

Special Court for Lebanon Conviction for Terrorism

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By: Dr Joseph Rikhof

On August 20, the Trial Chamber of the Special Court of Lebanon (STL) issued a historic judgment in the case of Ayyash (the Prosecutor v. Ayyash, Merhi, Oneissi and Sabra, see here). Of the four people charged with terrorism related offences under the Lebanese Criminal Code for the killing in a bomb attack of Mr. Rafik Hariri, the former prime minister of Lebanon, namely conspiracy to commit a terrorist act by means of an explosive device, committing a terrorist act by means of an explosive device, the intentional homicide of Hariri and of 21 others, the attempted intentional homicide of the

226 people injured in the blast and of being accomplices to these crimes (paragraph 14 of the judgment), only one was convicted, namely Salim Jamil Ayyash (paragraph 6904).

The judgment is very lengthy, even by international standards, namely 2227 pages for the majority judgment alone with another 208 pages for the two concurring judgments of the two majority judges. Most of the judgment discusses factual issues but there is also a considerable amount of attention paid to legal matters, which stands out for two reasons: namely the fact that the judges, after careful deliberation, decided only utilize Lebanese law to determine the parameters of the offences and modes of liability set out in the indictment and, the fact that the judges of this Trial Chamber find themselves frequently at odds with a decision of their own Appeals Chamber as to those parameters (for a general discussion of the legal issues decided by the STL, see here while the Appeals Chamber judgment in question can be found under “Criminal Association”). This article will be limited the discussion of these legal issues in the judgment.

The general legal framework

The Statute of the STL (see here) is a mix of Lebanese and international law. Article 2(a) of the Statute says that the following is applicable: “The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy” while article 3.1(a) states that a person shall be responsible if that person “committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute” with articles 3.1(b) and 2 using the wording of the Statute of the International Criminal Court (see here, articles 25.3(d) and 28) to set out the parameters for common purpose liability and command/superior liability respectively.

The judgment indicates that the above provisions all find their origin in international law, either transnational criminal law, namely the 1997 International Convention for the Suppression of Terrorist Bombings (see here) (article 2), or international criminal law (ICL) (article 3). (paragraphs 5901-5911) However, it then entered into an inquiry to determine whether the principle of a fair trial, including the concepts of legality and the principle that any doubt is to be resolved in favour of the accused, is paramount favours an interpretation of article 3.1(a) in the Statute dealing with extended liability based on ICL or Lebanese criminal law. (paragraphs 5912-5932)

But before completing this analysis, the Trial Chamber needed first to assess its position with respect to the precedent value and impact of decisions rendered earlier by the Appeal Chamber in general and specifically one on the same matter of extended liability, which had been an interlocutory decision. It was of the view that:

“The Trial Chamber therefore maintains as a matter of policy, meaning effective judicial management which is consistent with the rights of the Accused to a fair trial and the Prosecution’s interest in the process and that of the participating victims, that although not legally bound to do so, it should

generally follow the interpretation of the law of the first interlocutory decision unless cogent reasons exist not to. The Trial Chamber may depart from that interpretation if required in the interests of justice to ensure a fair trial, for example if the Appeals Chamber patently or manifestly erred in law. This would constitute persuasive reasons, or to use another term, cogent reasons in the interests of justice, for the Trial Chamber not to follow the Appeals Chamber's legal findings. In the circumstances—most especially the lapse of time between the Appeals Chamber's first decision, issued three years before the trial began, and almost seven and a half years before it closed—the Trial Chamber is of the view that the interests of justice required it to examine for itself the Lebanese case law cited by the Appeals Chamber. (paragraphs 5963-5964)"

The Trial Chamber also observed that the Appeals Chamber had come to the conclusion that Lebanese law was more favourable to the accused than international law and for that reason, the national law should be applied in the proceedings, (paragraphs 5983-5984 and 6013) a conclusion shared with the Trial Chamber. (paragraphs 5992, 6013 and 6023).

In its analysis with respect to the methodology of the substantive crime of terrorism, the Trial Chamber was very brief, saying (and implicitly disagreeing with Appeals Chamber in another interlocutory decision, here under "The Crime of Terrorism"):

"Hence attempting—by recourse to the laws of other nations and State practice—to divine a definition of an international crime of terrorism, and then potentially apply it to something as basic as the criminal law of a sovereign State, cannot be relevant to the Special Tribunal's function to try the crimes specified in Article 2. (paragraph 6017)"

However, with respect to extended liability, the Trial Chamber compared the contents of ICL with that of Lebanese law, first by a detailed examination of the latter and then by doing a more cursory overview of the former, generally coming to the conclusion that Lebanese law was the preferred choice.

Co-perpetration

Co-perpetration is regulated in articles 212 and 213 of the Lebanese Criminal Code as follows:

"Article 212: the perpetrator of an offence is anyone who brings into being the constituent elements of an offence or who participates directly in its commission.
Article 213: Each of the co-perpetrators of an offence shall be liable to the penalty prescribed by law for the offence."

Quoting a Lebanese Judicial Council, the Trial Chamber stated that article 212 covers:

"anyone who commits material acts that *contribute towards creating* the material element of the crime where criminal intent exists, and also anyone who takes positive action which does not contribute to the creation of its basic material element *but leads directly to the commission of the crime by laying*

the basis for its execution. (paragraph 6029, emphasis in the original)"

while saying itself:

"A wide variety of conduct can constitute the co-perpetration of terrorist acts, intentional homicides and attempted intentional homicides. The Lebanese courts have found that accused who planned and supervised the acts of other accused were themselves co-perpetrators of those crimes, even when that planner and supervisor neither performed nor was present during the physical action that completed the crimes, such as firing the fatal shot or pressing the button on a detonator. However, Lebanese courts consider that to qualify as co-perpetration of a terrorist act, intentional homicide or attempted intentional homicide, contributions must go beyond mere preparations to commit the crime. (paragraph 6031)"

The Trial Chamber found this approach reasonable and did not see a need to canvass any ICL jurisprudence on this point. (paragraph 6040)

Accomplice liability

Extended liability is set out in article 219 of the Lebanese Criminal Code, which says:

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

From the Lebanese jurisprudence regarding this section, the Trial Chamber set out the following propositions with respect to proof of liability for aiding and abetting a crime:
-there is no need for the accomplice to share the intent of the perpetrator (paragraph 6062);
-the *mens rea* for an accomplice is general knowledge of the intent of the perpetrator to commit a crime, and the intent to assist the perpetrator in committing the crime (paragraph 6061);
-the reference to agreement in some of the subsections of article 219 is a reference to the accomplice's awareness of the crime and its consequences and his acceptance of participation, but not that there is a direct evidence of an explicit agreement (paragraph 6057), disagreeing with the Appeals Chamber that there is a need to prove an objective understanding between perpetrator and accomplice (paragraphs 6059-6060);

-the *mens rea* includes *dolus eventualis* or the fact that the accomplice foresaw and accepted the risk that the perpetrator would commit the crime under contemplation (paragraphs 6058 and 6117);
- the exact level of knowledge specifically for subsections 4 and 5 of article 219 above is not clear from the Lebanese jurisprudence (paragraphs 6084 and 6124);
-in general, omissions could fall within the *mens rea* of these two subsections (paragraphs 6095-6096);
-with respect to *actus reus* only preparatory activities and not activities carried out after the commission of the crime are within the realm of these subsections (paragraphs 6108 and 6123-6124 with examples in paragraph 6089).

Having set out the parameters of accomplice liability in Lebanese law, the Trial Chamber then proceeded to examine ICL in this area to identify the differences between ICL and Lebanese law and identified the following elements in that area of law (in paragraph 6127):
-the acts or omission of aiding and abetting must have a substantial effect of the crime;
-the *mens rea* is knowledge that his actions would assist the commission of a crime;
-there is no need that the accomplice know the precise crime that was intended to be committed;
-the accomplice needs to know the specific intent of the perpetrator for specific intent crimes such as genocide or persecution.

Comparing then ICL with Lebanese law, the Trial Chamber then came to the conclusion that since Lebanese law is narrower and therefore more favourable to the accused, there was no need to use ICL at all in the proceedings (paragraphs 6135, 6144-6145). The differences noted relate to the fact that Lebanese law has only six specific forms of accomplice liability in article 219 while ICL is open ended; that ICL knows the concept of accessory after the fact, which is unknown in Lebanese law; and that some forms of accomplice in article 219 requires agreement which ICL does not. (paragraphs 6140-6143)

Conspiracy

Conspiracy is defined in article 270 of the Lebanese Criminal Code as an offence and defined as: “Any agreement concluded between two or more persons to commit a felony by specific means.” (paragraph 6200)

The Trial Chamber commenced its analysis of this offence by repeating first the conclusions of the Appeals Chamber in regards to the crime of conspiracy, namely:

1. conspiracy requires the participation of two or more people;
2. an agreement between those persons? a merger of their wills ?is necessary;
3. the aim of the agreement must be to commit a crime against State security;
4. the participants must agree on the means to carry out the crime;
5. the participants must have criminal intent;
6. motive is not part of the *mens rea*;

7. there is no need for the contemplated crime to have been completed;
8. attempted conspiracy is not possible. (paragraphs 6203-6205)

The Trial Chamber agreed with the first three elements set out by the Appeals Chamber while specifying that there is no need for specific form for the agreement (it can be oral or written) (paragraphs 6221-6222) while conspirators can join the agreement at different times. (paragraphs 6203 and 6223-6227).

The Trial Chamber also generally agreed with the proposition of the Appeals Chamber on the fifth element (paragraph 6228) but disagreed with the Appeals Chamber's conclusion that the appropriate criminal intent is not present if the person believed that the conspiracy was lawful because such a belief is generally irrelevant in Lebanese law (paragraphs 6229-6230).

With respect to the fourth element, the Trial Chamber indicated that the Appeal Chamber had stipulated that agreement "on the means to carry out the crime" in this element stood for the proposition that while the conspirators must have agreed to use a means liable to create a public danger they need not have precisely determined how to execute their agreement but finds this description lacking in specifics. (paragraph 6238)

The Trial Chamber provided these specifics by saying:

"Accordingly, the Trial Chamber finds that to prove a conspiracy to commit a terrorist act by specific means, it must be shown that the alleged conspirators agreed to use some means liable to create a public danger, and specifically which one, and that they agreed on some other key details of the plot. In particular, based on the definition of a terrorist act in Article 314, the alleged conspirators must also have agreed on using the relevant means in a way that would cause a state of terror. While not legally necessary in all cases, to satisfy this requirement it would be sufficient for the participants to have agreed on using a large explosive device in a public place, and that people would die and be injured as a consequence of this act. (paragraph 6263)"

In conclusion, the Trial Chamber was of the view that conspiracy has the following elements:

-two or more people must agree to commit a terrorist act, each of them knowing:
1. that the act will be committed using a means that is liable to create a public danger;
2. which particular means liable to create a public danger will be used; and
3. that those "means" will be used in a way that is liable to create a state of terror.
-if the terrorist act is intended to kill a particular person and killing that person would be likely to create a state of terror, each of them must also know:
4. that the act is intended to kill that person. (paragraph 6258)

Terrorism

Article 314 of the Lebanese Criminal Code defines terrorism as follows: “all acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents.” (paragraph 6153)

The Trial Chamber disagreed with the Appeals Chamber that this definition should be interpreted with reference to international law and was of the view that “such recourse to international law was and is unnecessary” for the most part because article 314 is unambiguous. (paragraph 6167)

After canvassing Lebanese jurisprudence on this issue, the Trial Chamber came to the conclusion that in order to fulfill the elements of committing a terrorist act by means of an explosive device a person must:

1. perform an act using an explosive device that is liable to create a public danger;
2. know that the act is to be committed using an explosive device that is liable to create a public danger; and
3. intend to cause a state of terror. (paragraphs 6199)

However, proof of motive is not required as a legal element although it can be helpful to contextualize the offences in question and can provide evidence of a person’s intent (paragraphs 6191-6198).

Similarly, the issue of whether a only a threat to create a public danger could be part of the *actus reus* of article 314 as indicated by the Appeals Chamber was not accepted by the Trial Chamber as it felt that this was not a requirement under Lebanese law but had been introduced by the Appeals Chamber as a result of the examination of international law (paragraphs 6155 and 6165).

The Trial Chamber also seems to disagree with the Appeals Chamber with respect to the notion of “means” in article 314 by contrasting the view of the Appeals Chamber that the “means” referred to in article 314 also included the use of any device or substance however modest that poses a public danger in the circumstances of its use, while Lebanese courts held that the *actus reus* required proof of a more wide-scale danger based on the force and violence that went beyond the limited and direct location where they were used (paragraphs 6162-6164)

Homicide

The judgment also discussed briefly the crimes of intentional homicide and attempted intentional homicide. The elements for intentional homicide are performing an act or omission that is a cause of another person’s death with the intention to cause the death of the other person (paragraph 6308) while for an attempt of such a crime the following has to be proven:

1. a person must perform an act or omission that either: a. begins the execution of an intentional homicide of another person, or b. executes completely the act(s) or omission(s) aimed at committing that crime, except that the other person does not die;

2. the first person must intend to cause the death of another person; and
3. circumstances beyond the first person's control must prevent the other person's death. (paragraph 6329)

Conclusion

While the discussion with respect to the various crimes and modes of liability are of interest because of the fact that the STL is an internationalized institution, the decision by the Trial Chamber to eschew international law completely makes it of little precedential value to other international institutions or even domestic courts. It does actually follow the approach used by most national courts, especially when setting the parameters of extended liability and inchoate offences, because they have for the most part used their own domestic precedents rather than rely on ICL for guidance, even for international crimes (see here, pages 426-427). Ironically, while the Trial Chamber discussed in great detail why it relied on Lebanese law for accomplice liability it did not do so for the two inchoate offences of conspiracy and attempt, where ICL jurisprudence is actually very close to the conclusions reached by the Trial Chamber regarding those two offences (see here, pages 374-375 and 378-379).

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