accused have contacted the Tribunal in any manner whatsoever.

## **II. Applicable law**

17. The provisions to be taken into consideration with regard to this Order are Rules 76 *bis* and 105 *bis* of the Rules.

18. Rule 76 *bis* of the Rules, which governs the procedure of public advertisement of the Indictment, is worded as follows:

In keeping with the President’s order made under Rule 76 (E), a form of advertisement shall be transmitted by the Registrar to the authorities of any relevant State or entity for publication in newspapers and/or for broadcast via radio, television and/or other media, including the internet, providing notification to the public of the existence of an indictment and calling upon the accused to surrender to the Tribunal or in any case to submit to its jurisdiction. The advertisement shall invite any person with information as to the whereabouts of the accused to communicate that information to the Tribunal.

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September 2011.

17 Letter including documents from the Registrar to the Pre-Trial Judge, Reply to your letter concerning the application of Rules 76 *bis* and 105 *bis* of the Rules, 28 September 2011 and second letter including documents from the Registrar to the Pre-Trial Judge, 12 October 2011.

19. Rule 105 *bis* of the Rules is entitled “Absence of the Accused from the Proceedings before the Pre-Trial Judge”. At the present stage of the proceedings, only paragraph (A) of this provision specifically relating to referring a case to the Trial Chamber is relevant. It is worded as follows:

If, within a period of 30 calendar days starting from the advertisement referred to in Rule 76 *bis*, the accused is not under the Tribunal’s authority, the Pre-Trial Judge shall ask the Trial Chamber to initiate proceedings *in absentia*.

20. Before seizing the Trial Chamber in order that it may determine whether it is appropriate to initiate proceedings against the Accused *in absentia*, notably in keeping with Rule 106 of the Rules, the Pre-Trial Judge must ensure that the period of 30 calendar days set out by Rule 105 *bis* of the Rules has elapsed, starting from the public advertisement referred to in Rule 76 *bis* of the Rules. Since, as can be seen in the procedural background of this Order, the public has been informed on several occasions and at different intervals – in particular by way of statements, notifications and advertisements – of the existence of the Indictment and of the need for the Accused to surrender to the Tribunal, when the period of time in Rule 105 *bis* of the Rules started is subject to interpretation. However, determining when that period of time started is essential insofar as the aforementioned period of time is intended, in particular, to ensure that the Accused have had sufficient time to be informed of the Indictment issued against them and, if appropriate, to obtain the necessary advice relating to what action they should take with regard to the proceedings relating to them.

### III. Observations from the Head of Defence and the Prosecutor

21. On 28 September 2011, the Pre-Trial Judge received an internal memorandum from the Head of Defence Office by way of which he acknowledged “[TRANSLATION] the importance of ensuring that the procedure of public advertisement of the Indictment as provided for in Rule 76 *bis* of the Rules is respected”.<sup>18</sup> The Head of Defence Office pointed out in this connection that:

<sup>18</sup> Internal memorandum from the Head of Defence Office to the Pre-Trial Judge, Case No. STL-11-01/I, *The Prosecutor v. Ayyash et al.* – Public Advertisement of the Indictment, 28 September 2011.



[TRANSLATION] It [...] results [from the Rules] that without giving an opinion on whether or not the public advertisement, transmitted by the Registrar to the Lebanese authorities that had it published in several newspapers on 15 September 2011, is restrictive, it is clear that in any case, according to the Head of Defence Office, the period of 30 calendar days provided for in Rule 105 *bis* of the Rules could not have started before the publication of that advertisement.

22. Further to the considerations expressed by the Head of Defence Office, the Pre-Trial Judge invited the Prosecutor to present, if he so wished, his observations in this connection.<sup>19</sup> On 3 October 2011, the Prosecutor replied to the Pre-Trial Judge noting that the Public Prosecutor at the Lebanese Court of Cassation reported to the Tribunal that the advertisements undertaken in accordance with Rule 76 *bis* of the Rules were published in the Lebanese newspapers on 15 September 2011.<sup>20</sup> According to the Prosecutor, it follows from this that the period of time set forth in Rule 105 *bis* of the Rules starts from that date and that consequently the Pre-Trial Judge may not request the Trial Chamber to initiate proceedings *in absentia* before 15 October 2011 at the earliest.

#### **IV. Statement of reasons**

23. The Pre-Trial Judge wishes firstly to point out that it is not for him to rule on whether the requirements to initiate proceedings *in absentia*, mentioned in Rule 106 of the Rules, have been met, nor whether it is appropriate to start such proceedings. Indeed, in accordance with Rule 105 *bis* (B) of the Rules, this responsibility is incumbent upon the Trial Chamber. The objective of this Order is specifically to seize the Chamber for that purpose while ensuring that the period of 30 calendar days referred to in Rule 105 *bis* (A) of the Rules has elapsed. Henceforth it is for the Pre-Trial Judge, as indicated above, to determine the precise moment at which that period of time started.

24. In this respect, the Pre-Trial Judge notes, according to the text of Rule 105 *bis* of the Rules, that that period of time starts from the public advertisement

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<sup>19</sup> Internal memorandum from the Pre-Trial Judge to the Prosecutor, Case No. STL-11-01/I Application of Rule 105 *bis* of the Rules, 29 September 2011.

<sup>20</sup> Letter from the Prosecutor to the Pre-Trial Judge, 3 October 2011.

mentioned in Rule 76 *bis* of the Rules. However, according to this last provision, that advertisement shall take the form of a text “providing notification to the public of the existence of an indictment and calling upon the accused to surrender to the Tribunal” and “invit[ing] any person with information as to the whereabouts of the accused to communicate that information to the Tribunal”. That text shall be published and/or broadcast, by appropriate means, in the State or States of origin of the Accused or in those States in whose territory the Accused were last known to be residing.

25. The Pre-Trial Judge notes that the President’s Statement of 11 August 2011 calling upon in particular the Accused to surrender to the Tribunal was published on the Tribunal website and was quoted in numerous Lebanese media outlets<sup>21</sup> which also relayed the Indictment, the Arrest Warrants,<sup>22</sup> and the President’s Order of 18 August 2011.<sup>23</sup> However, it was only on 15 September 2011 that the text of a public advertisement was published by the Lebanese newspapers<sup>24</sup> in the form of a wanted notice showing photographs of the Accused and providing, for each one, their name, first name and date of birth, as well as the charges laid against them. This wanted notice also mentions that any person with information on the Accused could contact the Tribunal on the telephone numbers indicated in that notice.<sup>25</sup> Therefore the requirements stipulated in Rule 105 *bis* (A) of the Rules were only met as of 15 September 2011.

26. Consequently, in keeping with the spirit of Rule 105 *bis* of the Rules and of the rights of the Accused, the Pre-Trial Judge is of the opinion that it is appropriate to consider 15 September 2011 as the starting date of the period of time stipulated by this provision, which is moreover the most advantageous date with regard to the Accused. This period of time therefore had elapsed as of 15 October 2011 at the

21 Cf. the following newspapers of 11 August 2011: *Al Hayat*, *Now Lebanon*, *Al Manar*, *Naharnet*; and the following newspapers of 12 August 2011: *Al Akhbar*, *Al Diyar*, *Al Joumhouria*, *Annahar*, *Al Mustaqbal*, *As Safir* and *Daily Star*.

22 Cf. the following newspapers of 18 August 2011: *Al Akhbar*, *Al Diyar*, *Al Hayat*, *Al Joumhouria*, *Al-Liwa’a*, *As Safir*, *L’Orient le Jour* and *Daily Star*.

23 Cf. the following newspapers of 19 August 2011: *Al Akhbar*, *Al Hayat*, *Al Joumhouria*, *Al-Liwa’a* and *L’Orient le Jour*.

24 Cf. *supra* notes 12, 13 and 14.

25 Public Prosecutor’s Report of 19 September 2011, p. 2.

very least. As a consequence, as of that date, the Pre-Trial Judge is well-founded to seize the Trial Chamber so that it may determine whether it is appropriate to initiate proceedings against the Accused *in absentia*.

27. For this purpose, in order that it may rule on this issue with full knowledge of the facts, the Trial Chamber must be able to have at its disposal the relevant documents in this respect and notably those which are listed in the Annex to this Order. The Pre-Trial Judge therefore requests that the Registrar transmit those documents to the Chamber, whilst respecting their confidential status, where appropriate.

## **DISPOSITION**

### **FOR THESE REASONS,**

Pursuant to Rules 76 *bis* and 105 *bis* (A) of the Rules,

### **THE PRE-TRIAL JUDGE,**

**SEIZES** the Trial Chamber so that it may determine whether it is appropriate to initiate proceedings *in absentia* against Messrs. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra; and

**REQUESTS** the Registrar to transmit to the Trial Chamber, as soon as possible, the documents listed in the Annex to this Order, whilst respecting their confidential status, where appropriate.

Done in French.

Leidschendam, 17 October 2011

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Daniel Fransen  
Pre-Trial Judge

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# Major rulings issued by the Special Tribunal for Lebanon in 2011

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| 1 | 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<br>“Preliminary Questions PTJ”                                      | <i>The Prosecutor v. Ayyash et al.</i><br>Pre-Trial Judge<br>Case No.: STL-11-01/I<br>21 January 2011  |
| 2 | Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging<br>“Applicable Law”  | <i>The Prosecutor v. Ayyash et al.</i><br>Appeals Chamber<br>Case No.: STL-11-01/I<br>16 February 2011   |
| 3 | Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed<br>“El Sayed Decision PTJ”  | <i>In the matter of El Sayed</i><br>Pre-Trial Judge<br>Case No.: CH/PTJ/2011/08<br>12 May 2011   |
| 4 | Decision Relating to the Examination of the Indictment of 10 June 2011 Issued against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra<br>“Confirmation of Indictment” | <i>The Prosecutor v. Ayyash et al.</i><br>Pre-Trial Judge<br>Case No.: STL-11-01/I<br>28 June 2011   |
| 5 | Indictment (not indexed)  | <i>The Prosecutor v. Ayyash et al.</i><br>Pre-Trial Judge<br>Case No.: STL-11-01/I/PTJ<br>Filed on: 10 June 2011; Public Redacted<br>Version published on 16 August 2011 |
| 6 | Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge’s Decision of 12 May 2011<br>“El Sayed Decision AC”  | <i>In the matter of El Sayed</i><br>Appeals Chamber<br>Case No.: CH/AC/2011/01<br>19 July 2011   |
| 7 | Decision on Languages in the Case of <i>Ayyash et al.</i><br>“Decision on Languages”  | <i>The Prosecutor v. Ayyash et al.</i><br>Pre-Trial Judge<br>Case No.: STL-11-01/I/PTJ<br>16 September 2011  |
| 8 | Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor against the Pre-Trial Judge’s Decision of 2 September 2011 and Ordering the Disclosure of Documents<br>“Disclosure Decision AC”                  | <i>In the matter of El Sayed</i><br>Appeals Chamber<br>Case No.: CH/AC/2011/02<br>7 October 2011   |
| 9 | Order to Seize the Trial Chamber Pursuant to Rule 105 bis (A) of the Rules of Procedure and Evidence in order to Determine whether to Initiate Proceedings <i>In Absentia</i><br>“Rule 105 bis Order”                       | <i>The Prosecutor v. Ayyash et al.</i><br>Pre-Trial Judge<br>Case No.: STL-11-01/I<br>17 October 2011  |

