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

THE APPEALS CHAMBER

Case No:	**STL-17-07/I/AC/R176*bis***
Before:	**Judge Ivana Hrdličková, Presiding** **Judge Ralph Riachy, Judge Rapporteur** **Judge David Baragwanath** **Judge Afif Chamseddine** **Judge Daniel David Ntanda Nsereko**
Registrar:	**Mr Daryl Mundis**
Date:	**18 October 2017**
Original language:	**English**
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INTERLOCUTORY DECISION ON THE APPLICABLE LAW: CRIMINAL ASSOCIATION AND REVIEW OF THE INDICTMENT

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HEADNOTE

I. The Preliminary Questions Submitted by the Pre-Trial Judge

Pursuant to Rule 68 (G) of the Special Tribunal for Lebanon's Rules of Procedure and Evidence, the Pre-Trial Judge has submitted to the Appeals Chamber fifteen preliminary questions regarding the applicable law that he deems necessary in order to examine and rule on the indictment currently before him. Those questions relate to the following:

A. the material element (actus reus) of the crime of criminal association;

B. the intentional element (mens rea) of the crime of criminal association;

C. the distinctive elements between criminal association and conspiracy; and

D. the criteria for reviewing the indictment.

II. The Decision of the Appeals Chamber

A. Questions Regarding the Material Element (*Actus Reus*) of the Crime of Criminal Association

Under Lebanese law, the elements of the actus reus of criminal association under Article 335 of the Lebanese Criminal Code are as follows: (i) an agreement, oral or written, between two persons or more; and (ii) a particular purpose or subject of the agreement, being the perpetration of one or more of the underlying felonies mentioned in Article 335.

Criminal association is committed upon the conclusion of an agreement to act collectively for the purpose of committing any of the felonies in Article 335. Under Lebanese law, it is not necessary to identify all participants in a criminal association. The specific form of the agreement, whether written or oral, explicit or implicit, is not material to its formation; a meeting of the minds of the parties to the agreement is all that is required. The commission of material acts is not an element of criminal association, although the existence of an agreement may be inferred from evidence of such acts. Similarly, while it is not necessary for the means of achieving the criminal purpose to be identified, such means may be critical to proof of the crime. An individual may be liable whether he or she takes part in the creation of the criminal association or joins a previously established association.

A criminal association must be directed at the specific types of felony mentioned in Article 335, which are reflected in various parts of the Lebanese Criminal Code. It is not necessary to list or precisely define the specific felonies sought to be committed by the association or agreement; it is enough that the suspect intend, in general terms, to commit felonies directed at persons, property, the authority of the State, its prestige or its civil, military, financial or economic institutions. The use of the plural "felonies" in Article 335 has a generic meaning, and therefore an association or agreement to commit one felony is sufficient.

B. Questions Regarding the Intentional Element (*Mens Rea*) of the Crime of Criminal Association

Under Lebanese law, the elements of the mens rea of criminal association are as follows: (i) an intention to join the association or agreement to commit one or more of the felonies mentioned in Article 335; and (ii) knowledge that the purpose of the agreement was to commit a crime directed at persons, property, the authority of the State, its prestige or its civil, military, financial or economic institutions.

It is not necessary that the members of the criminal association know the precise nature of the felonies that they intend be committed, as long as they agree to commit the felonies referred to in general terms in Article 335.

C. Questions Regarding the Distinctive Elements Between Criminal Association and Conspiracy

Criminal association and conspiracy, though similar, are separate crimes under Lebanese law. Their distinctive characteristics are twofold. First, criminal association involves an agreement to commit felonies against persons or property, or to undermine the authority of the State, its prestige or its civil, military, financial or economic institutions; whereas conspiracy is restricted to those felonies against the security of the State that are expressly mentioned as possible aims of a conspiracy. Second, conspiracy additionally requires an agreement on the means to commit the criminal purpose.

The assassination of a political figure is not an element of either conspiracy or criminal association; each is criminalized regardless of whether or not they target a political figure.

The Pre-Trial Judge should be particularly careful to allow cumulative charging only when separate elements of the charged offences make them truly distinct. Where conspiracy and criminal association are based on the same underlying conduct, they cannot be charged cumulatively as they cannot be said to be "truly distinct". This is without prejudice to the right of the Prosecution to charge these crimes in the alternative.

D. Questions Regarding the Criteria for Reviewing the Indictment

The Pre-Trial Judge's task under Article 18 of the Statute and Rule 68 (F) requires him to assess whether the supporting materials provided by the Prosecutor demonstrate a credible case which could, if not contradicted, be a sufficient basis to convict the suspect on the particular charge in the indictment. The determination of whether this standard is met lies with the Pre-Trial Judge; the Appeals Chamber's role under Rule 176 bis in addressing preliminary questions in the abstract prevents it from instructing the Pre-Trial Judge on conducting his assessment with respect to particular supporting materials. Given the unambiguous language of the Rules, it is irrelevant whether particular supporting materials have also been submitted as evidence in the Ayyash et al. case.

The text of Rule 68 (F) plainly limits the scope of the Pre-Trial Judge's review to material provided by the Prosecutor. It is not relevant whether additional materials exist in the public domain; in conducting his prima facie assessment of the case, the Pre-Trial Judge has no authority to refer to material other than that provided to him by the Prosecutor.

I. INTRODUCTION

1. On 11 August 2017, the Pre-Trial Judge of the Special Tribunal for Lebanon ("Tribunal") issued an order under Rule 68 (G) of the Rules of Procedure and Evidence ("Rules"), in which he indicated that he is seized of an indictment that was submitted for confirmation by the Prosecutor on 21 July 2017 and that, having read the counts in the indictment, he considers that several questions arise regarding the applicable law.[1] Pursuant to Rule 68 (G) of the Rules, which provides that "[t]he 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", the Pre-Trial Judge submitted 15 preliminary questions, including sub-questions, to the Appeals Chamber ("Preliminary Questions").[2]

2. Through the Preliminary Questions, the Pre-Trial Judge seeks clarification from the Appeals Chamber on the interpretation of the Statute of the Tribunal ("Statute") and the Rules regarding the applicable law relating to: (i) the constituent elements of the crime of criminal association set out in Article 335 of the Lebanese Criminal Code; (ii) the distinctive elements between the crime of criminal association and the crime of conspiracy; and (iii) the criteria for reviewing the indictment.[3]

3. Pursuant to Rule 176 *bis* of the Rules, the Appeals Chamber shall issue an interlocutory decision on any question raised by the Pre-Trial Judge under Rule 68 (G) of the Rules, after hearing the Prosecutor and the Head of Defence Office in public session and without prejudging the rights of any accused.

[1] F0003, Public Redacted Version of the "Order on Preliminary Questions Addressed to the Appeals Chamber Pursuant to Rule 68 (G) of the Rules of Procedure and Evidence" of 11 August 2017, 11 September 2017 ("Order on Preliminary Questions"), para. 1.
[2] Order on Preliminary Questions, pp. 6-8.
[3] Order on Preliminary Questions, paras 3-9, pp. 6-8.

II. PROCEDURAL HISTORY

4. By confidential and *ex parte* decision of 23 August 2017, the Appeals Chamber granted the Prosecution's request that the proceedings relating to the Preliminary Questions under Rule 176 *bis* of the Rules be maintained as strictly confidential until 7 September 2017, so that the risks associated with public proceedings may be minimized.

5. On 24 August 2017, in order to ensure a comprehensive discussion of the issues at stake, the Appeals Chamber ordered the Prosecutor and the Head of Defence Office to file written submissions on the Preliminary Questions prior to the holding of the public session mandated under Rule 176 *bis* (B) of the Rules.[4]

6. On 5 September 2017, the Appeals Chamber denied the Head of Defence Office's requests to immediately make public the Rule 176 *bis* proceedings or, in the alternative, to grant him leave to inform Defence Counsel in the *Ayyash et al.* case of the existence of these proceedings.[5] The Appeals Chamber also denied the Head of Defence Office's requests that the Prosecution be ordered to inform him and the Defence Counsel in the *Ayyash et al.* case whether one or more accused in this case are implicated in the STL-17-07 case and, if so, to disclose those names to him and to Counsel for the accused concerned, emphasizing that the indictment is confidential until confirmation.[6] As instructed by the Appeals Chamber on 23 August 2017, the confidentiality of the proceedings relating to the Preliminary Questions was lifted on 8 September 2017.

7. The Prosecution and the Defence Office filed written submissions pursuant to the 24 August 2017 Scheduling Order on 7 and 14 September 2017.[7] They presented oral arguments at the public hearing held on 11 October 2017.[8]

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[4] F0006, Scheduling Order for Written Submissions Pursuant to Rule 176 *bis* (B) of the Rules, 24 August 2017 ("24 August 2017 Scheduling Order").
[5] F0011, Decision on Defence Office Request to Lift the Confidentiality of Information, 5 September 2017 ("5 September 2017 Decision").
[6] 5 September 2017 Decision, paras 8-11.
[7] F0013, Prosecution Submissions Pursuant to the Appeals Chamber Scheduling Order of 24 August 2017, 7 September 2017 ("Prosecution Written Submissions"); F0012, Public Redacted Version of the "Defence Office Submissions Following the Order of the Appeals Chamber Dated 24 August 2017" Dated 7 September 2017, 11 September 2017; F0015, Prosecution Response to Defence Office Submissions of 7 September 2017 and Request to the Appeals Chamber Arising from Defence Office Submissions, 14 September 2017; F0016, Defence Office Response to the Prosecution Submissions on the Applicable Law of 7 September 2017, 14 September 2017 ("Defence Office Written Submissions in Response").

8. The Preliminary Questions before the Appeals Chamber are as follows:

A. Regarding the material element (*actus reus*) of the crime of criminal association:

a) How should the material element (*actus reus*) of the crime of criminal association be defined?

b) Is it necessary for all the participants in the criminal association to be identified?

c) Is the crime of criminal association committed as soon as the agreement has been entered into?

d) What specific form must the association or the written or oral agreement take? Is it necessary for the association or the agreement to be demonstrated by material acts or is community of thought sufficient?

e) Is it necessary for the means of achieving the criminal purpose of the criminal association to be identified?

f) Insofar as Article 335 of the Lebanese Criminal Code provides that the agreement may be established either "to commit felonies against persons or property" or "to undermine the authority of the State, its prestige or its civil, military, financial or economic institutions", what "crimes" or offences fall respectively into these two categories? Furthermore, is it necessary to list those specific offences or crimes as constituent elements of the crime of criminal association?

g) In order to bear criminal responsibility in the context of a criminal association, must the perpetrator necessarily have participated in its establishment, as might be indicated by a literal interpretation of Article 335 of the Lebanese Criminal Code, or may they incur responsibility if they join an association already formed?

B. Regarding the intent (*mens rea*) of the crime of criminal association:

a) How should the intent (*mens rea*) of the crime of criminal association be defined?

b) To incur criminal responsibility, must a participant in the association or the agreement know precisely what the unlawful purpose of the criminal association is?

C. Regarding the crimes of conspiracy and criminal association:

a) What are the characteristics that distinguish a criminal association which undermines "the authority of the State", referred to in Article 335 of the Lebanese Criminal Code, from the crime of conspiracy referred to in Article 270 of the Lebanese Criminal Code and Article 7 of the Lebanese Law of 11 January 1958 increasing the penalties for sedition, civil war and interfaith struggle?

b) In particular, what are the characteristics that distinguish a criminal association in order to assassinate Lebanese political figures from a conspiracy to commit a terrorist act through an agreement to assassinate Lebanese political figures?

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[8] Hearing of 11 October 2017, pp. 1-84. All references to transcript pages in this decision are to the English version. *See also* F0014, Scheduling Order for Public Hearing Pursuant to Rule 176 *bis* (B) of the Rules, 13 September 2017.

c) May the crime of conspiracy be considered to be a form of criminal association, or vice versa, and if so, in what context and under what conditions?

d) May the crimes of conspiracy and criminal association be the subject of cumulative charging based on the same underlying conduct (see in particular Articles 181 and 182 of the Lebanese Criminal Code)? If not, in the context of a *concours idéal d'infractions*, which of the two offences should be charged?

D. Regarding the criteria for reviewing the Indictment:

a) To what extent must the Pre-Trial Judge assess the credibility and the reliability of the evidence presented in the *Ayyash et al.* case, which has been submitted as supporting materials to the Indictment, for his *prima facie* review?

b) Insofar as some of the supporting materials submitted to him for review in the context of the confirmation of the Indictment constitute evidence whose assessment of the credibility and reliability was the subject of adversarial proceedings in the *Ayyash et al.* case (testimony and exhibits filed during those testimonies), must the Pre-Trial Judge take into account and assess, in the context of the confirmation of the Indictment, the submissions made during those adversarial proceedings? Does the fact that the content of those discussions has not been submitted to him pursuant to Rule 68 (B) of the Rules, but is publicly available, have an effect on the answer to the previous question?

III. DISCUSSION

A. Preliminary Observations

9. Before addressing the Preliminary Questions, the Appeals Chamber will recall relevant considerations from its 2011 Decision on Applicable Law[9] and will discuss: (i) the provenance and purpose of the Rule 68 (G) power; (ii) the scope of the Appeals Chamber's jurisdiction; and (iii) the general principles of interpretation to be applied in the present case.

1. The Provenance and Purpose of the Rule 68 (G) Power

10. Articles 21 and 28 of the Statute 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". Guided by these principles, the Judges of the Tribunal adopted Rules 68 (G) and 176 *bis* (A) of the Rules at a plenary meeting held on 10 November 2010 to enable the Appeals Chamber to clarify in advance the law to be applied by the Pre-Trial Judge and the Trial Chamber on specific issues raised in the proceedings before them.[10] The Appeals Chamber's clarification of the applicable law is independent from any alleged specific set of facts, which remains unknown to the Appeals Chamber at this stage, and is subject to the right of any future defendant under Rule 176 *bis* (C) of the Rules to seek

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[9] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/AC/R176bis, F0936, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 ("2011 Decision on Applicable Law"), para. 7.

[10] 2011 Decision on Applicable Law, para. 7. *See also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/R176*bis*, F0327, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, 18 July 2012 ("18 July 2012 Decision"), paras 34-35; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, F0171, Corrected Version of Decision on the Pre-Trial Judge's Request Pursuant to Rule 68(G), 29 March 2012 ("29 March 2012 Decision"), para. 27.

Art. 21 STL St. ("Powers of the Chambers") provides in relevant part:

> 1. 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.

Art. 28 STL St. ("Rules of Procedure and Evidence") further provides (emphasis added):

> 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.
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> 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.*

reconsideration of the Appeals Chamber's decision in light of the particular facts of the case.[11]

11. It is important to emphasize, as stated in the 2011 Decision on Applicable Law, that the Appeals Chamber's function under Rule 176 *bis* of the Rules is to make legal findings *in abstracto*, without any reference to facts.[12] The purpose of the procedure is to avoid the risk that the Pre-Trial Judge or the Trial Chamber adopt an interpretation of the law that this Appeals Chamber would not ultimately affirm, which would unavoidably and unnecessarily delay the resolution of the cases before the Tribunal, thereby causing prejudice to the parties and infringing the requirement under Articles 21 and 28 of the Statute that the Tribunal prevent any unreasonable delay in the proceedings.[13]

2. The Tribunal's Jurisdiction Pursuant to Article 1 of the Statute and Rule 68 (G) of the Rules

12. The Tribunal's jurisdiction in the instant case is limited to the 15 Preliminary Questions by the Pre-Trial Judge's Order on Preliminary Questions. The Pre-Trial Judge's first three series of questions relate to the crime of criminal association and its distinctiveness from the crime of conspiracy. The last series of questions relates to the provisions of the Statute and the Rules concerning the review of an indictment submitted by the Prosecutor.

13. The Appeals Chamber can only be validly seized of the Preliminary Questions insofar as they fall within Articles 1 ("Jurisdiction of the Special Tribunal") and 2 ("Applicable Criminal Law") of the Statute. Article 1 confers jurisdiction to the Tribunal over the attack of 14 February 2005 resulting in the death of Rafiq Hariri and in the death and injury of other persons, as well as over other connected attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005 (provided that the connection satisfies the criteria set out in this Article). Pursuant to Article 2, the Tribunal shall determine whether these attacks fall within the ambit of 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 (including criminal association) and failure to report

[11] 2011 Decision on Applicable Law, paras 8, 10. *See also* 29 March 2012 Decision, paras 29, 34-35. *Cf. also* 18 July 2012 Decision, paras 14-27, 37.
[12] *See* 2011 Decision on Applicable Law, paras 8-11. *See also* 18 July 2012 Decision, paras 19-27, 37; 29 March 2012 Decision, paras 29, 34-35.
[13] *See* 2011 Decision on Applicable Law, para. 9.

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

14. In his Order on Preliminary Questions, the Pre-Trial Judge specified that the questions raised arise from one or more of the cases he identified in 2011 as connected within the meaning of Article 1 of the Statute.[14] The Preliminary Questions therefore fall within Article 1 of the Statute, and those specifically related to the crime of criminal association call for the clarification of the relevant Lebanese law applicable under Article 2 of the Statute. Consequently, the Appeals Chamber has jurisdiction to provide the clarifications on the applicable Lebanese law and procedure sought by the Pre-Trial Judge.

3. General Principles of Interpretation

15. The Appeals Chamber finds it necessary, for the sake of consistency and legal stability, to recall certain relevant general principles of interpretation set out in the 2011 Decision on Applicable Law relating to: (a) the interpretation and application of the provisions of the Statute; and (b) the interpretation and application of the substantive criminal law of Lebanon.

16. In the 2011 Decision on Applicable Law, the Appeals Chamber explained that the interpretation of a statute must start with the statute's language, which must be read within the statute's legal and factual contexts.[15] In this respect, the Appeals Chamber recalls that both the "internal" and "external" contexts of the statute are important. As held in 2011:

> 20. [...] 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.
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> 21. Also relevant are the conditions of the day [...]. 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.[16]

[14] *See* Order on Preliminary Questions, para. 2, fn. 5.
[15] 2011 Decision on Applicable Law, para. 19.
[16] 2011 Decision on Applicable Law, paras 20-21 (internal citation omitted).

a. Principles of Interpretation of the Statute

17. The Appeals Chamber stresses the need to harmonize and effectuate the presumed intent of: (i) the Lebanese Legislature with regard to the applicable Lebanese criminal law; (ii) the United Nations and the Government of Lebanon with regard to the Statute; and (iii) the Judges of the Tribunal and the authors of the Lebanese Code of Criminal Procedure with regard to the Rules.[17]

18. The Appeals Chamber further recalls that, where national laws and international instruments (including treaties) contain inconsistent provisions, the dominant provision must be identified and applied. For the "penumbral situations", 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.[18]

19. Judges may not refuse to rule because of a lack of clarity of the applicable legal text, and must interpret the Statute without "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".[19]

20. As is clear from Article 2 of the Statute, the starting point for interpretation is Lebanese criminal law. The principle of legality requires that any alleged criminal conduct be measured against the law in effect at the time it was committed,[20] and prohibits the retroactive application of criminal law (*nullum crimen sine lege*).[21]

21. As emphasized in the 2011 Decision on Applicable Law, the Appeals Chamber considers it appropriate, save to the extent that the Lebanese law adopted by Article 2 clearly otherwise provides, to apply international law on the interpretation of treaty provisions to the Statute.[22] It is incumbent on the Tribunal to interpret the provisions of the Statute in good faith in accordance with the ordinary meaning to be given to the terms of the Statute in their context and in the light of its object and purpose. The Appeals Chamber also reiterates that the principle of teleological interpretation calls for a construction of the provisions of the

[17] 2011 Decision on Applicable Law, para. 22.
[18] 2011 Decision on Applicable Law, para. 23.
[19] 2011 Decision on Applicable Law, paras 23-24.
[20] 2011 Decision on Applicable Law, paras 25, 32.
[21] 2011 Decision on Applicable Law, para. 32.
[22] 2011 Decision on Applicable Law, para. 26.

Statute in such manner as to render them effective and operational with a view to bringing to fruition their purpose.[23] This requires "an interpretation that best enables the Tribunal to achieve its goal to administer justice in a fair and efficient manner".[24] The same holds true for the interpretation of the Rules.

b. Principles on the Interpretation of Lebanese Law

22. Pursuant to Article 2 of the Statute, the Tribunal is to apply Lebanese law as the substantive law governing the crimes falling within its jurisdiction. Generally speaking, the Tribunal will therefore apply Lebanese law as interpreted and applied by Lebanese courts. This may require the Appeals Chamber to go beyond the mere examination of specific past decisions in order to identify the principles that express the state of the art in Lebanese jurisprudence.[25] However, the Appeals Chamber may depart from past application and interpretation of the relevant law by Lebanese courts when such application or interpretation (i) appears to be unreasonable, (ii) may result in a manifest injustice, or (iii) is not consonant with international principles and rules binding upon Lebanon.[26]

23. Where Lebanese courts take different or conflicting views of the relevant legislation, the Appeals Chamber will interpret that legislation in a manner which it deems to be more appropriate and consistent with international legal standards.[27]

24. In accordance with a well-known principle of interpretation, national law (Lebanese law in this case) is to be construed in accordance with international legal standards binding upon the State.[28]

[23] 2011 Decision on Applicable Law, paras 28-32.
[24] 2011 Decision on Applicable Law, para. 32.
[25] 2011 Decision on Applicable Law, paras 33-35.
[26] 2011 Decision on Applicable Law, para. 39, fns 58-60.
[27] 2011 Decision on Applicable Law, para. 40, fn. 62.
[28] 2011 Decision on Applicable Law, paras 41, 82.

B. Questions A and B: The Constituent Elements of the Crime of Criminal Association

25. The first two series of questions raised by the Pre-Trial Judge, Questions A and B, relate to the material elements (*actus reus*) and intentional element (*mens rea*) of the crime of criminal association under Article 335 of the Lebanese Criminal Code. Before turning to the analysis of these constituent elements of the crime, the Appeals Chamber will make the following preliminary observations.

1. Preliminary Observations

26. As mentioned above, pursuant to Article 2 of the Statute, the Tribunal is to apply Lebanese law as the substantive law applicable to the crimes falling within its jurisdiction. Such is the case of "illicit associations" ("التجمعات غير المشروعة" in Arabic, "*associations illicites*" in French) referred to in Article 2 (a) of the Statute. The crime of criminal association in the Lebanese Criminal Code is governed by Articles 335 and 336, which fall under Section I ("Criminal Association" in English, "جمعيات الأشرار" in Arabic), Chapter III ("Illicit Associations" in English, "في الجمعيات غير المشروعة", in Arabic), Title II ("Crimes against Public Security" in English, "في الجرائم الواقعة على السلامة العامة" in Arabic), Book II ("Offenses" in English, "في الجرائم" in Arabic).[29]

27. Article 335 of the Lebanese Criminal Code ("Article 335") reads as follows:

> If two or more persons establish an association or enter into a written or oral agreement with a view to commit felonies against persons or property, or to undermine the authority of the State, its prestige or its civil, military, financial or economic institutions, they shall be punishable by fixed-term hard labour. The term of this penalty shall be not less than 10 years if the offenders' acts were directed against the lives of other persons or those of employees of public institutions and administrations.
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> However, any person who reveals the existence of such an association or agreement and divulges such information as he possesses regarding the other offenders shall be exempt from punishment.[30]

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[29] Article 336 of the Lebanese Criminal Code, which is not relevant to the Preliminary Questions, provides as follows:

> Members of a group of three or more persons operating on public highways and in rural areas as an armed band with a view to robbing passers-by, attacking persons or property, or committing any other act of robbery, shall be liable to fixed-term hard labour for a minimum term of seven years.
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> They shall be sentenced to hard labour for life if they committed one of the above-mentioned acts.
>
> The death penalty shall be imposed on any member who, in executing a felony, kills or attempts to kill the victims or subjects them to torture or acts of barbarity.

[30] All English translations of the Lebanese Criminal Code provided in this decision are STL translations.

28. Criminal association, as defined under Article 335, is a crime aimed at preventing the commission of serious crimes ("felonies" in the terms of Article 335) by criminalizing their early planning, independently from the execution of the crimes themselves.

29. To clarify the elements of any crime stipulated in Article 2 of the STL Statute, the Appeals Chamber will, as previously recalled, apply Lebanese law as interpreted and applied by Lebanese courts,[31] and will take into account any relevant international law that is binding on Lebanon. The Appeals Chamber notes, however, that for the purpose of the analysis that follows concerning the crime of criminal association, we have not elaborated upon international conventional or customary law: there is no equivalent crime in international criminal law nor any international conventions or customs binding upon Lebanon that assist in identifying or defining the crime of criminal association or its constituent elements under Lebanese law.[32]

30. The Appeals Chamber considers it useful to review the historical evolution of Article 335 in order to determine the scope of the current provision in context. It is to this task that we first turn.

31. Article 335 was inspired by Article 265 of the French Criminal Code of 1893,[33] which was later modified several times before becoming the current Article 450-1 of the French

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[31] Of relevance to the present decision, we note that the Lebanese Court of Cassation is constituted of different Chambers, three of which are "Criminal Chambers". Cases are distributed among the different Chambers on a geographical (Governates) basis. The Lebanese Court of Justice (المجلس العدلي) (sometimes translated as the Lebanese Judicial Council) may be seized pursuant to a decree of the Council of Ministers. It tries offences set out in Article 356 of the Lebanese Code of Criminal Procedure, including the offences provided for in Articles 270 to 336 of the Lebanese Criminal Code and in the Law of 11 January 1958.

[32] In reaching this conclusion, the Appeals Chamber has given careful attention to the United Nations Convention against Transnational Organized Crime entered into force on 29 September 2003 and ratified by Lebanon on 5 October 2005, which calls upon State Parties to adopt such legislative and other measures as may be necessary to criminalize "participation in an organized criminal group". An "organized criminal group" is defined for the purposes of the Convention as follows:

> a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

See United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 U.N.T.S. 209, Arts 2(a), 5(1). While "participation in an organized criminal group" as defined in this Convention presents many features common to the crime of criminal association as defined in Lebanese law, this concept is not the same as the crime of criminal association. *See id.*, Art. 5. We further note that the purpose of this Convention was specifically "to prevent and combat transnational organized crime more effectively". *See id.*, Art. 1.

[33] Article 265 of the French Criminal Code, as modified by the Law of 18 December 1893, read as follows in 1893:

> *Toute association formée, quelle que soit sa durée ou le nombre de ses membres, toute entente établie dans le but de préparer ou de commettre des crimes contre les personnes ou les propriétés [constituent un crime contre la paix publique].*

Criminal Code.[34] Considering the similarities between Article 335 of the Lebanese Criminal Code and former Article 265 of the French Criminal Code, reference to French case law and scholarly writings may assist in understanding the scope of Article 335.

32. The current version of Article 335 differs from its original version adopted in 1943 by the Lebanese Legislature. The original version of Article 335 provided as follows:

> If two or more persons establish an association or enter into an agreement with a view to commit felonies against persons or property, they shall be punishable by fixed-term hard labour. The term of this penalty shall be not less than 7 years if the offenders' acts were directed against the lives of other persons.
>
> However, any person who reveals the existence of such an association or agreement and divulges such information as he possesses regarding the other offenders shall be exempt from punishment.

33. Following the Lebanese civil war that started in 1975, the Lebanese Criminal Code was amended by Legislative Decree No. 112, issued on 16 September 1983. Through Article 14 of the Decree, Article 335 was amended as follows (emphasis added):

> If two or more persons establish an association or enter into a written or oral agreement with a view to commit felonies against persons or property, or to undermine the authority of the State, its prestige or its civil, military, financial or economic institutions, they shall be punishable by fixed-term hard labour. The term of this penalty shall be not less than 10 years if the offenders' acts were directed against the lives of other persons or those of employees of public institutions and administrations.

See Louis Lambert, *Traité de droit pénal spécial : Etude théorique et pratique des incriminations fondamentales,* Editions Police-Revue, Paris, 1968, p. 891.

The Appeals Chamber notes that, at the end of the 19th century, the anarchist movement in France undertook a series of attacks, sometimes using explosive devices, mostly targeting State institutions, such as Parliament (on 9 December 1893) and the President of the Republic (on 24 June 1894). That movement gave rise to a series of laws called "*les lois scélérates*" aimed at fighting anarchist behaviours which were threatening French society at that time. One of them is the Law of 18 December 1893, targeting the association of evildoers or "*associations de malfaiteurs*". *See* André Vitu, *Participation à une association de malfaiteurs*, *JurisClasseur*, Fascicule 20, updated 20 December 2016 ("Vitu"), para. 8.

[34] Under Title V of Book IV of the French Criminal Code ("*De la participation à une association de malfaiteurs*"), Article 450-1 provides as follows:

> *Constitue une association de malfaiteurs tout groupement formé ou entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'un ou plusieurs crimes ou d'un ou plusieurs délits punis d'au moins cinq ans d'emprisonnement.*
>
> *Lorsque les infractions préparées sont des crimes ou des délits punis de dix ans d'emprisonnement, la participation à une association de malfaiteurs est punie de dix ans d'emprisonnement et de 150 000 euros d'amende.*
>
> *Lorsque les infractions préparées sont des délits punis d'au moins cinq ans d'emprisonnement, la participation à une association de malfaiteurs est punie de cinq ans d'emprisonnement et de 75 000 euros d'amende.*

Article 450-2 of the French Criminal Code provides as follows:

> *Toute personne ayant participé au groupement ou à l'entente définis par l'article 450-1 est exempte de peine si elle a, avant toute poursuite, révélé le groupement ou l'entente aux autorités compétentes et permis l'identification des autres participants.*

> However, any person who reveals the existence of such an association or agreement and divulges such information as he possesses regarding the other offenders shall be exempt from punishment.

34. The scope of Article 335 has thus been expanded to criminalize not only agreements aimed at committing felonies against persons and property, but also agreements aimed at undermining the authority of the State, its prestige, or its civil, military, financial or economic institutions. The *raison d'être* behind the expansion of the scope of the crime of criminal association was the need to prevent the reoccurrence of acts of a criminal nature that took place during the civil war, where the authority of the State and its institutions were severely undermined by different military groups operating in that period.

35. As mentioned above, Article 335 provides for a separate crime, punishable independently from the actual perpetration of the crimes to which it refers. It is an "*incrimination-obstacle*"[35] that aims, as is the case in French law, at preventing the commission of other crimes, in that it criminalizes preparatory steps aimed at the commission of the underlying felonies mentioned in Article 335. It enables the authorities to act before the perpetrators actually commit those crimes.

2. Constituent Elements

a. Questions A: Material Elements (Actus Reus)

i. Question A(a)

36. The first question put by the Pre-Trial Judge relates to the definition of the *actus reus* of criminal association:

> **a) How should the material element (*actus reus*) of the crime of criminal association be defined?**

37. We note that, pursuant to Article 335, the *actus reus* of the crime of criminal association under this provision is composed of the following elements:

- an agreement, oral or written, between two persons or more; and
- a particular purpose or subject of the agreement, being the perpetration of one or more of the underlying felonies mentioned in Article 335.

[35] *See* Vitu, para. 5 ("*[...] l'incrimination d'association de malfaiteurs [est une] véritable incrimination-obstacle placée très en amont sur le chemin criminel*") (emphasis in the original).

38. The characteristics of the agreement and its purpose will be developed below, as we answer the following questions of the Pre-Trial Judge.

ii. Question A(b)

39. Concerning the identification of the participants in the criminal association, the Pre-Trial Judge asks:

> **b) Is it necessary for all the participants in the criminal association to be identified?**

40. It is clear from the wording of Article 335 that the association or agreement must involve two or more persons. However, as the Prosecution submits,[36] it is not necessary that all the participants in the criminal association be identified; the identification of more than one of the members of the association or parties to the agreement is not a requirement for the crime to be established. Likewise, a person prosecuted under Article 335 is not required to know all the members of the association or parties to the agreement.[37] There is abundant Lebanese case law involving convictions for criminal association for membership and active participation in the activities of Al-Qaeda, Daesh and other criminal groups where the judges did not require that the accused know all members of the criminal association.[38] As is the case for the crime of conspiracy (Article 270 of the Lebanese Criminal Code), an individual can be prosecuted under Article 335 if it is established that he or she has agreed with others, even though they remain unidentified, to commit the felonies mentioned in Article 335, as long as the existence of the group and its activities and goals are clearly established.[39]

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[36] Prosecution Written Submissions, para. 3.

[37] Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 257/2011, 23 June 2011 ("It should be noted that in order for the *actus reus* of the offence described in article 335 of the Criminal Code to be proven, it is not necessary for all the conspirators to know one another; it suffices to prove that they had all hardened their resolve, with others, to commit an offence against persons and property"). *See also* Vitu, para. 20. All decisions of the Lebanese Court of Cassation referred to in the present decision were published in *Al Marjaa' Cassandre*, unless otherwise specified. All English translations of decisions of Lebanese courts cited are STL translations.

[38] *See, e.g.*, Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 7/2013, 8 January 2013; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 54/2008, 6 March 2008; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 212/2007, 25 October 2007.

[39] *See* Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 328/2013, 5 December 2013, in *Al-Moustashar-Majmou'at Al-Moussannafat lil Kadi Afif Chamseddine* ("*Al Moustashar*"); Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 20/2013, 15 January 2013; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 7/2013, 8 January 2013; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 54/2008, 6 March 2008; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 239/2007, 27 November 2007. *See also* Vitu, para. 20.

iii. Question A(c)

41. The Pre-Trial Judge also poses the following question regarding the *actus reus* of the crime:

> **c) Is the crime of criminal association committed as soon as the agreement has been entered into?**

42. In Lebanese law, the crime of criminal association is committed upon the conclusion of the agreement itself,[40] as submitted by the Prosecution.[41] However, in order for the agreement or association to fall within the scope of Article 335, it is not sufficient that the parties merely share ideas, regardless of their seriousness or dangerous character. Article 335 does not criminalize the mere intentions of the participants but the resolution to take action to give effect to that intention. Indeed, there is no crime unless the agreement entails a decision, between two or more persons, to act collectively for the purpose of committing the felonies mentioned in Article 335.[42] In the absence of such decision to act collectively, the element of the agreement would be lacking and the crime of criminal association would not have been committed.[43]

43. A decision of the Sixth Chamber of the Lebanese Court of Cassation issued on 8 July 2004 illustrates the significance of the decision to act collectively. The facts before the Court concerned a demonstration, during which a number of demonstrators blocked streets, attacked public institutions and facilities, threw stones and opened fire against Lebanese Army units which had been sent to maintain peace. The Court held that the spontaneous

[40] Lebanon, Court of Justice, Decision No. 2, 26 June 2003, in *Al Moustashar* ("[…] the felony of forming an association and entering into a joint oral agreement for the purpose of achieving the aforesaid objective has been established through the union of wills of the persons involved. It is an act independent from the crime of kidnapping or attempted kidnapping.").

[41] Prosecution Written Submissions, para. 5.

[42] Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 257/2011, 23 June 2011 ("The contested decision is […] legally valid for it substantiates the existence of agreement and cooperation between the applicant and the other convicted persons with the intent of perpetrating offences against individuals and property, an agreement which was made openly, materially and tangibly, as outlined above and as described in detail in that decision."); *See* Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 207/2008, 18 June 2008. *See also* René Garraud, *Traité théorique et pratique du droit pénal français*, L. Larose et L. Tenin, 1913, Paris, as translated and adapted by Lynn Saleh Matar, in *Mawsou'at Qanoun Al 'Ouqoubat Al Khass*, Publisher Al Halabi, Beirut, 2003 ("Garraud"), Tome VI, para. 1751.

[43] Lebanon, Beirut Indictment Chamber, Decision No. 794, 14 November 2005 ("It is not sufficient for the perpetrators to come together and for some of them to inform the others of what they intend to do; or for them to exchange and discuss their hopes and desires; or for them to give expression to their transient interests or passions in a state of emotional agitation; or for them to pursue ambiguous and imprecise projects. Moreover, their decision in this regard must be united, uncontested, final and definitive."); Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 315/2003, 24 December 2003; Garraud, para. 1751. *See also* Vitu, paras 22-23.

presence of the accused on the scene of the demonstration did not constitute evidence of the agreement required under Article 335 and, accordingly, concluded that the accused could not be tried for criminal association.[44]

iv. Question A(d)

44. Regarding the form and proof of the agreement, the Pre-Trial Judge asks:

> **d) What specific form must the association or the written or oral agreement take? Is it necessary for the association or the agreement to be demonstrated by material acts or is community of thought sufficient?**

45. The first part of this question relates to the form of the association or agreement.

46. The Appeals Chamber considers that, by specifying that the agreement can be "written or oral", the text of Article 335 makes clear that the form taken by the agreement is not important. As agreed by the Prosecution,[45] the way in which the agreement is expressed, whether oral or written, explicit or implicit, is not essential to its formation, as long as there is a meeting of the minds of the parties to the agreement.[46]

47. The Prosecution and the Defence Office further referred to a "lasting" resolution or agreement.[47] The Appeals Chamber notes that the wording of Article 335 does not suggest that a specific duration for the association or agreement is required. It can be permanent or temporary in nature; it could exist and then cease to exist before or after the consummation of the crime that was the purpose of its existence.[48]

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[44] Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 196/2004, 8 July 2004 ("Nothing has emerged from the investigations or the documentation to prove that the defendants/appellees established an association, nor has it been proven that they entered into a written or oral agreement. Rather, their presence at the location of the demonstration, as shown by the investigation, was the result of collective compliance among them all and not the outcome of an agreement as defined in article 335 of the Criminal Code.").

[45] Prosecution Written Submissions, paras 6-7.

[46] Lebanon, Court of Cassation, Criminal Chamber 7, Decision No. 4/2016, 14 January 2016; Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 207/2008, 18 June 2008 ("For the elements of [Article 335] to be fulfilled, it is sufficient for the members of the association to agree among themselves, explicitly or implicitly, to establish said association by their actions".); Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 252/2005, 4 October 2005; Lebanon, Court of Justice, Decision No. 2, 26 June 2003, in *Al Moustashar*.

[47] Prosecution Written Submissions, paras 18(i), 19 (referring to Decision No. 252/2005); Defence Office Written Submissions in Response, para. 6 (referring to Decision No. 252/2005). We note that while the Decision No. 252/2005 relates to a criminal association aimed at committing several robberies, nothing in this decision suggests that a "lasting" agreement is required.

[48] Farid El Zoghbi, *Al Mawsou'a Al Jaza'ia* [The Criminal Encyclopedia], 3rd ed., Sader, Beirut 1995 ("El Zoghbi"), Vol. 10, p. 186; Garraud, para. 1763.

48. Another matter raised by the Defence Office regarding the form of the agreement is whether criminal association requires the existence of a hierarchy between its members.[49] Lebanese jurisprudence is somewhat mixed on this question. While nothing in Article 335 suggests such a requirement, Lebanese courts have differed in their interpretation of the law on this point. For example, the Lebanese Court of Justice, in a Decision of 12 April 1994, refused to consider the existence of a hierarchy and of subordination as a pre-requisite for the application of Article 335.[50] However, the Third Chamber of the Lebanese Court of Cassation in a Decision of 17 April 2002, as well as two other chambers in other decisions, have taken a different view, finding that criminal association requires the existence of a hierarchy, a plan and a division of roles between the perpetrators.[51]

49. The Appeals Chamber considers that, according to the terms of Article 335, the existence of a hierarchy and of subordination between the members of a criminal association is not a pre-requisite for the application of this Article. This view is supported by the majority of Lebanese case law, including decisions issued by the Court of Cassation subsequent to those cited by the Defence Office.[52] As observed by the Prosecution,[53] this jurisprudence indicates that while the existence of a hierarchy or designated roles may be a relevant evidentiary factor to prove the existence of a criminal association, no hierarchy or other structure is required as an element of the crime.

50. In relation to the second part of this question concerning the requirement of material acts, the Prosecution submits that Lebanese courts have relied upon proof of preparatory acts to show that an accused entered into or joined a criminal association, but that such acts are

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[49] Defence Office Written Submissions in Response, para. 6; Hearing of 11 October 2017, pp. 41, 43, 44. The Prosecution objected to the Defence Office's assertions regarding any particular hierarchy to establish a criminal association, arguing that no such structure is required. *See* Hearing of 11 October 2017, pp. 8-13.

[50] Lebanon, Court of Justice, Decision No. 1, 12 April 1994, in *Al Moustashar*.

[51] Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 169/2002, 17 April 2002. *See also* Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 481/2015, 10 December 2015; Lebanon, Beirut Indictment Chamber, Decision No. 794, 14 November 2005.

[52] By not requiring a hierarchy or subordination between the members of a criminal association, the following decisions indicate that this is not an element of the crime: Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 365/2016, 8 December 2016; Lebanon, Court of Cassation, Criminal Chamber 7, Decision No. 92/2015, 31 March 2015; Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 87/2015, 17 March 2015; Lebanon, Court of Cassation, Criminal Chamber 7, Decision No. 179/2014, 22 July 2014; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 53/2014, 18 February 2014; Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 207/2008, 18 June 2008; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 252/2005, 4 October 2005; Lebanon, Court of Justice, Decision of 26 June 2003, in *Al Moustashar*.

[53] Hearing of 11 October 2017, pp. 8-13.

not a material element of the crime under Article 335.[54] By contrast, the Defence Office submits that Lebanese case law requires the existence of several preparatory acts and material facts to confirm the existence of a criminal association, pointing to a decision of the Beirut Indictment Court.[55]

51. In this respect, the Appeals Chamber considers that, as a matter of general principle, it is important to distinguish between the material elements of the crime and the evidence of the crime. As emphasized by the Prosecution,[56] while the existence of an agreement is a material element of the crime of criminal association, that agreement can be inferred from evidence of such matters as meetings, discussions, correspondence, or various preparatory acts, including acquisition of explosives.[57] We emphasize that the commission of material acts in furtherance of the agreed criminal purpose is not an element of the crime; it can, however, constitute *a posteriori* evidence of the existence of an association or agreement.[58]

v. Question A(e)

52. The Pre-Trial Judge further asks:

> **e) Is it necessary for the means of achieving the criminal purpose of the criminal association to be identified?**

53. The Appeals Chamber notes that Article 335 does not refer to the "means" of achieving the purpose of a criminal association when defining the crime. This provision differs in this respect from Article 270 of the Lebanese Criminal Code, which expressly requires an agreement to commit a felony "by specific means" for a criminal agreement against State security to qualify as a conspiracy. The Appeals Chamber considers that, by not

[54] Prosecution Written Submissions, para. 9; Hearing of 11 October 2017, p. 13.
[55] Defence Office Written Submissions in Response, para. 8 (referring to Lebanon, Beirut Indictment Chamber, Decision No. 794/2005, 14 November 2005); Hearing of 11 October 2017, pp. 38, 40, 42-43, 53, 55-56. The Defence Office further noted that the Prosecution took a different position on the importance of preparatory acts in separate submissions before this Tribunal in 2012, a position which the Prosecution stated at the oral hearing they no longer endorse. *See* Defence Office Written Submissions in Response, para. 8 (referring to STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, F0160, Prosecution Submissions Pursuant to the President's Scheduling Order of 7 March 2012, 15 March 2012, paras 33(iv), 35(ii)); Hearing of 11 October 2017, pp. 13, 41-42, 53.
[56] Hearing of 11 October 2017, p. 15.
[57] *See, e.g.*, Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 278/2015, 14 July 2015; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 237/2013, 3 October 2013; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 257/2011, 23 June 2011; Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 207/2008, 18 June 2008; El Zoghbi, Vol. 10, p. 185.
[58] *See, e.g.*, Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 252/2005, 4 October 2005; Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 3/2005, 12 January 2005. *See also* Vitu, paras 24-25.

referring to an agreement on the means as an element of the crime of criminal association (whereas it did expressly require such an agreement for the crime of conspiracy), the Lebanese Legislature intended to indicate that such agreement is not an element of the crime of criminal association. It follows, as submitted by the Prosecution,[59] that it is not necessary that the means of achieving the purpose of a criminal association be identified for the agreement to qualify as criminal association. The crime of criminal association is constituted whether or not the members of the association agreed on or identified the means to be used.

54. However, even though the means for committing the targeted felony is not an element of the crime of criminal association, in practice it may be critical as proof of the crime.[60] For instance, the identification of the means used to perpetrate specific underlying offences will, in certain circumstances, be decisive for a conclusion that the agreement was aimed at committing a felony rather than a misdemeanour or a petty offence. An agreement aimed at committing a "simple" theft, a misdemeanor under Lebanese law, would, for example, not fall under Article 335 since it is not a felony.[61] On the other hand, an agreement to commit theft by violent acts against a person or "with breaking and entering" may be characterized as a criminal association, since such "aggravated theft" is a felony.[62]

55. The same can be said for a criminal association aimed at committing terrorism. Proving an agreement as to the means liable to create a public danger as required for the felony of terrorism under Article 314 of the Lebanese Criminal Code may often be decisive to proving the agreement to commit terrorism.

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[59] Prosecution Written Submissions, paras 10, 18(iv).
[60] French case law on criminal association reflects the significance of the means to be used to achieve the agreed criminal purpose as a means of proof: *see*, *e.g.*, France, Paris Court of Appeals, *Chambre correctionnelle* 10, Section B, Decision No. 98/04217-C, 12 May 2000; France, Paris Court of Appeals, *Chambre correctionnelle* 10, Section A, Decision No. 98/05162, 28 June 1999; France, Court of Cassation, Criminal Chamber, Decision, 26 May 1999; France, Paris Court of Appeals, *Chambre correctionnelle* 10, Section A, Decision No. 98/06763, 24 February 1999; France, Court of Cassation, Criminal Chamber, Decision, 29 December 1970.
[61] Lebanese Criminal Code, Arts 636-637.
[62] Lebanese Criminal Code, Arts 638-640. *See* Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 365/2016, 8 December 2016.

vi. Question A(f)

56. Turning to the felonies to which the criminal association must be directed, the Pre-Trial Judge asks the following:

> **f) Insofar as Article 335 of the Lebanese Criminal Code provides that the agreement may be established either "to commit felonies against persons or property" or "to undermine the authority of the State, its prestige or its civil, military, financial or economic institutions", what "crimes" or offences fall respectively into these two categories? Furthermore, is it necessary to list those specific offences or crimes as constituent elements of the crime of criminal association?**

57. We first recall that criminal association is committed when individuals agree to commit felonies without necessarily actually committing or attempting to commit those felonies.

58. As is clear from the wording of Article 335, the aim of the agreement must be the commission of felonies[63] mentioned in Article 335 ("underlying crimes"). Misdemeanours and petty offences are excluded from the underlying crimes.[64] The Prosecution agrees with this reading of Article 335.[65] Nothing in Article 335 suggests that the amendment made in 1983 intended to expand the scope of this Article to encompass crimes other than those qualified as felonies. Article 335 aims at preventing serious offences by criminalizing preparatory steps to commit offences of a particular gravity that would otherwise not be punishable in the absence of implementing acts.[66]

59. We further recall that in 1983, the scope of Article 335 was extended to incorporate not only felonies "against persons or property", but also felonies committed to undermine the "authority of the State, its prestige or its civil, military, financial or economic institutions".

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[63] For clarification on the generic meaning of "felonies" in plural, see below para. 60.

[64] This, together with the requirement of "material actions", differentiates the crime of "criminal association" in the Lebanese Criminal Code from "criminal association" under Article 450-1 of the French Criminal Code, which includes the most serious misdemeanors.

[65] Hearing of 11 October 2017, pp. 72-75. At the oral hearing, the Prosecution retracted its contention in its written submissions that "the purpose of undermining the authority of the State, its prestige and institutions may include misdemeanours as well as felonies". *See* Prosecution Written Submissions, fn. 18; Hearing of 11 October 2017, pp. 73-75.

[66] For instance, purchasing a gun to commit murder is a preparatory act and not the beginning of the execution of the crime. As such, it cannot be punished unless it constitutes a crime in itself, such as a violation of a prohibition to carry weapons.

60. Moreover, contrary to the position taken by the Prosecutor and Defence Office,[67] although Article 335 refers to "felonies" (in plural), it does not mean that the association or agreement must aim at committing multiple felonies. Construed teleologically in accordance with Lebanese case law, the use of the plural here has a generic meaning, and is intended to draw a distinction between felonies on the one hand, and misdemeanours and petty offences on the other. An association or agreement to commit one felony is sufficient.[68] Requiring multiple felonies, as was done in some Lebanese decisions that depart from the general jurisprudence,[69] would restrict the scope of the text's application; it would also render an association or agreement constituted with the view to commit a single isolated crime not punishable under Article 335. Such a position would defeat the purpose of Article 335 as accepted by the Lebanese Court of Cassation. We note that there may be occasions when a single crime, by its intrinsic gravity, undermines peace and public security to a greater extent than other multiple crimes would do.

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[67] Prosecution Written Submissions, paras 18(i), 19; Defence Office Written Submissions in Response, para. 6; Hearing of 11 October 2017, pp. 66-70, 77-80. We note that, in response to an oral question from a Judge of the Appeals Chamber, the Prosecutor agreed that the wording of Article 335 did not preclude the "generic interpretation in light of what comes after the word 'felonies,' the categories of crimes" and stated that "the interpretation of the generic over the plural [...] is a plausible potential reading of the article". The Prosecutor nonetheless added that it was not his understanding of the jurisprudence. *See* Hearing of 11 October 2017, pp. 66-69. The Defence Office maintained at the oral hearing its position that the term "felonies" in Article 335 cannot be interpreted other than as requiring a plurality of offences. *See id.*, pp. 69-70, 77-80. We further note that the Prosecution misconstrued Decision No. 252/2005 of the Lebanese Court of Cassation of 4 October 2005, upon which it relied in support of its position. In this decision, the 6th Criminal Chamber of the Court of Cassation did not require that the agreement of a criminal association aim at committing more than one crime. Read in context, the reference to the accused's goal of committing multiple crimes in this decision reflects the facts of the case, not a legal requirement. *See* Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 252/2005, 4 October 2005.

[68] Lebanon, Court of Cassation, Criminal Chamber 7, Decision No. 43/2017, 16 February 2017 (in that decision, the Court of Cassation convicted the accused of criminal association aimed at committing a single felony of aggravated theft); Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 259/2003, 21 October 2003 ("As regards matters imputed to the defendants under Article 335 of the Criminal Code, the investigation failed to show that an oral or written agreement had been made with a view to committing *any of the acts* stipulated by that Article.") (emphasis added). *See also* El Zoghbi, Vol. 10, p. 185.

[69] Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 481/2015, 10 December 2015; Lebanon, Beirut Indictment Chamber, Decision No. 794, 14 November 2005; Lebanon, Court of Justice, Decision No. 3/94, 26 October 1994, in *Al Moustashar*; Dr. Mohammed El Fadel, *Al-Jaraa'im Al-Waqi'a 'ala Amin Al-Dawla*, [Crimes against the security of the State], Damascus University Edition, 1963 (El Fadel), pp. 81-82 (referring to Article 325 of the Syrian Criminal Code, which is similar in this respect to Article 335 of the Lebanese Criminal Code).

61. The underlying crimes of criminal association are, as expressly set forth by Article 335:

(i) Felonies against persons or property; or

(ii) Felonies undermining the authority of the State, its prestige or its civil, military, financial or economic institutions.

62. Felonies of the first group ("against persons or property") embrace large categories of felonies which may appear in different parts of the Lebanese Criminal Code. Two Titles of the Lebanese Criminal Code are clearly dedicated to crimes against persons and crimes against property. One of those is Title VIII of Book II of the Lebanese Criminal Code (Articles 547-586), which is titled "Felonies and Misdemeanours against Persons" and includes crimes against persons such as intentional homicide (Articles 547-550), deprivation of liberty (Article 569) and other felonies. The other is Title XI of Book II of the Lebanese Criminal Code (Articles 638-640), which is titled "Crimes against Property" and includes felonies such as theft with breaking and entering (Article 639 (1)). Misdemeanours listed under Titles VIII and XI do not fall within the ambit of Article 335.

63. It is nonetheless important to clarify that further felonies against persons and property that fall within the ambit of Article 335 are regulated under other sections in the Lebanese Criminal Code than these two Titles. For example, terrorism and aggravated kidnapping (Articles 314 and 515 of the Lebanese Criminal Code, respectively) are felonies against persons (and against property for terrorism) that do not fall within Titles VIII and XI of Book II.

64. The felonies of the second group ("undermining the authority of the State, its prestige or its civil, military, financial or economic institutions") were added to Article 335 by Legislative Decree No. 112, issued on 16 September 1983.[70] This enlargement of the scope of criminal association was aimed at preventing the most serious crimes and violent behaviour that took place during the Lebanese civil war that started in 1975. The language used in this amendment refers to undefined concepts, hence the need to clarify their content.

[70] *See* above, paras 33-34.

65. Not all of the felonies of the second group correspond to a specific Title in the Lebanese Criminal Code. Regarding offences undermining the prestige of the State, the felonies set forth in Articles 295 and 296 of the Lebanese Criminal Code, under Book II, Title I, Chapter I, Section V, titled "Infringement to the Prestige of the State and the State Sentiment", are relevant, as well as the other felonies, not expressly listed under this Section, which are aimed at protecting the same interests. The other offenses falling under this Section V (Articles 297-298) cannot be the target of a criminal association, as they are misdemeanours and not felonies.[71]

66. Concerning felonies against the authority of the State, we note that the Lebanese Criminal Code does not give an exhaustive list of these crimes, nor does the Lebanese jurisprudence. Whereas Chapter II, under Title III of Book II of the Lebanese Criminal Code concerns "Crimes against Public Authority", only Articles 382 (2), 396 (2) and 397 (in its aggravated form) under this Chapter provide for crimes that can be the subject of a criminal association, as all the other crimes listed are not felonies.

67. The word "authority" is defined as "the power to enforce obedience", "moral or legal supremacy", or "the right to command or give a final decision".[72] Any crime aimed at changing the constitutional regime, destroying the State's institutions, or undermining its security or national integrity, would "undermine the authority of the State". Crimes undermining the authority of the State include felonies infringing the fundamental values of the State: those values that underpin the exercise of the State's powers and the proper functioning of its institutions.

68. In this context, we specify that the felonies falling under Title I, Book II, of the Lebanese Criminal Code relating to "Offences against State Security" [73] fall within the ambit

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[71] *See* Articles 37-40 of the Lebanese Criminal Code for the distinction between felonies and misdemeanours.

[72] *See* Shorter Oxford English Dictionary, Sixth Edition, 2007. The term is defined as follows in Arabic: " سلطة، حُكم، سيادة يفرضها القانون، قوة سيادية يخضع لها المواطن، قدرة على فرض التأثير والنفوذ على الآخرين". *See Al Munjid fil Al-lougha Al-'Arabiya Al-Mou'asira*, Dar Al-Mashrek, Third Edition, Beirut, 2008. The French term "*autorité*" is defined as "*droit de commander, pouvoir (reconnu ou non) d'imposer l'obéissance*", "*pouvoir de commander appartenant aux gouvernants et à certains agents publics*". *See Le Nouveau Petit Robert*, Dictionnaire alphabétique et analogique de la langue Française, 2009; Gérard Cornu, *Vocabulaire juridique*, Eighth Edition, 2007.

[73] The aim of the agreement in a conspiracy is to commit a crime "against the security of the State". These crimes, listed in Articles 273 to 320 of the Lebanese Criminal Code, include terrorism, treason, espionage, illegal relations with the enemy, violations of international law, the infringement of the State's prestige and of the national sentiment and crimes against the Constitution. However, as clarified in 2011, the jurisdiction of this Tribunal only extends to conspiracy to commit acts of terrorism. *See* 2011 Decision on Applicable Law, para. 198.

of the crime of criminal association. However, we consider that the choice of different language in Article 335 ("undermining the authority of the State, its prestige or its civil, military, financial or economic institutions") evidences a desire to refer to felonies other than those listed between Articles 270 and 321 of the Lebanese Criminal Code. For example, counterfeiting the State's seal (Article 437 of the Lebanese Criminal Code) or forgery committed by a public officer (Article 456 of the Lebanese Criminal Code) are felonies that can be considered as undermining the authority of the State or its institutions, even though they fall outside the "offences against State security".

69. As for offences undermining the State's civil, military, financial or economic institutions referred to in Article 335, they primarily relate to the felonies set out in Book II under Title III of the Lebanese Criminal Code on "Offences against the Public Administration", as well as to the other felonies protecting the same interests that can be found in the Code outside of this Title.

70. Turning to the second part of Question A(f), we agree with the Prosecution that, according to Lebanese jurisprudence, it is not necessary to list the specific felonies sought to be committed by the group or to define them in a precise manner;[74] it is sufficient that the perpetrators intend, in general terms, to commit felonies directed at persons, property, the authority of the State, its prestige or its civil, military, financial or economic institutions.[75] This is borne out by the fact that the association becomes criminal by the very existence of the agreement aimed at committing the underlying felonies. No other requirement is necessary.

[74] Prosecution Written Submissions, para. 12.

[75] Lebanon, Assizes Court of Mount-Lebanon, Decision No. 231/98, 19 February 1998; Lebanon, Mount-Lebanon Indictment Chamber, Decision No. 285/1994, 5 July 1994; Lebanon, Court of Justice, Decision No. 1, 12 April 1994, *Al Moustashar* ("The accused [...] concluded an agreement among themselves to work together to commit felonies against persons and property, in particular the offence of car theft. They did so in general terms and without specifying the felonies or identifying the victims thereof. This constitutes the offense stipulated in article 335 of the Criminal Code"). *See also* Vitu, para. 32.

vii. Question A(g)

71. The Pre-Trial Judge asks the following:

> **g) In order to bear criminal responsibility in the context of a criminal association, must the perpetrator necessarily have participated in its establishment, as might be indicated by a literal interpretation of Article 335 of the Lebanese Criminal Code, or may they incur responsibility if they join an association already formed?**

72. As clarified by the jurisprudence of Lebanese courts, the language of Article 335 should not be interpreted as meaning that joining a criminal association after its establishment does not fall within the scope of that provision. An individual can be held liable for criminal association not only where he or she took part in the creation of the criminal association, but also where he or she joined the association or entered into the agreement at any time after its establishment.[76]

73. The jurisprudence of Lebanese courts is consistent in this regard: the accused does not need to have participated in the establishment of a criminal association and may join at a later time to bear criminal responsibility.

b. Questions B: Intentional Element (*Mens Rea*)

74. The Appeals Chamber will now turn to the two questions put by the Pre-Trial Judge regarding the *mens rea* of the crime of criminal association.

i. Question B(a)

75. The Pre-Trial Judge first asks:

> **a) How should the intent (*mens rea*) of the crime of criminal association be defined?**

76. As the wording of Article 335 suggests and the Prosecution submits,[77] the crime of criminal association requires that the accused intend to establish or join an association or agreement aimed at committing the felonies mentioned generically in Article 335.

[76] *See* Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 54/2014, 18 February 2014; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 20/2013, 15 January 2013; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 54/2008, 6 March 2008; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 239/2007, 27 November 2007. *See also* El Zoghbi, Vol. 10, p. 185; Prosecution Written Submissions, para. 13.
[77] Prosecution Written Submissions, para. 14.

The accused must also have known that the purpose of the association or agreement was to commit a felony against persons or property, or aimed at undermining the authority of the State, its prestige or its civil, military, financial or economic institutions, even if the crime was not precisely identified.[78]

ii. Question B(b)

77. The second question of the Pre-Trial Judge related to the *mens rea* is:

> **b) To incur criminal responsibility, must a participant in the association or the agreement know precisely what the unlawful purpose of the criminal association is?**

78. The Prosecution submits that the knowledge requirement for criminal association is the general knowledge that the aim of the agreement or association is prohibited by law. It contends that a criminal association does not need to have a purpose any more precise than the general criminal aims set out in Article 335, and that the participant must be aware of one or more of these general criminal aims.[79]

79. The Lebanese case law reflects that it is not necessary that the members of the criminal association determine or know the precise nature of the felonies that they intend be committed or identify the particular victims targeted, as long as they agree to commit the felonies referred to in general terms in Article 335.[80] An accused may be held liable under Article 335 even if his knowledge of the purpose of the association is not precise, for example, because the crimes in preparation are still unclear or because he is in contact with only one other member of the association and is not aware of the entire criminal project.[81]

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[78] *See* Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 244/2007, 4 December 2007; El Zoghbi, Vol. 10, p. 186. *See also* Prosecution Written Submissions, para. 14.
[79] Prosecution Written Submissions, para. 16.
[80] Lebanon, Court of Justice, Decision No. 1, 12 April 1994, in *Al Moustashar*. *See also* Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 54/2008, 6 March 2008.
[81] *Cf.* Vitu, para. 40.

C. Questions C: Distinctive Elements Between Conspiracy and Criminal Association

80. The Appeals Chamber will now address the series of questions which concern the distinctions between the crime of criminal association and the crime of conspiracy raised by the Pre-Trial Judge as Questions C(a)-(d).

1. Questions C(a) and (b)

81. The Pre-Trial Judge asks the Appeals Chamber the following:

> a) **What are the characteristics that distinguish a criminal association which undermines "the authority of the State", referred to in Article 335 of the Lebanese Criminal Code, from the crime of conspiracy referred to in Article 270 of the Lebanese Criminal Code and Article 7 of the Lebanese Law of 11 January 1958 increasing the penalties for sedition, civil war and interfaith struggle?**
>
> b) **In particular, what are the characteristics that distinguish a criminal association in order to assassinate Lebanese political figures from a conspiracy to commit a terrorist act through an agreement to assassinate Lebanese political figures?**

82. The Appeals Chamber first recalls that its 2011 Decision on Applicable Law provided guidance to the Pre-Trial Judge on the elements of the crime of conspiracy. It identified the following five elements: (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 (v) a criminal intent.[82] The constituent elements of the crime of criminal association have been clarified in the present decision.

83. We question whether the mechanism of preliminary questions provided for under Rule 68 (G) of the Rules was designed for comparing the distinct elements of the relevant crimes when the law applicable to each of those crimes has already been clarified by this Chamber. As to the hypothetical scenario identified by the Pre-Trial Judge under Question D(b), we are wary of addressing such a specific situation in the absence of a particular factual context which would better inform the analysis. Nonetheless, because we are mindful of the fine line that exists between these two crimes, we will provide further guidance on this point, based purely on the law.

[82] *See* 2011 Decision on Applicable Law, paras 194-202 and p. 150.

84. Both "conspiracy" and "criminal association" are forms of criminal agreement that require an agreement between two or more persons to commit a felony. While similar, "criminal association" and "conspiracy" remain two separate crimes under Lebanese law. Their distinctive characteristics are twofold.

85. First, as previously explained, criminal association is a "more inclusive form[] of criminal agreement" than conspiracy.[83] Criminal association must involve an agreement to commit one or more crimes falling within the broad categories of "felonies" (specifically, felonies against persons or property or undermining the authority of the State, its prestige or its civil, military, financial or economic institutions). By contrast, conspiracy is restricted to a specific type of felony: those directed against the "security of the State" that are expressly mentioned as possible aims of a conspiracy. These felonies are comprehensively enumerated under Title I, Book II, of the Lebanese Criminal Code titled "Offences against State Security" and in the Law of 11 January 1958.[84] We recall, however, that the jurisdiction of this Tribunal only extends to conspiracy to commit acts of terrorism.[85]

86. Second, whereas an agreement on the means to commit the crime is specifically required for the crime of conspiracy,[86] such agreement is not an element of the crime of criminal association.[87]

87. In addition to the two above-mentioned elements, the Prosecution also suggested the following three elements as additional distinctive elements between the crimes of conspiracy and criminal association: (i) a "lasting agreement" for criminal association; (ii) a plurality of crimes targeted for criminal association; and (iii) an agreement "upon the specific crime to be

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[83] 2011 Decision on Applicable Law, para. 193.

[84] We note that, in accordance with the principle of legality of offences and penalties, conspiracy is criminalized and punishable only where the law provides for this crime and a particular sentence for it. The Lebanese Criminal Code criminalizes and provides sentences for the conspiracies specified in Articles 289 (2) (conspiracy to commit an attack aimed at changing by violence the Constitution or the Government of a foreign State), 305 (conspiracy to commit crimes against the Lebanese Constitution), and 315 (conspiracy to commit a terrorist act). *See* El Fadel, pp. 92-93; El Zoghbi, p. 39. It is important to note that Article 315 of the Lebanese Criminal Code has been temporarily suspended by the Law of 11 January 1958 and replaced by Article 7 of that Law, which provides that:

> Any person who enters into a conspiracy with a view to the commission of any of the offences set out in the preceding articles shall be punishable by hard labour for life.

[85] Article 2 (b) STL St., referring to Articles 6 and 7 of the Law of 11 January 1958. *See also* 2011 Decision on Applicable Law, para. 198.

[86] 2011 Decision on Applicable Law, para. 199 ("The agreement has also to contemplate the means and tools that the conspirators want to use to commit the crime. The agreement would be incomplete, and the conspiracy would not stand, if the conspirators did not agree on the means to achieve their aim. However, a precise determination of the means is not required.") (internal citation omitted).

[87] *See* above, para. 53.

committed" for conspiracy.[88] Having carefully reviewed the relevant Lebanese case law on these issues and for the reasons developed earlier, we are of the view that these three alleged requirements are not elements of either criminal association or conspiracy.[89] Where individuals agree to commit the relevant specific felonies with a view to undermine the authority of the State, the need for agreement on the means is the only legal element that distinguishes conspiracy from criminal association.

88. We note in this context that the assassination of a political figure is not an element of conspiracy or of criminal association as defined in Articles 270 and 335 of the Lebanese Criminal Code, and that nothing in these provisions suggests so. Conspiracy and criminal association are criminalized regardless of whether or not they target a political figure.

2. Question C(c)

89. The Pre-Trial Judge raises the following question:

> **c) May the crime of conspiracy be considered to be a form of criminal association, or vice versa, and if so, in what context and under what conditions?**

90. As clarified above, though similar, criminal association and conspiracy are two separate crimes under Lebanese law. As agreed by the Prosecution,[90] a conspiracy is not a form of criminal association, nor is a criminal association a form of conspiracy.

91. In the event of an allegation of a criminal agreement aimed at committing terrorist acts, it will be for the Pre-Trial Judge, in light of the facts before him (which are unknown to the Appeals Chamber), to determine whether the facts as alleged satisfy the requirements of the crimes of criminal association or conspiracy, or both.

[88] Prosecution Written Submissions, paras 18(i) and (iii), 19.
[89] Concerning the requirements of a "lasting agreement" and a plurality of felonies targeted for criminal association, we refer to the discussion above at paragraphs 47 and 60. With respect to the requirement of an agreement to commit a "specific crime" for conspiracy, we note that paragraph 197 of the 2011 Decision on Applicable Law relied upon by the Prosecution does not support its contention. In this paragraph, the Appeals Chamber clarified that, for the crime of conspiracy, the aim of the agreement must be to commit "a specific type of crime", *i.e.* a crime against State security, not a "specific crime".
[90] *See* Prosecution Written Submissions, para. 21.

3. Question C(d)

92. In the last question of this series, the Pre-Trial Judge asks the Appeals Chamber to answer the following question:

> **d) May the crimes of conspiracy and criminal association be the subject of cumulative charging based on the same underlying conduct (see in particular Articles 181 and 182 of the Lebanese Criminal Code)? If not, in the context of a *concours idéal d'infractions*, which of the two offences should be charged?**

93. In its 2011 Decision on Applicable Law, the Appeals Chamber provided extensive guidance on the principles applicable to cumulative and alternative charging and cumulative convictions.[91] At the time, it also identified whether it would be most appropriate to charge specific crimes cumulatively rather than alternatively, although it made it clear that it did so "with hesitation".[92] Despite having clarified all relevant principles applicable to cumulative charging and convictions, the Appeals Chamber is again asked to address a similar specific hypothetical question in the abstract. We can only reiterate the difficulty of such an exercise in the absence of concrete facts that would better inform its analysis. Moreover, in light of the guidance offered in 2011 and the clarifications on the elements of the crime of criminal association provided in the present decision, the Pre-Trial Judge is now in a position to answer Question C(d). In response to the question posed, and given our lack of knowledge of the facts put before the Pre-Trial Judge for the confirmation of the indictment, we can, at this point in time, only recall the principles and applicable law set out in the 2011 Decision on Applicable Law and provide general guidance purely based on the law, leaving it to the Pre-Trial Judge to determine how to apply them to the facts before him.[93]

94. 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 and where the rules envisaging each offence relate to substantially different values.[94] In particular, when one offence encompasses another, the Judge should always choose the former and reject pleading of the latter. Likewise, if the

[91] 2011 Decision on Applicable Law, paras 265-301 and p. 152.
[92] 2011 Decision on Applicable Law, para. 301.
[93] We note that, at the oral hearing, the Prosecutor submitted that the Appeals Chamber in its 2011 Decision on Applicable Law took a restrictive view on cumulative charging, questioning the rationale for the Appeals Chamber's decision to limit cumulative charging. *See* Hearing of 11 October 2017, pp. 16-21, 23-24. Having carefully considered the Prosecutor's submissions and the jurisprudence he relied upon, we do not find any cogent reason to depart from the principles and applicable law on cumulative charging as articulated in the 2011 Decision on Applicable Law.
[94] 2011 Decision on Applicable Law, para. 298 and p. 152.

offences are provided for under a general provision and a special provision, the Judge should always favour the special provisions.[95] Crimes that do not meet that test may however be charged in the alternative.[96]

95. Second, the Pre-Trial Judge should be guided by the goal of providing the greatest clarity possible to the Defence. The Pre-Trial Judge may, for instance, request the Prosecutor to reconsider the submission of formally distinct offences which do not in practical terms further the achievement of truth and justice through the criminal process. As a general principle, the Pre-Trial Judge should be hesitant before accepting additional charges which do not protect substantially different values. This approach serves to promote more efficient proceedings while at the same time avoiding unnecessary burdens on the Defence. Overall, the approach furthers the overarching goal of the Tribunal to do justice in a fair and efficient manner.[97]

96. Third, under international criminal law, instances of "*concours réel d'infractions*" and "*concours idéal d'infractions*" are treated in the same manner as in Lebanese law.[98] The first category embraces the cases where a person perpetrates several crimes against one or more victims *by a set of separate actions*, while the second category covers cases where a person, *by a single act or transaction*, simultaneously violates more than one rule, in other words commits more than one crime.[99] Cases of "*concours idéal d'infractions*" are regulated by Article 181 of the Lebanese Criminal Code, which 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.

As is clear from its terms, Article 181 is relevant at the conviction stage, not at the charging stage. Article 182 of the Lebanese Criminal Code referred to in Question C(d) reflects the principle of *non bis in idem* and is not relevant to the issue of cumulative charging.[100]

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[95] 2011 Decision on Applicable Law, para. 298.
[96] 2011 Decision on Applicable Law, para. 271 and p. 152.
[97] *See* 2011 Decision on Applicable Law, para. 299.
[98] *See* 2011 Decision on Applicable Law, para. 282. *See also id.*, para. 270 and p. 152.
[99] *See* 2011 Decision on Applicable Law, paras 273, 276. *See also id.*, paras 274-275, 277-279.
[100] Article 182 of the Lebanese Criminal Code provides as follows:

> The same act shall be liable to prosecution only once.

Under international criminal law, 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) at the conviction stage.[101]

97. Although they are separate crimes, the crimes of conspiracy and criminal association under Lebanese law, when *based on the same underlying conduct*, cannot be said to be "truly distinct" and to aim at protecting substantially different values. Contrary to the Prosecution's submission,[102] conspiracy and criminal association do not each possess distinct elements in circumstances where the underlying conduct is the same. Further, by aiming to prevent the commission of serious offences against the State, they protect substantially similar values. In this case, it would therefore not be appropriate to allow these crimes to be charged cumulatively.[103] This, however, is without prejudice to the right of the Prosecution to charge these crimes in the alternative.

D. Questions D: Criteria for Reviewing the Indictment

98. The last series of questions raised by the Pre-Trial Judge, namely questions D(a) and D(b), relates to the criteria for reviewing the indictment.

1. Question D(a)

99. In relation to the applicable standard of review, the Pre-Trial Judge first asks:

> **a) To what extent must the Pre-Trial Judge assess the credibility and the reliability of the evidence presented in the *Ayyash et al.* case, which has been submitted as supporting materials to the Indictment, for his *prima facie* review?**

100. Concerning this question, the Prosecution submits that the Pre-Trial Judge should not engage in any assessment of credibility and reliability of the evidence submitted as supporting materials to the indictment.[104] It contends that this is the function of the Trial Chamber when considering the admission of evidence and when determining its weight in its

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However, if the consequences of the criminal act are aggravated after the initial prosecution, the act shall become liable to a more serious qualification. It shall be prosecuted accordingly and the heavier penalty shall be imposed. If the previously imposed sentence has been served, it shall be deducted from the new sentence.

[101] *See* 2011 Decision on Applicable Law, para. 285. *See also id.*, paras 271, 283-284.
[102] Prosecution Written Submissions, paras 23, 25; Hearing of 11 October 2017, p. 22. *See*, *contra*, Defence Office Written Submissions in Response, paras 9-17.
[103] 2011 Decision on Applicable Law, para. 298.
[104] Prosecution Written Submissions, para. 28. *See also* Hearing of 11 October 2017, pp. 27-28.

final judgment; and that it is not appropriate for the Pre-Trial Judge to do so at the confirmation stage.[105] It further argues that the Pre-Trial Judge should assess all supporting materials in the same manner, regardless of whether they have been admitted into evidence in the *Ayyash et al.* proceedings.[106]

101. The Defence Office submits that the Pre-Trial Judge should examine the credibility and reliability of the material provided by the Prosecutor to support the indictment, and that nothing should prevent the Pre-Trial Judge from referring to submissions that have already been made in respect of that material before the Tribunal.[107] In particular, it refers to the unique role of the Pre-Trial Judge in the context of this Tribunal.[108] It submits that the Pre-Trial Judge cannot simply accept the evidence submitted by the Prosecutor; rather, he needs to take into account the inconsistencies, ambiguities and contradictions within that evidence and act as a "filter" so that the indictment is not confirmed on a fragile basis.[109]

102. To respond to the Pre-Trial Judge's question, the Appeals Chamber first analyzes the nature and scope of the *prima facie* review to be conducted by a Pre-Trial Judge at the confirmation stage of the proceedings.

103. The *prima facie* standard is derived from Article 18 (1) of the Statute, which states that:

> [t]he Pre-Trial Judge shall review the indictment. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If he or she is not so satisfied, the indictment shall be dismissed.[110]

Rule 68 (F) of the Rules gives effect to Article 18 (1) of the Statute, elaborating on the confirmation procedure as follows:

> (F) 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.[111]

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[105] Prosecution Written Submissions, para. 28.
[106] Prosecution Written Submissions, para. 29.
[107] Defence Office Written Submissions in Response, para. 27.
[108] Defence Office Written Submissions in Response, paras 21-22, 25; Hearing of 11 October 2017, pp. 47-50, 59, 69-71.
[109] Defence Office Written Submissions in Response, para. 23; Hearing of 11 October 2017, pp. 48-50.
[110] The official French version of Art. 18 (1) STL St. reads "*Le juge de la mise en état examine l'acte d'accusation. S'il estime que le Procureur a établi qu'au vu des présomptions, il y a lieu d'engager des poursuites, il confirme l'acte d'accusation. À défaut, il le rejette*" and the official Arabic reads:
يتولى قاضي الإجراءات التمهيدية النظر في قرار الإتهام. فإذا ما اقتنع بأن المدعي العام قد قرر الملاحقة في ضوء القرائن، فإنه يعمد إلى تثبيت قرار الإتهام. أما إذا لم يقتنع بذلك فإنه يرد القرار.

These provisions, however, do not identify what standard the Pre-Trial Judge employs in making that determination.

104. We note that the Pre-Trial Judge in his 2011 Decision Relating to the Examination of the Indictment concluded that, for the purposes of reviewing an indictment, he should determine whether "a prima facie case based on sufficient and credible evidence exists to institute proceedings against the suspects."[112]

105. The Appeals Chamber recalls that the Pre-Trial Judge of this Tribunal is mandated with a unique role that distinguishes him from judges sitting in pre-trial phases in other international tribunals.[113] Distinctive aspects of the Pre-Trial Judge's functions include the power to rule on granting victims the status of victims participating in the proceedings, the power to exceptionally gather evidence, and the fact that he "is not a member of the Trial Chamber but is a neutral body distinct from both Chambers, dealing with all pre-trial matters and ensuring that trial proceedings are brought to a start quickly and efficiently".[114] It is also noteworthy, as acknowledged by both the Prosecution and the Defence Office,[115] that while the drafters of the Tribunal's Rules drew inspiration from the Lebanese experience and the Lebanese Code of Criminal Procedure in identifying many of the Pre-Trial Judge's powers, they did not confer on him the powers of an investigative judge.[116] We observe that under the Statute, the Pre-Trial Judge's role as it relates to the confirmation of an indictment is neither unique to the Tribunal, nor derived from, or analogous to, Lebanese criminal procedure. Rather, it is closely modelled on the role of confirming or reviewing judges at the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the Special Court for Sierra Leone ("SCSL").

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[111] The official French version of Rule 68 (F) reads "*Le Juge de la mise en état examine chacun des chefs d'accusation et toute pièce justificative fournie par le Procureur pour déterminer s'il y a lieu, de prime abord, d'engager des poursuites contre le suspect*" and the official Arabic reads : " يدقق قاضي الإجراءات التمهيدية في كل تهمة من التهم الواردة في قرار الاتهام وفي العناصر المؤيدة التي قدمها المدعي العام ليقرر إذا كان هناك بصورة أولية أدلة كافية لملاحقة المشتبه به".

[112] STL, STL-11-01/I, F0012, 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, Public Redacted Version, 28 June 2011 ("2011 Decision Relating to the Examination of the Indictment"), para. 28(ii).

[113] *See* Defence Office Written Submissions in Response, paras 21-25; Hearing of 11 October 2017, pp. 48-50, 58-61, 70-71.

[114] *See* Articles 7-8, 17 STL St.; Rules 86, 91, 92, 95 STL RPE; STL RPE Explanatory Memorandum, April 2012, paras 4, 12; STL, Statement from the STL President Judge Antonio Cassese ("1. The Enhanced Role of the Pre-Trial Judge"), 1 April 2009.

[115] Prosecution Written Submissions, para. 37; Defence Office Written Submissions in Response, para. 21; *contra* Hearing of 11 October 2017, p. 59.

[116] STL RPE Explanatory Memorandum, April 2012, paras 11-12.

106. In this context, the role of Pre-Trial Judge at the confirmation stage must be distinguished from the roles of the Pre-Trial Judge and the Trial Chamber at later stages of the proceedings. The Pre-Trial Judge has himself previously noted this distinction, finding, in the context of his role in examining supporting materials submitted to him at the confirmation stage in the *Ayyash et al.* case:

> [...] 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. 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.[117]

107. Significantly, it is the Trial Chamber that is afforded broad discretion to admit any relevant pieces of evidence which it deems to have probative value, by virtue of Article 21 (2) of the Statute and Rule 149 (C) of the Rules. In the Appeals Chamber's view, the nature of the Trial Chamber's discretion suggests that the assessment made by the Pre-Trial Judge at the confirmation stage, as a distinct process provided for under the Rules, must not encroach upon the assessment of evidence conducted by the Trial Chamber under Rule 149 (C).

108. The precise wording of Article 18 of the Statute and Rule 68 (F) of the Rules supports this interpretation. The term "*prima facie*", which appears in both provisions, is a Latin term meaning "at first sight", "on the face of it", or "on first impression".[118] While the term itself is imprecise as to the standard applicable at the confirmation stage, virtually identical provisions exist in the Statutes of the ICTY and the ICTR.[119] The practice of those tribunals may therefore serve as a useful reference point for understanding the nature of the

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[117] 2011 Decision Relating to the Examination of the Indictment, para. 26.

[118] James Morwood, *A Dictionary of Latin Words and Phrases* (Oxford University Press, 1998), p. 149. *See also* ICTY, *Prosecutor v. Rajić*, IT-95-12-I, Review of the Indictment, 29 August 1995, p. 2; David Hunt, "The Meaning of a "*prima facie* Case" for the Purposes of Confirmation", in Richard May *et al.* (eds), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald*, (Kluwer Law International, 2001), p. 146. Having carefully examined the French and Arabic versions of Article 18 of the Statute and Rule 68 (F) of the Rules in context, the Appeals Chamber is of the view that they do not denote any intention to depart from the meaning to be ascribed to the term "*prima facie*" as interpreted in the present decision.

[119] Article 19 (1) ICTY St.; Article 18 (1) ICTR St. *See also* Rule 47 (E) ICTY RPE; Rule 47 (E) ICTR RPE. The practice of those tribunals may therefore serve as a useful reference point for understanding the nature of the examination of supporting materials to be undertaken by the Pre-Trial Judge to determine whether a *prima facie* case exists. *See* 2011 Decision Relating to the Examination of the Indictment, para. 23; Prosecution Written Submissions, para. 30.

examination of supporting materials to be undertaken by the Pre-Trial Judge to determine whether a *prima facie* case exists.[120] We consider the incorporation of the language of the corresponding articles of the ICTY and ICTR Statutes to be a deliberate effort to import into our Tribunal the confirmation procedures and practices developed at those tribunals.

109. After some early debate regarding the meaning of the *prima facie* standard in the context of the ICTY's Statute,[121] arriving at an accepted definition of that standard proved uncontroversial. Reviewing Judges at the ICTY consistently endorsed the definition of the "*prima facie* case" standard first adopted in the *Kordić et al.* case: "a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge".[122] This formulation is markedly similar to the previous observation made by this Tribunal's Pre-Trial Judge.[123] Similar formulations have been adopted at the ICTR and the SCSL.[124] For the above reasons, and considering the decision taken by the drafters of this

[120] *See* 2011 Decision Relating to the Examination of the Indictment, para. 23.

[121] *See* ICTY, *Prosecutor v. Rajić*, IT-95-12-I, Review of the Indictment, 29 August 1995, pp. 6-8.

[122] ICTY, *Prosecutor v. Kordić et al.*, IT-95-14-I, Decision on the Review of the Indictment, 10 November 1995, p. 3 (quoting Report of the International Law Commission on the Work of its 46th Session, 49th Sess., UN Doc. A/49/10 (1994) p. 95). *See also* ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Decision on Motion to Amend the Amended Indictment, 12 January 2007, para. 22; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-PT & IT-05-88/1-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, para. 36; ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-PT, Decision on Defence Requests for Certification to Appeal Decision Granting Prosecution Leave to Amend the Amended Indictment, 8 February 2006, p. 3; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-I, Decision on Review of the Indictment, 9 March 2005, p. 2; ICTY, *Prosecutor v. S. Milošević*, IT-02-54, Decision on Review of Indictment, 22 November 2001, para. 14. For slightly different formulations of the same standard, see ICTY, *Prosecutor v. Mladić*, IT-95-5/18-I, Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 8 November 2002, para. 26; ICTY, *Prosecutor v. S. Milošević et al.*, IT-99-37-I, Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, 29 June 2001, para. 3.

[123] 2011 Decision Relating to the Examination of the Indictment, para. 25 ("The [confirmation] 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").

[124] At the ICTR, the *prima facie* case standard has been described as requiring the reviewing Judge "to make a preliminary assessment of the case". *See* ICTR, *Prosecutor v. Bagilishema*, ICTR-95-1-I, Decision on the Review of the Indictment, 28 November 1995, p. 2. The ICTR has followed a general practice of concluding, without elaboration, that *a prima facie* case had been established and that the acts charged fell within the jurisdiction of the Tribunal. *See, e.g.*, ICTR, *Prosecutor v. Munyeshyaka*, ICTR-2005-87-I, Decision on Confirmation of an Indictment Against Wenceslas Munyeshyaka, 22 July 2005; *Prosecutor v. Bikindi*, ICTR-01-72-I, *Décision de confirmation de l'acte d'accusation*, 5 July 2001; ICTR, *Prosecutor v. Musabyimana*, ICTR-2001-62-I, Confirmation of the Indictment and Order for Non-Disclosure, 13 March 2001; ICTR, *Prosecutor v. Hategekimana et al.*, ICTR-2000-55, Decision to Confirm the Indictment, 2 February 2000; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-I, Decision on the Review of the Indictment, 16 February 1996, p. 2. Those occasions where the *prima facie* case standard has been explored in more detail support the conclusion that the role of the reviewing Judge tasked with examining whether "*a prima facie* case has been established" at the ICTR was to consider whether the evidence supported the case as a whole, without undertaking a qualitative assessment of individual items of evidence. *See, e.g*, ICTR, *Prosecutor v. Kabuga*, ICTR-98-44B-PT, Decision on the Amended Indictment, 24 June 2005, para. 6. With respect to the SCSL, Rule 47 (C) SCSL RPE indicates that a Prosecutor submits an indictment accompanied by a case summary

Tribunal's Statute to adopt of the *prima facie* standard in substantially the same terms as in the statutes of the ICTY and the ICTR, we find the above-mentioned interpretation of the standard highly persuasive.

110. In light of the above, the Appeals Chamber considers that – despite the unique aspects of his role at other stages of the proceedings – the Pre-Trial Judge's task under Article 18 of the Statute and Rule 68 (F) requires him to assess whether the supporting materials provided by the Prosecutor demonstrate a credible case which could, if not contradicted, be a sufficient basis to convict the suspect on the charge(s) in the indictment. The determination of whether this standard is met lies with the Pre-Trial Judge. He is uniquely situated to review the full scope of the indictment and supporting materials before him. We are of the view that, as suggested by the Prosecution,[125] the role of the Appeals Chamber in addressing the Pre-Trial Judge's questions in the context of Rule 176 *bis* proceedings prevents it from guiding the Pre-Trial Judge on how to conduct his assessment with respect to particular supporting materials.

111. Insofar as the Pre-Trial Judge's question suggests that the examination under Rule 68 (F) might differ, because of supporting materials before him that have also been submitted as evidence in the *Ayyash et al.* case, the Rules are unambiguous. According to Rule 68 (F), the Pre-Trial Judge is to "examine each of the counts in the indictment and *any supporting materials provided by the Prosecutor*".[126] Whether or not such material has also been submitted as evidence in the *Ayyash et al.* case is inconsequential: the Pre-Trial Judge must examine *any* material that is provided by the Prosecutor in respect of the counts in the indictment to determine whether a *prima facie* case exists against the suspect.

"briefly setting out the allegations he proposes to prove in making his case". The jurisprudence of that tribunal indicates that an indictment can be confirmed, under Rule 47 (E) of that tribunal's rules, if the reviewing Judge is satisfied that the crimes charged are within the SCSL's jurisdiction and "the allegations [in the case summary] would, if proven, amount to the crimes specified and particularised in the said Indictment". SCSL, *Prosecutor v. Brima*, SCSL-2003-06-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003, p. 2. *See* SCSL, *Prosecutor v. Kallon*, SCSL-2003-07-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003, p. 2.

[125] Hearing of 11 October 2017, pp. 82-83.

[126] Emphasis added.

2. Question D(b)

112. The Pre-Trial Judge also poses the following further question:

> **b) Insofar as some of the supporting materials submitted to him for review in the context of the confirmation of the Indictment constitute evidence whose assessment of the credibility and reliability was the subject of adversarial proceedings in the Ayyash et al. case (testimony and exhibits filed during those testimonies), must the Pre-Trial Judge take into account and assess, in the context of the confirmation of the Indictment, the submissions made during those adversarial proceedings? Does the fact that the content of those discussions has not been submitted to him pursuant to Rule 68 (B) of the Rules, but is publicly available, have an effect on the answer to the previous question?**

113. In relation to this Question, the Prosecution submits that because the Pre-Trial Judge does not assess the credibility and reliability of supporting materials generally, it follows that he should not consider legal submissions made in the *Ayyash et al.* proceedings going to that issue.[127] It contends that the Rules do not permit the Pre-Trial Judge to consider the submissions of non-parties, and that Rule 68 (F), in particular, limits the Pre-Trial Judge to considering the materials provided by the Prosecution.[128] It further argues that the Pre-Trial Judge does not have investigative or general independent evidence-gathering authority, and that limiting the Pre-Trial Judge's review to the materials submitted by the Prosecution is consistent with his role.[129] The Defence Office submits that it would be artificial to limit the Pre-Trial Judge's analysis to the evidence submitted by the Prosecutor, when some of that evidence has already been the subject of adversarial proceedings in a case before the Tribunal to which the new case is connected.[130]

114. The Appeals Chamber is of the view that the text of Rule 68 (F) plainly limits the scope of Pre-Trial Judge's review to "each of the counts of the indictment and any supporting materials *provided by the Prosecutor*".[131] This requirement is consistent with the nature of the Pre-Trial Judge's role as set forth in the Statute. In this respect, the Appeals Chamber recalls that, under the procedure outlined in the Tribunal's Statute, "there is no investigating judge

[127] Prosecution Written Submissions, para. 34.
[128] Prosecution Written Submissions, para. 35; Hearing of 11 October 2017, p. 29.
[129] Prosecution Written Submissions, para. 37.
[130] Defence Office Written Submissions in Response, para. 24; Hearing of 11 October 2017, pp. 60-61.
[131] Emphasis added. Nonetheless, by virtue of Rule 68 (I) (ii), the Pre-Trial Judge may request the provision of additional supporting material from the Prosecutor.

proper (*juge d'instruction*); each party is responsible for gathering evidence in support of its own case".[132]

115. The absence of general investigative powers is reinforced by certain provisions of the Tribunal's Statute and Rules. Article 11 of the Statute and Rules 61 to 66 of the Rules clearly show that the Prosecutor is responsible for conducting investigations of alleged crimes falling under the Tribunal's jurisdiction. The limited investigative powers that the Pre-Trial Judge does possess are set out in Rule 92 of the Rules, and are available only in exceptional circumstances. They provide no general authority to the Pre-Trial Judge to seek extraneous materials outside of those submitted by the Prosecutor. It is therefore not relevant whether material exists in the public domain; the Pre-Trial Judge has no authority under Rule 68 (F) to refer to material other than that provided to him by the Prosecutor in conducting a *prima facie* assessment of a case.

116. Based on the above, in answer to Question D(b), we conclude that the Pre-Trial Judge must neither take into account, nor assess, in the context of the confirmation of the indictment, submissions made during adversarial proceedings in the *Ayyash et al.* case that are not before him as supporting material. Whether or not the content of such submissions is publicly available is inconsequential.

[132] STL RPE Explanatory Memorandum, April 2012, para. 4.

IV. 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 Preliminary Questions submitted by the Pre-Trial Judge;

NOTING the respective written submissions of the Prosecution and the Defence Office and the arguments they presented at the public hearing held on 11 October 2017;

DETERMINES that;

A. With regard to the material element (*actus reus*) of the crime of criminal association:

a) Pursuant to Article 335 of the Lebanese Criminal Code, the *actus reus* of the crime of criminal association is composed of the following elements (see above para. 37):

- an agreement, oral or written, between two persons or more; and
- a particular purpose or subject of the agreement, being the perpetration of one or more of the underlying felonies mentioned in Article 335;

b) It is not necessary that all the participants in the criminal association be identified; the identification of more than one of the members of the association or parties to the agreement is not a requirement for the crime of criminal association to be established (see above para. 40);

c) The crime of criminal association under Article 335 of the Lebanese Criminal Code is committed upon the conclusion of the agreement which entails a decision between two or more persons to act collectively for the purpose of committing the felonies mentioned in Article 335 of the Lebanese Criminal Code (see above para. 42);

d) The form of the association or agreement is not important as long as there is a meeting of the minds of the parties to the agreement. The commission of material acts is not an element of the crime of criminal association (see above paras 46-51);

e) The means for achieving the criminal purpose of a criminal association is not an element of the crime of criminal association (see above paras 53-54);

f) The aim of the agreement or association must be the commission of one or more felonies against persons or property or felonies to undermine the authority of the State, its prestige or its civil, military, financial or economic institutions. The underlying felonies that fall within the ambit of Article 335 are detailed in paragraphs 62-69 above. While it is enough that the perpetrators intend, in general terms, to commit those felonies, it is not necessary to list the specific felonies sought

to be committed by the group or to define them in a precise manner (see above paras 57-70);

g) An individual can be held liable for the crime of criminal association not only where he or she took part in the creation of the criminal association, but also where he or she joined the association or entered into the agreement at any time after its establishment (see above paras. 72-73).

B. With regard to the intentional element (*mens rea*) of the crime of criminal association:

a) Pursuant to Article 335 of the Lebanese Criminal Code, the *mens rea* of the crime of criminal association is the intention to establish or join the association or agreement aimed at committing one or more of the felonies mentioned in Article 335 of the Lebanese Criminal Code and the knowledge that the purpose of the association or agreement is to commit a felony against persons or property, or aimed at undermining the authority of the State, its prestige or its civil, military, financial or economic institutions (see above para. 76);

b) In order to incur criminal responsibility, a participant in the association or agreement is not required to know precisely the felonies intended to be committed (see above para. 79).

C. With regard to the crimes of criminal association and conspiracy:

a) The distinctive characteristics between the crime of conspiracy and the crime of criminal association are twofold (see above paras 84-86):

- Criminal association must involve an agreement to commit one or more crimes falling within the broad categories of "felonies" mentioned in Article 335 of the Lebanese Criminal Code while the possible aims of a conspiracy under Article 270 of the Lebanese Criminal Code are restricted to a specific type of felonies, those directed against the "security of the State";
- An agreement on the means to commit the crime is specifically required for conspiracy but is not an element of criminal association;

b) The assassination of a political figure is not an element of conspiracy or criminal association: conspiracy and criminal association are criminalized regardless of whether or not they target a political figure (see above para. 88);

c) The crime of conspiracy is not a form of criminal association, nor is a criminal association a form of conspiracy (see above paras 90-91);

d) In circumstances where the underlying conduct is the same and can qualify as both conspiracy and criminal association, it would not be appropriate to allow that these crimes be charged cumulatively. This is without prejudice to the right of the Prosecution to charge these crimes in the alternative (see above para. 97).

D. With regard to the criteria for reviewing the indictment:

a) Pursuant to Rule 68 (F) of the Rules, the Pre-Trial Judge is to "examine each of the counts in the indictment and any supporting materials provided by the Prosecutor". Whether or not such material has also been submitted as evidence in the *Ayyash et al.* case is inconsequential: the Pre-Trial Judge must examine *any* material that is provided by the Prosecutor in order to determine whether a *prima facie* case exists against the suspect (see above paras 110-111);

b) The Pre-Trial Judge must neither take into account, nor assess, in the context of the confirmation of the indictment, submissions made during adversarial proceedings in the *Ayyash et al.* case that are not before him as supporting material. Whether or not the content of such submissions is publicly available is inconsequential (see above para. 116).

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

Dated 18 October 2017

Leidschendam, the Netherlands

Judge Ivana Hrdličková
Presiding