

## Criminal Association and Conspiracy in Lebanese Law

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1. In general, a criminal idea goes unpunished as long as it remains at the mental stage. Usually mere thoughts are not punishable by the law as it is considered that they do not constitute risk to social order. The reason behind it is that society is neither aware of nor endangered by those ideas as long as they remain internal to the person who thought of them and are not associated with any material acts. The Lebanese Law took a different turn and provided exceptions to this principle.

2. Even though criminal agreement is a mere idea with no concrete action, it is still considered that it increases the possibility of harmful action, threatens society and endangers the safety of citizens. Therefore, the Lebanese legislator found grounds in incriminating it and providing provisions that govern it in different circumstances, two of which will be discussed thoroughly in this memo; the crime of criminal association and the crime of conspiracy.

3. That is why the legislator wished to strike such "association as soon as it was formed without waiting for it to enter an active phase". It is this idea that prompted the legislator to "restrain not only the crimes committed but the association established with the view of committing them". Several countries, including Lebanon, have retained this crime in order to prevent the harmful consequences of such agreements.<sup>(1)</sup>

4. The Lebanese Criminal Law considers conspiracy as a crime and not as a mode of liability. Therefore, under the Lebanese law and the Lebanese jurisprudence, conspiracy constitutes a criminal offence just as the crime of criminal association.

5. In this legal study, there will be a discussion on the crime of Criminal Association under Lebanese Law (I) as well as the crime of Conspiracy (II). Then, the Similarities and Differences between these two similar but separate crimes will be provided (III).

6. We shall refer to two decisions issued by the Appeals Chamber of the Special Tribunal for Lebanon. The first is the decision on the 18th of October 2017 and will be referred to in section for the crime of criminal association (I). The second

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(1) Poland, Denmark, Holland, Belgium, Judge Farid Zoghbi, « Crimes Contre la Sécurité Intérieure de l'Etat », in la Loi Pénale au Liban, Volume 10, Sader, p.183, Beirut 1995.

Appeals Chamber decision, on the other hand, will be referred to for the crime of conspiracy in section (II). It is the decision of the 16th of February 2011 on the Applicable Law. We shall not refer to the Trial Chamber's judgment of the 18<sup>th</sup> of August 2020, and the Appeals Chamber's decision of 10<sup>th</sup> of March 2022 which shall be the subject of a future detailed study.

## **I. The Crime of Criminal Association Under Lebanese Law**

### **A. Elements**

#### **a) The Legal Element**

7. According to the principle of legality, there can be no crime without law. If an act is to be prohibited, the legislator must spell out in advance what behavior is banned.

8. The crime of criminal association is governed in the Lebanese Law by Article 335 of the Lebanese Criminal Code (LCC). This article states the following "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. 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."<sup>(2)</sup>

9. It should be noted, however, that a special law was enacted on January 11, 1958 on "increasing the penalties for sedition, civil war, and interfaith struggle".

10. The painful incidents that took place in Lebanon in 1957 and 1958 and the accompanying bombings, killings and violence that claimed thousands of Lebanese lives led to the enactment of this law.

11. Articles 306 to 315 of the Lebanese Criminal Code (LCC), except for article 314, were temporarily and exceptionally suspended by articles in the law 11/1/1958. Article 315 LCC was 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."

12. The Law of 11/1/1958 is a special provision in comparison with the Lebanese Criminal Code which is a general provision. Article 181 LCC states that "If an act has several qualifications, they shall all be mentioned in the judgement and the Judge shall impose the heaviest penalty. However, if both a general

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(2) STL Official Translation from Arabic.

provision of criminal law and a special provision are applicable to the act, the special provision shall be applied.”

13. Pursuant to article 181(2) LCC, the Law of 11/1/1958 prevails and therefore shall be applied instead of article 335 LCC.

14. This practice was mostly common between the years of 2015 and 2017 where the Lebanese Court of Cassation convicted the accused for the crime of criminal association pursuant to articles in the Law of 11/1/1958 instead of Article 335 of the Lebanese Criminal Code (LCC).<sup>(3)</sup> Each time, the court justified by referring to article 181 LCC mentioned above.

15. Therefore, even though the requirements of Article 335 LCC were met in those cases and it could be applied, the 6<sup>th</sup> criminal chamber of the Court of Cassation would instead choose to depend on articles of the Law 11/1/1958 since the latter is a special provision that prevails over the general provision which is Article 335 LCC.

#### **b) The Material Element (*Actus Reus*)**

16. From Article 335 LCC above mentioned, the following can be derived as the material element of the crime of criminal association:

- i. The existence of an association or agreement
- ii. Resolved between two or more persons to commit offences
- iii. With the view to commit crimes against persons or property or to undermine the authority of the State, its prestige or its civil, military, financial or economic institutions

#### ***i. The association or agreement***

17. A criminal association is essentially a crime that is manifested by a written or oral agreement. It should be concluded between at least two persons who have resolved to act in common to commit the offences listed in Article 335 LCC. It is not enough that they share the same ideas or objectives, the resolution for the commission of the mentioned offences must be formed between them, whereby in the absence of such a resolution, one should not speak of a criminal association. This was confirmed by the Lebanese Court of Cassation, as it ruled that “The elements of the criminal association were not gathered in the absence of a prior agreement between the protesters for the commission of the incriminated facts.”<sup>(4)</sup>

18. A question may be asked; is it only the act of establishing a criminal association that is criminalized or can a person also be prosecuted for joining an

(3) Lebanon, Court of Cassation, 6th Criminal Chamber, Decision No. 183/2017, 6/6/2017, *Cassandre* 2017, p.936; Lebanon, Court of Cassation, 6th Criminal Chamber, Decision No. 462/2015, 1/12/2015, *Cassandre* 2015, p.2300; Lebanon, Court of Cassation, 6th Criminal Chamber, Decision No. 405/2015, 27/10/2015 (Unpublished); Lebanon, Court of Cassation, 6th Criminal Chamber, Decision No. 92/2015, 31/3/2015, *Cassandre* 2015, p.554; Lebanon, Court of Cassation, 6th Criminal Chamber, Decision No. 278/2015, 14/7/2015, *Cassandre* 2015, p.1444.

(4) Lebanon, Court of Cassation, 6th Criminal Chamber, 8/7/2004, *Cassandre* 2004, Volume No.7 p. 1189.

association previously created by other members? In its 2017 decision, the Appeals Chamber considered that the language of Article 335 LCC should not be interpreted as meaning that joining a criminal association after its establishment does not fall within the scope of that provision.<sup>(5)</sup> This is the approach taken by Lebanese jurisprudence, as there were a large number of cases where individuals were convicted for the crime of criminal association even though they had joined terrorist groups such as Al-Qaeda and ISIS after their establishment.<sup>(6)</sup>

19. Below are a few cases ruled by the Lebanese Court of Cassation.

20. In a case, the accused had joined a syrian armed terrorist group where he trained members of the groups, communicated with their leaders, and participated in an armed conflict against the Syrian army. The court ruled that the fact he joined a syrian armed group that commits felonies against persons or property or to undermine the authority of the State, its prestige, or its institutions in addition to his participation in training members and in combat fall within the description of article 335 LCC. Therefore, he was convicted for the crime of criminal association pursuant to Article 335 LCC, Article 219 LCC and Article 6 of the Law of 11/1/1958.<sup>(7)</sup>

21. In another case, the accused had joined armed military groups led by a Sheikh and had received trainings on how to use weapons and combat. Some of them had even trained on how to manufacture explosives in order to commit terrorist acts. In the above case, the court ruled that these accused joining armed military groups that had already been established and receiving the trainings mentioned fall under the crime of criminal association pursuant to Article 335 LCC.<sup>(8)</sup>

22. Also, there was a case where the accused had confessed to joining the group “Osbat Al-Ansar” after being convinced by its principles with the aim of establishing a cell for the group in Tripoli as assigned by the leader of the group. The Court of Cassation considered that the group “Osbat Al-Ansar” is a terrorist group since it aims at committing felonies against persons and undermining the authority of the State, its prestige or its civil and military institutions. The court ruled that accused joining this group after its establishment and with knowledge of its aims qualifies as the crime of criminal association and thus convicted them pursuant to Article 335 LCC.<sup>(9)</sup>

(5) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 72.

(6) Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 20/2013, 15 January 2013 (Unpublished); Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 7/2013, 8 January 2013, *Cassandre* 2013, p.143. See also El Zoghbi, Vol. 10, p. 185.

(7) Court of Cassation, Criminal Chamber 6, Decision No. 54/2014, 18 February 2014, *Cassandre* 2014, p.309.

(8) Court of Cassation, Criminal Chamber 6, Decision No. 54/2008, 6 March 2008, *Cassandre* 2008, p.634.

(9) Court of Cassation, Criminal Chamber 6, Decision No. 239/2007, 27 November 2007, *Cassandre* 2007, p.2066.

23. Lastly, we refer to a case where the accused had joined a military organization and transmitted information about the Lebanese army and the UNIFIL. He was thus convicted for the crime of criminal association for joining that group after its establishment pursuant to Article 335 LCC and Articles 5 and 6 of the Law of 11/1/58.<sup>(10)</sup>

24. Therefore, it can be deduced from the above case law that according to the Lebanese Court of Cassation, even if the accused had not participated in the establishment of a criminal association but had joined or entered into the agreement at a later time, he can still be held liable and bear criminal responsibility.

## **ii. Two or more persons**

25. According to the wording of Article 335 LCC which governs the crime of criminal association, at least two persons must be involved. This means that two or more persons should agree on the commission of felonies provided for in that article.

26. However, one might ask; is it necessary for all the participants in the criminal association to be identified? In other words, can a person be prosecuted if he were the only person identified in a criminal association?

27. As confirmed in the Appeals Chamber decision,<sup>(11)</sup> it is not necessary that all the participants in the criminal association be identified and is therefore not a requirement for the establishment of the crime.

28. Yet, in order to prosecute the sole identified participant in a criminal association, all other elements that constitute this crime should be established. In other words, it should be proven that he had entered into a written or oral agreement with at least one other person, who can be unknown to the court, to commit the felonies provided in Article 335 LCC.

29. Also, in its decision, the Appeals Chamber considered that it is not a requirement that the participant in a criminal association knows all other members in the same association or agreement.<sup>(12)</sup> In one of the decisions cited by the Chamber, the Lebanese Court of Cassation 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

(10) Court of Cassation, Criminal Chamber 6, Decision No. 212/2007, 25 October 2007, *Cassandre* 2007, p.1793.

(11) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 40.

(12) Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 7/2013, 8 January 2013, *Cassandre* 2013, p.143; 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 (Unpublished).

they had all hardened their resolve, with others, to commit an offence against persons and property”.<sup>(13)</sup>

30. In analyzing the approach taken by Lebanese courts, we refer to 3 cases demonstrated above.<sup>(14)</sup> In all these cases, the accused were convicted for the crime of criminal association for joining already established terrorist groups. When joining such groups, the accused do not know all the members nor were they all identified. Nevertheless, the Lebanese Court of Cassation still convicted them pursuant to Article 335 LCC, without requiring neither that the accused know all the other members in the associations they had joined nor that all those other members be identified for the accused to be held liable.

### **iii. The objectives of the association/agreement**

31. From Article 335 LCC, we could derive the objectives of the criminal association or agreement. The purpose of this association must be to commit crimes, excluding offenses and contraventions, against persons or property or crimes that infringe upon the authority of the State its prestige or its institutions.

#### *a. Specification of the Objective*

32. The crimes agreed upon do not have to be necessarily predetermined or specified in a precise manner, as the Appeals Chamber considered.<sup>(15)</sup> In the decision cited by the Chamber, the Lebanese Court of Justice decided that 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 offence stipulated in article 335 of the Criminal Code”.<sup>(16)</sup> It is therefore sufficient that the objective of the criminal association remains in the general sense; to commit felonies directed at persons, property, or the authority of the State, its prestige or its civil, financial or economic institutions.

#### *b. Form of the Agreement*

33. If we go back to the wording of Article 335 LCC that governs the crime of criminal association in the Lebanese Law, it states that participants can enter into a written or oral agreement. This article therefore does not require a specific form as the agreement can be reached by writing, orally, and can even be explicit or implicit. What is essential, as confirmed by the Appeals Chamber in its decision, is the meeting of the wills of the parties of the agreement.<sup>(17)</sup> Among the Lebanese

(13) 6th Criminal Chamber, Court of Cassation, Decision No. 257, 23/6/2011, *Cassandre* 2011, p.1336.

(14) Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 239/2007, 27 November 2007, *Cassandre* 2007, p.2066; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 54/2008, 6 March 2008, *Cassandre* 2008, p.634.; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 212/2007, 25 October 2007, *Cassandre* 2007, p.1793.

(15) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 70.

(16) Lebanon, Court of Justice, Decision No. 1, 12 April 1994, *Al Moustashar*.

(17) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 46.

Case law that were referred to,<sup>(18)</sup> the Chamber cited a decision by the Lebanese Court of Cassation that read “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”.<sup>(19)</sup>

34. Also, the Appeals Chamber considered that this criminal agreement can be either permanent or temporary; it could exist and then cease to exist before or after the commission of the crime agreed upon.<sup>(20)</sup>

*c. Structure of the Agreement*

35. Within the question on whether or not there should be a specific structure for the crime of criminal association to be established, lies the matter of the existence of a hierarchy between its members.

36. Lebanese jurisprudence is somewhat mixed on this question. Those who consider that there is no requirement that the participants form a structured, hierarchical group comprising a large number of people seem to rely on the use of the conjunction “or” in the phrase “association or agreement” by the legislator in Article 335 LCC. Therefore, they are with the view that it is enough for an agreement to exist between two individuals neither of whom assumes the role of a leader. While nothing in Article 335 LCC suggests such a requirement, Lebanese courts have differed in their interpretation of the law on this point.

37. There are cases where Lebanese courts did not require this hierarchy for the crime of criminal association.<sup>(21)</sup> 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.<sup>(22)</sup>

38. In a case before the Lebanese Court of Cassation, the accused had established a criminal association to commit robberies and had already committed 3 by the time they were arrested. The court convicted them for the crime of establishing a criminal association pursuant to Article 335 LCC and for robbery and threat using a gun at night under Articles 639/640 LCC.<sup>(23)</sup>

(18) Lebanon, Court of Cassation, Criminal Chamber 7, Decision No. 4/2016, 14 January 2016, *Cassandre* 2016, p. 101; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 252/2005, 4 October 2005, *Cassandre* 2005, p.1845; Lebanon, Court of Justice, Decision No. 2, 26 June 2003, in *Al Moustashar*.

(19) Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 207/2008, 18 June 2008, *Cassandre* 2008, p.1344.

(20) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 47.

(21) Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 365/2016, 8 December 2016, *Cassandre* 2016, p. 2246; Lebanon, Court of Cassation, Criminal Chamber 7, Decision No. 92/2015, 31 March 2015, *Cassandre* 2015, p. 554; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 53/2014, 18 February 2014, *Cassandre* 2014, p.342; Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 207/2008, 18 June 2008, *Cassandre* 2008, p.1344; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 252/2005, 4 October 2005, *Cassandre* 2005, p.1845; Lebanon, Court of Justice, Decision of 26 June 2003, in *Al Moustashar*.

(22) Lebanon, Court of Justice, Decision No. 1, 12 April 1994, in *Al Moustashar*.

(23) Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 87/2015, 17 March 2015, *Cassandre* 2015, p. 555.

39. There was another case where 3 accused had agreed to rob numerous houses and had already committed them, which is a felony against persons and property. The Lebanese Court of Cassation considered that these accused had established an association with a view to commit felonies against persons and then to rob several houses during the night after breaking and entering. Therefore, they were convicted for the crime of criminal association pursuant to Article 335 LCC and Articles 639/640 LCC.<sup>(24)</sup>

40. In the above cases, it was not proven that there was a mastermind or leader for those criminal associations and the members were still convicted pursuant to Article 335 LCC. This means that in none of those cases did the Lebanese courts require a hierarchy for the crime to be qualified as a criminal association.

41. On the other hand, some Lebanese jurisprudence does require the existence of a hierarchy, a mastermind who directs the group in agreement with the distribution of roles.<sup>(25)</sup> The Third Chamber of the Lebanese Court of Cassation in a Decision of 17 April 2002, for instance, as well as two other chambers in other decisions, has taken a different view, finding that criminal association requires the existence of a hierarchy, a plan and a division of roles between the perpetrators.<sup>(26)</sup>

42. In a case before the Lebanese Court of Cassation, 4 accused jointly and intentionally abducted, sexually assaulted and killed the victim. The court considered that such a criminal agreement requires a certain hierarchy where roles are distributed amongst the members under the leadership of a mastermind who plans and organizes the common criminal act. Due to the fact that this requirement was not met, it was considered that this agreement does not qualify as a crime of criminal association and therefore Article 335 LCC cannot be applied.<sup>(27)</sup>

43. There was also a ruling of the Lebanese Court of Cassation that determined that the offence requires an agreement between several people or the existence of an organization that brings together several people, under the leadership of a “mastermind”, where roles are distributed between the participants.<sup>(28)</sup>

44. Elsewhere it was held that by committing numerous thefts and attacks against persons, a group of minors constituted the criminal association provided for in Article 335 LCC, the intent to commit felonies against persons or property

(24) Lebanon, Court of Cassation, Criminal Chamber 7, Decision No. 179/2014, 22 July 2014, *Cassandre* 2014, p.1392.

(25) 3rd Criminal Chamber, Court of Cassation, 17/4/2002, *Al Adl* 2002, Volume No. 2 p 518.

(26) Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 169/2002, 17 April 2002, *Cassandre* 2002, p.452; Lebanon, Beirut Indictment Chamber, Decision No. 794, 14 November 2005 (Unpublished).

(27) Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 481/2015, 10 December 2015, *Cassandre* 2015, p. 2341.

(28) Court of Cassation, Criminal Chamber 3, 17/04/2001, *Al Adl* 2002, p. 518.



having been met on evidence that the association had a mastermind, had elaborated plans and had assigned roles to its members.<sup>(29)</sup>

45. In another case it was held that the elements of Article 335 LCC were incomplete in terms of the requirement for entry into a written or verbal agreement where the defendants were together present at places of demonstration, it having been established that they were there as a result of collective obedience and not because of an agreement among them in the sense of the said Article 335 LCC.<sup>(30)</sup>

46. In its October 2017 decision, the Appeals Chamber considered that the existence of a hierarchy is not a requirement for the establishment of a criminal association and is therefore not a pre-requisite for the application of Article 335 LCC, but merely a relevant evidentiary factor to prove the existence of a criminal association.<sup>(31)</sup>

47. It should be noted, nevertheless, that in most cases in the Lebanese jurisprudence, it was said that the accused had joined a group which was led by an individual, mostly in the cases previously demonstrated where the accused had joined terrorist groups like “Al-Nosra” or “Al-Qaeda”. This shows that such criminal associations usually do have a mastermind, a leader who directs the group in agreement and distributes the roles of the participants.<sup>(32)</sup> Yet, even though it is quite common in Lebanese Case Law, it was not clear that the Lebanese courts had taken the existence of a hierarchy as a requirement for convicting the accused for the crime of criminal association pursuant to Article 335 LCC. Proving the existence of this specific structure is hard in reality, which adds grounds for the fact that the crime of criminal association is hard to prove and is maybe the reason why some Lebanese courts have disregarded it as an element.

#### *d. Material Acts*

48. Another debatable issue regarding the material element of the crime of criminal association is whether or not this agreement should be materialized by certain acts. In other words, does Article 335 LCC require the commission of material acts in furtherance of the agreed criminal purpose in order to be applied?

49. Some have considered that this agreement should be exteriorized by preparatory acts. Others considered that preparatory acts are not a material element of the crime of criminal association; the latter is constituted by the agreement itself and preparatory acts are relied upon merely as proof that an accused has entered or established a criminal association.<sup>(33)</sup> According to this point of view, it is

(29) Criminal Court of Cassation, Decision No. 169, 17/04/2002, *Cassandre* 2002, No. 4, p. 452; *Al Adl* 2002, V 2 and 3, p. 518.

(30) Court of Cassation, 6th Chamber, Decision No. 196, 8/7/2004, *Cassandre* 2004, No. 7, p. 1189.

(31) AC Interlocutory Decision on the Applicable Law, para. 49.

(32) 3rd Criminal Chamber, Court of Cassation, 17/4/2002, *Al Adl* 2002, V 2 p 518.

(33) Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 252/2005, 4 October 2005, *Cassandre* 2005, p.1845; Lebanon, Court of Cassation, Decision No. 237/2013, 3 October 2013, *Cassandre* 2013, p.1580; Lebanon, Court of Cassation, Decision No. 257/2011, 23 June 2011; Lebanon, Court of Cassation, Decision No. 207/2008, 18 June 2008.

therefore not necessary for participants in such an agreement to have acted or even attempted to consummate it. This means that the material element in the crime of criminal association is different from that of other offences where a material act, a result and a causal link between them are always required.

50. This approach is clear from the following Lebanese case law.

51. The Court of Cassation considered that the repetition of robberies and the presence of the accused with the other defendants with whom he had formed a gang to commit robberies, in all the operations prior to the theft of the plaintiff, make his presence a partner in the offense even though he does not show any action against the plaintiff.<sup>(34)</sup>

52. In another case before the Court of Cassation, an accused had agreed with a leader in ISIS to send a car with explosives to murder members of the Lebanese military who are often in the restaurant where the first works. The court ruled that that agreement is a criminal agreement to commit felonies against person or property and against the civil and military institutions in Lebanon. Therefore it falls under Article 335 LCC.<sup>(35)</sup>

53. In principle, only crimes committed are punishable by the legislator. Attempt is also sanctioned if manifested by a commencement of execution. As for the crime of criminal association, it is punishable even if the acts, the object of the criminal agreement, were not committed. The association itself constitutes a crime independent of crimes that the participants in the criminal agreement have proposed to commit or have already committed.<sup>(36)</sup> Therefore, this crime in itself constitutes "a separate and autonomous offense of the offenses prepared or subsequently carried out".<sup>(37)</sup>

54. In its October 2017 decision, The Appeals Chamber supported the above view as it emphasized that the commission of material acts is not an element of the crime of criminal association but can however constitute a posterior evidence of the existence of an association or agreement, and that there should be a distinction between material elements of a crime and the evidence of a crime.<sup>(38)</sup>

55. The Appeals Chamber added that 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.<sup>(39)</sup>

(34) Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 3/2005, 12 January 2005.

(35) Lebanon Court of Cassation, Criminal Chamber 6, Decision No. 278/2015, 14 July 2015, *Cassandre* 2015, p. 1444.

(36) Judge Farid Zoghbi, « *Crimes Contre la Sécurité Intérieure de l'Etat* », in la Loi Pénale au Liban, Volume 10, Sader, p.181, Beirut 1995.

(37) Véron, Michel, « *Infraction Autonome et Distincte des délits préparés* » *Juris Classeur, Droit Pénal* no. 11, November 2010, comm. 125, 2010.

(38) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 51.

(39) 6th Criminal Chamber, Court of Cassation, Decision No. 278/2015, 14 July 2015, *Cassandre* 2015, p. 1444; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 237/2013, 3 October →

56. In its decision, the Appeals Chamber regards Article 335 LCC as aiming 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.<sup>(40)</sup> This article enables the authorities to act before the perpetrators actually commit those crimes.<sup>(41)</sup> This means that the Appeals Chamber considers the agreement itself, which would in other situations be considered as an unpunishable preparatory act, as the punishable crime when it comes to criminal association.

57. Therefore, it can be deduced from Lebanese Case Law, and as the Appeals Chamber considered in its decision on the 18th of October 2017, that the establishment of a criminal association is a crime in itself. Article 335 LCC provides for a separate crime, punishable independently from the actual perpetration of the crimes to which it refers. Whether the felonies that were agreed upon were in fact executed or committed is merely a matter of proof. Due to the fact that the crime provided for in Article 335 LCC is basically an agreement and a merger of wills, it is hard to prove. That is why the Indictment Chamber of Beirut considered in decision number 794 of 14 November 2005 that the legislator only punishes agreements that are “materialized by one or more material acts” as “the proof of the decision to act is very difficult to establish directly”.<sup>(42)</sup>

58. It should be noted that if the planned offences are performed, attempted or completed, in addition to being incriminated for joining a criminal association, this leads to a situation of actual concurrence of offences.<sup>(43)</sup>

#### *e. Number of Felonies Required*

59. An agreement is punishable pursuant to Article 335 LCC when it is established with the objective of preparing the offences listed under that article. As previously mentioned, the agreement should aim at the commission of felonies against persons, property, or to undermine the authority of the State, its prestige or its civil, military, financial or economic institutions. Therefore, the first requirement is that the offences must be felonies, not misdemeanors or minor offences. Secondly, they must be crimes against people or property, or crimes that damage the authority of the State, its prestige or institutions.

60. The Appeals Chamber in its 2017 October Interlocutory Decision considered that as it is clear from the wording of Article 335 LCC, the aim of the agreement must be the commission of felonies mentioned in the article itself. Misdemeanors and petty offences are therefore excluded from the underlying

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→ 2013; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 257/2011, 23 June 2011, *Cassandre* 2011, p.1336.; Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 207/2008, 18 June 2008, *Cassandre* 2008, p.1344; El Zoghbi, Vol. 10, p. 185.

(40) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 58.

(41) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 35.

(42) Indictment Chamber of Beirut, Decision No. 794, 14 November 2005, *Al Adl*, 2006, p. 449.

(43) Court of Cassation, 3rd Chamber, 12/1/2005, *Cassandre* 2005, Section 1, p. 114.

crimes. The Chamber added that, taking the amendment made to this article in 1983 into account, nothing suggests that it was intended to encompass crimes other than those qualified as felonies.<sup>(44)</sup>

61. One issue that was raised and dealt with by the Appeals Chamber is the number of felonies required to constitute the purpose of a criminal association. This is a matter of debate in the Lebanese case law, as some courts have considered that just one felony is enough,<sup>(45)</sup> while others required the association aiming at committing more than one felony in order to speak of a criminal association.<sup>(46)</sup>

62. The first view was approached by the Court of Cassation on October 21, 2003 as it read in its decision “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”.<sup>(47)</sup>

63. In its decision, the Chamber considered that the plural “felonies” was used by the legislator in order to differentiate between felonies on one hand, and misdemeanors and petty offences on the other hand.<sup>(48)</sup> Therefore the Chamber considered that the term “felonies” was not exactly meant to specify the need of agreeing on more than one felony in order for a criminal association to be established, but on the contrary, one felony is enough. This position and interpretation of the wording of Article 335 LCC was justified with the argument that just one crime could sometimes undermine peace and public security more than multiple crimes would.

64. Judges are often called upon to make a construction, or interpretation, of an unclear term in cases that involve a dispute over the term’s legal significance. Strict construction occurs when ambiguous language is given its exact and technical meaning, and no other equitable considerations or reasonable implications are made.

(44) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 58.

(45) Lebanon, Court of Cassation, Criminal Chamber 7, Decision No. 43/2017, 16 February 2017, *Cassandre* 2017, p. 246. (in that decision, the Court of Cassation convicted the accused of criminal association aimed at committing a single felony of aggravated theft); See also El Zoghbi, Vol. 10, p. 185.

(46) Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 481/2015, 10 December 2015, *Cassandre* 2015, p. 2341; Lebanon, Beirut Indictment Chamber, Decision No. 794, 14 November 2005 (Unpublished); 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).

(47) Court of Cassation, Criminal Chamber 6, Decision No. 259/2003, 21/10/2003, *Cassandre* 2003, p.1412.

(48) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 60.

65. In Criminal Law, strict construction must be applied to criminal statutes. This means that a criminal statute may not be enlarged by implication or intent beyond the fair meaning of the language used or the meaning that is reasonably justified by its terms. As a result, criminal statutes will not be held to encompass offences and individuals other than those clearly described and provided for in their language.

66. This means that since article 335, which governs the crime of criminal association, is found in the Lebanese Criminal Code, it is a criminal text and the above applies to it. This text, if in need of any interpretation, has to be interpreted precisely as written. And in the case of ambiguity, this criminal statute should be resolved in favor of the defendant according to the rule of lenity.

67. Back to the exact wording of this article, it is required that the persons establish an association or enter into a written or oral agreement with a view to commit felonies. The term “felonies” was used in this article, as opposed to the term “felony” found in Article 270 LCC which governs the crime of conspiracy in the Lebanese Law. The latter article states that “Any agreement concluded between two or more persons to commit a felony by specific means shall be qualified as a conspiracy.”

68. If the legislator did in fact consider that a single felony would be enough to speak of a criminal association being established, why did Article 335 LCC not say “with a view to commit a felony” as it did in Article 270 LCC? The comparison between these two texts is to be done to show that the will of the legislator was to require “felonies” for the crime of criminal association and “a felony” for the crime of conspiracy. We add that due to the fact that Article 335 LCC is a criminal statute, it should be interpreted, if need be, strictly and without drifting away from the will of the legislator, the latter being the establishment of a criminal association with a view to commit two or more felonies.

69. To support this opinion, we refer to a few Lebanese Cases where the Lebanese Court of Cassation required multiple felonies. The first was already referred to and demonstrated in the section related to the structure of the agreement. In this case, the Court of Cassation considered that Article 335 LCC requires an agreement between two or more persons to commit multiple felonies. When giving its decision, the court considered that there is no evidence that the 4 accused committed these felonies or had planned their criminal acts in order to commit more than one felony and then ruled that the conditions of Article 335 LCC are not met. This shows that the court took into consideration the number of felonies that the accused had as a purpose of their criminal agreement, and due to the fact that they were not more than one felony, the accused were acquitted for the crime of criminal association.<sup>(49)</sup>

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(49) Court of Cassation, Criminal Chamber 6, Decision No. 481, 10/12/2015, *Cassandre* 2015, p. 2341.

70. There was another case before the Lebanese Court of Cassation where it read “taking into consideration the number of robberies committed and the methods through which they were committed”. Then the court convicted the accused for the crime of criminal association pursuant to Article 335 LCC and Articles 639/640 LCC. This means that when taking into consideration the number of felonies committed, the court requires multiple felonies for the crime of criminal association to be established.<sup>(50)</sup>

71. Therefore, the objectives of the agreement imply that the latter is aimed at the commission of several crimes rather than an isolated crime. Indeed, if the plan to commit an isolated crime was the constituent element for the offence covered by Article 335 LCC, any criminal complicity would be characterized as participation in a criminal agreement or association. One judgement of the Criminal Court of Mount Lebanon ruled that the criteria for the offence stipulated in Article 335 LCC had not been met because the agreement established between the accused was confined to the joint commission of two isolated cases of theft against determinate victims.<sup>(51)</sup>

### c) The Moral or Intentional Element (*Mens Rea*)

72. The crime of criminal association requires the following in order to speak of the intentional element: (i) The intention of the accused to establish or join an association or agreement aimed at committing the felonies mentioned generically in Article 335 LCC; (ii) 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.<sup>(52)</sup>

73. A criminal association is essentially an intentional crime. The participants in the criminal agreement have the same intention oriented towards a criminal objective. This means that they know that the aim is criminal and prohibited by law, but nevertheless adhered to it voluntarily.

74. One person’s intention to commit a crime against Public Security is not enough to establish the offence because Article 335 LCC requires two or more persons in order to speak of a criminal association.

75. However, in order for the agreement or association to fall within the scope of this article, it is not sufficient that the parties merely share ideas, regardless of their seriousness or dangerous character. Article 335 LCC 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,

(50) Court of Cassation, Criminal Chamber 3, Decision No. 87, 17/3/2015, *Cassandre* 2015, p. 555.

(51) Court of Cassation, 19/2/1998, *Cassandre* 1998, Section 2, p. 222.

(52) Court of Cassation, Criminal Chamber 6, Decision No. 244/2007, 4 December 2007, *Cassandre* 2007, p.2290; El Zoghbi, Vol. 10, p. 186.

between two or more persons, to act collectively for the purpose of committing the felonies mentioned in Article 335.<sup>(53)</sup> 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.<sup>(54)</sup> This is what the Appeals Chamber confirmed in its October 2017 decision.<sup>(55)</sup>

76. The Appeals Chamber went on to elaborate what is meant when it is said that the participants in a criminal association should “have knowledge”. It is required that they have general knowledge that the aim of the agreement or association is prohibited by law. In other words, a criminal association does not need to have a purpose any more precise than the general criminal aims set out in Article 335 LCC, and that the participant must be aware of one or more of these general criminal aims.<sup>(56)</sup>

77. Indeed, 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 intended to be committed or identify the particular victims targeted. What is required is that they agree to commit the felonies referred to in general terms in Article 335.<sup>(57)</sup> Therefore, an accused may be held liable under Article 335 LCC 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.

### **B. Sentence**

78. The sentence for criminal association is forced labour for terms ranging from 3 to 15 years. According to Article 335 LCC, the minimum is set at 10 years if the objective of the guilty parties was to endanger the life of another person or the lives of officials in public institutions or administrations.

### **C. Exemption from Punishment**

79. Pursuant to Article 335 LCC paragraph 2, “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.”

(53) 6th Criminal Chamber, Court of Cassation, Decision No. 257/2011, 23/6/2011, *Cassandre* 2011.

(54) Indictment Chamber of Beirut, Decision No. 794, 14 November 2005, *Al Adl*, 2006, p. 449; 6th Criminal Chamber, Court of Cassation, Decision No. 315/2003, 24/12/2003, *Cassandre* 2003, p.1792; 6th Criminal Chamber, Court of Cassation, Decision No. 196/2004, 8/7/2004, *Cassandre* 2004, p.1189.

(55) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 42.

(56) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 78.

(57) Court of Justice, Decision No. 1, 12 April 1994, in *Al Moustashar*; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 54/2008, 6 March 2008, *Cassandre* 2008, p.634.

## II. The Crime of Conspiracy Under Lebanese Law

### A. Elements

80. There are 5 elements for the crime of conspiracy, 4 of which constitute the material element of conspiracy while another is the moral or intentional element. These elements are:

- i. Two or more individuals
- ii. Concluding or joining an agreement
- iii. Aiming at committing crimes against the security of a State
- iv. With the predetermination of the means to be used to commit the crime
- v. Criminal intent<sup>(58)</sup>

81. A third element is added, the legal element, which is the legal text that governs a crime.

82. Each element, as previously mentioned, will be further discussed based on Lebanese jurisprudence and doctrine, with reference to the STL's Appeals Chamber decision on the 16th of February 2011.

#### a) The Legal Element

83. In the Lebanese Law, the crime of conspiracy is governed by Article 270 of the Lebanese Criminal Code (LCC) and Article 7 of the Law of 11/1/1958.

84. Article 270 of the Lebanese Criminal Code (LCC) states that "Any agreement concluded between two or more persons to commit a felony by specific means shall be qualified as a conspiracy".<sup>(59)</sup>

85. The above text only provides a definition for conspiracy but does not expressly identify the required crimes to be committed. By limiting it to the intention of committing a crime by specific means, this article is considered insufficient to criminalize conspiracy.<sup>(60)</sup> However, due to the fact that the legislator had incorporated the crime of conspiracy in Book II Chapter I of the Lebanese Criminal Code which governs the offences against State security, it can be concluded that the object of a conspiracy is meant to be a crime against State security. Therefore, the crime of conspiracy must involve a criminal plan that threatens security and public order in a State.

86. Article 7 of the Law of 11/1/1958 also governs the crime of conspiracy and states 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."<sup>(61)</sup>

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

(59) STL Official Translation from Arabic.

(60) Dr. Philomène Joachim Nasr, *Qanun al-'uqubat al-khass, jara'im wa 'uqubat, dirasah muqaranah wa tahlil*, Sader Legal Publishing, Beirut, 2009, p. 527.

(61) STL Official Translation from Arabic.



### **b) The Material Element (*Actus Reus*)**

87. The conditions that comprise the material element of a conspiracy can be deduced from Article 270 LCC mentioned above. In its 2011 decision, the Appeals Chamber confirmed the following as being the constituents of the material element. These conditions are as follows:

- i. A criminal agreement
- ii. Between two or more persons
- iii. to commit a felony against State Security
- iv. by specific means

#### ***i. A criminal agreement***

88. The conspirators must conclude or join an agreement. By definition, a criminal agreement is an agreement in which the parties share the same intent directed towards a criminal purpose.

89. Seen as the merger of wills, the agreement is reached when the conspirators agree completely, and their agreement is final.<sup>(62)</sup> Therefore, it must be proven that there were shared and unified wills between the participants in the agreement to commit the crime rather than mere individual thoughts.

#### ***a. The form of the Agreement***

90. The nature of the agreement implies a concrete and material aspect, since the agreement is an expression of the will of the parties who have knowledge of it and express their consent. This expression can be made in an oral or written form or even body language if it is clearly understood. This shows that there is no specific form or manner required in the Lebanese Law for the agreement in the crime of conspiracy to be established, nor is it necessary that the criminal agreement is structured and the roles are allocated to each of the different participants.

91. For example, the conspirators do not have to be assembled in the same location or in a single group. An agreement is still deemed to have occurred even when one person is abroad and the agreement is concluded by correspondence. It is therefore enough that a final and clear-cut decision was taken for it to be said that a criminal agreement has occurred.<sup>(63)</sup>

92. Also, it is not a requirement for a conspiracy agreement to be made in secrecy, even though it might seem unlikely for it to be otherwise.<sup>(64)</sup> Throughout

(62) AC 16 February 2011 Decision, para. 196.

(63) Dr. Ali Muhammad Ja'far, *Qanun al-'uqubat wal-jara'im, al-i'tida' 'ala amn al-dawlah wal-salamah al-'amah wal-idarah al-qada'iyah, al-ikhlal bi-wajibat al-wadhifah, al-sirqah, al-mukhadarat*, Entreprise Universitaire d'Etudes et de Publications, Beirut, 2000, p. 29; Dr. Philomène Joachim Nasr., op. cit., p. 529.

(64) Dr. Ali Muhammad Ja'afar, *Qanun al-'uqubat wal-jara'im, al-i'tida' 'ala amn al'dawlah wal-salamah al-'amah wal-idarah al-qada'iyah, al-ikhlal bi-wajibat al-wadhifah, al-sirqah, al-mukhadarat*, Entreprise Universitaire d'Etudes et de Publications, Beirut 2000, p. 29; Dr. Philomène Joachim Nasr., op. cit., p. 529.

history, a great number of conspiracies have been carried out in secret on account of the tyranny and dictatorship of rulers. Nevertheless, this does not preclude a conspiracy from sometimes being open and made public, especially in liberal democracies, where individuals may use force and violence for the explicit purpose of changing a country's political regime.

93. In its 2011 decision, the Appeals Chamber considered that this criminal agreement can be conditional, depending on a foreseeable particular circumstance or a likely future event.<sup>(65)</sup> In other words, the conspirators can agree on the commission of the crime depending on whether or not the circumstance or event occurs. Such conditions might be the death of a politician, the dissolution of parliament, the election of a candidate for deputy.<sup>(66)</sup> Even though there seems to be no published Lebanese jurisprudence on this issue, this view is supported by Lebanese doctrine where it is considered that the crime of conspiracy is established even in the case of a conditional criminal agreement and the condition is independent of the intent of the participants.<sup>(67)</sup>

94. The Chamber added that no explicit time-line is required for the validity of the agreement. The agreement stands, even though it is a long-term one or has no predefined or foreseen term.

*b. Impossibility of the Purpose of the Agreement*

95. There are times where the object of the conspiracy agreed upon is impossible to execute. This means that the felony that was agreed by the conspirators to be executed as a result of their conspiracy cannot be committed. This raises the question on whether in such a case the crime of conspiracy is still punishable.

96. There have been conflicting views as some commentators consider that in the case of a conspiracy with an object legally impossible, the conspiracy should not be punishable.<sup>(68)</sup>

97. Others believe that there is no crime of conspiracy unless its realization is possible and even probable.<sup>(69)</sup>

98. A different point of view can oppose the first one, as it considers that the crime of conspiracy is punishable even if the crime, the object of the agreement, is legally impossible. The core of the agreement is not whether the crime agreed upon by the conspirators could be committed or not, it is the agreement itself to commit that crime. The criminal intention to commit a crime against State security

(65) AC 16 February 2011 Decision, para. 196.

(66) S. Alié. Manuel des infractions contre la sûreté de l'Etat, Beyrouth 2008 qui cite à l'appui de ces deux derniers exemples; Garçon, Code pénal annoté T.I art. 89 No. 14.

(67) Atef Naquib, Cours de droit pénal spécial, cours polycopié, p. 19.

(68) Dr. Abdelfattah Al Saifi, cite à Samir Alia, Synthèse de l'explication des crimes contre la sûreté de l'Etat, Association Universitaire pour Etudes, Editions et Publications, 1999, p. 87

(69) Atef Naquib, Cours de droit pénal spécial, cours polycopié, p. 19.

is manifested in the criminal agreement. In other words, once the agreement is complete, it becomes punishable.

99. Similar to the crime of criminal association, as demonstrated above, the agreement in itself is the crime punishable by the Lebanese Law pursuant to Article 270 LCC in the case of conspiracy. Once at least two persons have agreed on the commission of a felony against State security and have agreed on the means through which it shall be committed, the crime of conspiracy is established. Therefore, regardless of whether or not this intended crime is legally possible, once all other conditions and elements of conspiracy are met, Article 270 LCC can be applied and the accused can be convicted for the crime of conspiracy.

### *c. Attempt of Conspiracy*

100. This raises another issue which is whether or not it is possible to attempt to conspire. In the Appeals Chamber 2011 decision, it was considered that there is no attempted conspiracy.<sup>(70)</sup> That is because the Chamber, as previously mentioned, considered the crime of conspiracy to be the agreement itself. Therefore, before the agreement is concluded and there is merger of the wills of the conspirators, there is no crime. Once the agreement is complete, the crime is complete and is considered already executed.

101. That is the reason why the Chamber considers that conspirators are punishable even though they did not materialize their agreement to commit a felony against State security. Thus there can be no “attempted conspiracy” and all the conduct preceding the merger of wills is but a mere preparatory act.<sup>(71)</sup>

102. However, there has been a different view regarding the possibility of an attempted conspiracy. The Lebanese Law punishes the attempt of all felonies, even in the absence of a specific text, according to Article 200 LCC.<sup>(72)</sup> In contrast, according to Article 202 LCC,<sup>(73)</sup> attempt does not apply to misdemeanors unless explicitly provided for in a specific text. Since conspiracy is a felony, attempt is de

(70) AC 16 February 2011 Decision, para. 200.

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

(72) Article 200 LCC: “Any attempt to commit a felony that began with acts aimed directly at its commission shall be deemed to constitute the felony itself if its completion was prevented solely by circumstances beyond the control of the perpetrator. The penalties prescribed by law may, however, be commuted as follows: The death penalty may be replaced with hard labour for life or fixed-term hard labour for 7 to 20 years; Hard labour for life may be replaced with fixed-term hard labour for at least five years; life imprisonment may be replaced with fixed-term imprisonment for at least five years; Any other penalty may be commuted by one half to two thirds. Any person who begins to commit an act and then voluntarily desists shall be punished only for acts that he committed which constituted offences per se.”

(73) Article 202 LCC: “Neither an attempted nor an abortive misdemeanour shall be punished except in cases explicitly provided for by law. The penalty incurred for a completed misdemeanour may be commuted by up to one half in the case of an attempted misdemeanour and by up to one third in the case of an abortive misdemeanour.”

facto punishable, even if for certain perpetrators, attempted conspiracy would be difficult to ascertain.<sup>(74)</sup>

## *ii. Between two or more persons*

103. As stated in article 270 LCC, a minimum of two persons must be involved in a conspiracy. The concluded agreement is therefore a bilateral or multilateral agreement. Consequently, the intent of a single person to commit a crime against State security is not sufficient to establish the offence. The Appeals Chamber confirmed in its 2011 decision that a conspiracy requires more than one person.<sup>(75)</sup>

### *a. Identification of Conspirators*

104. In its decision, the Appeals Chamber also added that there is no requirement that all the conspirators be identified. It must simply be proven that the accused had made up his mind with others to perpetrate a felony against State security.<sup>(76)</sup> This means that a single person can be tried for conspiracy, provided that all the elements of conspiracy are proven, when it is established that he agreed with others to commit the relevant crime, even though these “others” remain unknown by the court.<sup>(77)</sup>

### *b. In the case of Renunciation of a Conspirator*

105. If two persons agree to conspire and one of them decides to report the matter to the authorities in order to benefit from the exemption provided for in Article 272 LCC, the crime of conspiracy still stands. The fact that one of the two reports the matter does not decriminalize his action nor does it negate the criminality that characterized the agreement as long as the two had been willful parties to a joint agreement at some stage. The fact that some of them are later exempted from punishment for one reason or another does not affect it, as the conspiracy still stands. If one of the conspirators benefits from an absolute defence or mitigation provided by the law, the conspiracy remains established, since that excuse is a cause of impunity whose effects apply only to the punishment and not to criminal responsibility.

106. This matter will be further discussed in part **E** of this memo regarding the exemption from the punishment of conspiracy.

### *c. Complicity*

107. An individual having participated in a conspiracy is considered as a co-perpetrator in relation to the other conspirators, and as such he is said to have participated in a criminal agreement. Whether it was he or another person who had

(74) Conseil Judiciaire, arrêt No. 8, daté du 31/05/1969, recueil Alia des jurisprudences du Conseil Judiciaire, No. 232, p. 168 et 171.

(75) AC 16 February 2011 Decision, para. 195.

(76) Dr. Samir Aliyah, *Ijtihadat al-majlis al-`adli fil-jara'im al-waqi'ah `ala amn al-dawlah* (1949-1977), Entreprise Universitaire d'Etudes et de Publications, Beirut, 1987, p. 168.

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

generated the idea is of little importance, as long as he had accepted it and expressed his consent through the agreement.<sup>(78)</sup>

108. The Appeals Chamber held that there can be complicity to commit conspiracy whereby an accomplice lends his support to the conspiracy without being a party to the agreement, on condition that he is aware he is participating in the commission of a conspiracy.<sup>(79)</sup> The Chamber provided the elements of complicity to be divided into objective and subjective. Objective elements<sup>(80)</sup> include an understanding of the agreement; assistance in one of the 6 forms listed in Article 219 LCC;<sup>(81)</sup> and conduct by the perpetrator amounting to a conspiracy. As for the subjective elements,<sup>(82)</sup> the accomplice should have knowledge of the intent of the perpetrator to commit the crime of the conspiracy and must have the intention to assist him in the commission.

109. In the case of a conspiracy to commit terrorism, to be charged with being an accomplice, a person would need to have had knowledge of the perpetrator's intention to commit an act of terrorism. It would not be enough to say that the accomplice had simply foreseen that an act of terror would occur.

*d.* Article 220 LCC in its first paragraph states that "the accomplice without whose assistance the offence would not have been committed shall be punished as if he himself were the perpetrator".<sup>(83)</sup> In other words, his assistance is necessary and essential for the commission of the crime. Also in the case of a conspiracy to commit an act of terrorism, this accomplice should be aware that he is assisting in that conspiracy. Therefore, because of its causal link to the crime agreed upon as a result of the conspiracy, this assistance could lead to his conviction for complicity to commit terrorism even though he would be punished as a perpetrator.

*e. In the case of Denying Criminal Responsibility Based on an Excuse of Defence*

110. Due to the fact that this agreement requires two or more persons, a question might be asked about those who deny criminal responsibility based on an excuse of defence such as insanity, minor status, coercion or material error. There

(78) Atef Naquib, Cours de droit pénal spécial donnés à l'Université Libanaise 1966-1967, p. 27.

(79) AC 16 February 2011 Decision, para. 201.

(80) AC 16 February 2011 Decision, para. 219.

(81) Article 219 LCC: "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."

(82) AC 16 February 2011 Decision, para. 220.

(83) STL Official Translation from Arabic.

cannot be a criminal agreement between two persons who are mentally impaired, between an adult and a child, or between a normal adult and a one with psychiatric problems as he could not be held criminally responsible. If, however, amongst the participants in the conspiracy agreement, more than one person is shown to bear responsibility, the crime of conspiracy continues to stand and punishment is incurred on that basis.

### ***iii. Aiming at committing crimes against the security of the State***

111. Back to the wording of Article 270 LCC, it is clear that the criminal agreement has to be geared to the commission of a particular type of crime; a felony. No conspiracy is possible for misdemeanors, unless provided separately by the law. Also, as the Appeals Chamber confirmed in its decision, the purpose of a conspiracy has to be a felony specifically against State security and not just any unqualified felony.

112. The Chamber added that the need for a specific aim or crime is justified by the fact that conspiracy draws its criminal characterization from the criminal classification of the purpose that the conspirators aim to achieve. Therefore, if an agreement between two or more individuals was not directed at committing a crime against State security, but was aimed at committing a different crime, it cannot be considered a “conspiracy”. It may, however, be characterized as a “criminal association” under Article 335 of the Lebanese Criminal Code.

#### ***a. The Crimes Against State Security in the Lebanese Law***

113. When it comes to the crime of conspiracy, the legislator does not distinguish between agreeing on committing crimes against the external and internal security of the State. The reason is that the will to commit one of the crimes against State security is enough to establish the crime of conspiracy, on condition that the other elements are met. These crimes are listed in Articles 273 to 320 of the Lebanese Criminal Code. In addition to terrorism, they include: treason; espionage; illegal relations with the enemy; violations of international law; the infringement of the State’s prestige and of the “national sentiment”(sentiment national); crimes committed by suppliers (during war time); crimes against the Constitution; the illegal exercise (usurpation) of a civil or political power or of a military command; sedition; crimes against national unity or crimes disturbing the harmony between the people; the infringement of the State credit, or financial position (le credit de l’Etat).

114. Crimes against State security can be summed up in 4 circumstances provided by the legislator in the Lebanese Criminal Code whereby a criminal agreement is deemed to constitute a punishable conspiracy offence. These circumstances are as follows: Felonies against international law (Articles 288-289 LCC); Felonies against the Constitution (Article 305 LCC); Felonies aimed at civil strife (Article 313 LCC appended to the Law of 11/1/1958); and felonies of terrorism (Article 314 LCC). In a conspiracy to commit terrorism for example, the

purpose of the conspiracy must therefore be the commission of an act of terrorism, which is expressly penalized under Article 7 of the Law of 11 January 1958.<sup>(84)</sup>

*b. Specification of the Criminal Object*

115. As is the case for the crime of criminal association, the law does not impose a requirement that the criminal object of the conspiracy is specified. The conspirators can be planning for example to commit a crime which will ‘undermine the State entity’.

116. learn from both articles is that due to the fact that the judgement that will be issued by the Special Tribunal, as expected, will be final and is expected to meet the Lebanese Laws’ conditions for granting it an executive form, the assets of the convicted can be subject to compulsory execution.

117. In this regard, it is interesting to refer to the Court of Justice decision of 31 May 1969 in the case of the attempt to assassinate the former Lebanese President Camille Chamoun (published in *Al Moustachar*), The court ruled that: “Whereas, and following the allegations of the accused affirming that his partners prepared a dangerous project, the accused manifestly revealed his willingness to commit a crime to create turmoil in the Lebanese entity”. In this case, the conspirators had agreed to assassinate the former President, Camille Chamoun, but without agreeing on a plan. They had decided that the assassination could take place during his movement on the campaign trail or on another occasion. This shows that the conspirators did not have the precise crime which would be an offence against State security, but had merely focused on a plan that would “undermine Lebanon”. Therefore, even though they had not planned or agreed on details, the conspirators were still convicted pursuant to Article 2<sup>(85)</sup> of the Law of 11/1/1958 due to the political position that Chamoun possessed and the effect that his assassination would have on Lebanon.

*c. Commission of the Criminal Object*

118. It should be noted that whether the offence was committed by the conspirator or by a third party is irrelevant, the conspiracy still stands and is considered as a separate crime complete in itself. It is also not necessary that the foreseen crime be in fact executed for the crime of conspiracy to be established. This crime is considered committed if the criminal agreement itself is complete.<sup>(86)</sup>

***iv. The predetermination of the means to be used to commit the crime***

119. It is In addition to having agreed on the purpose or object of the conspiracy, the commission of a felony against State security, the agreement of the

(84) AC 16 February 2011 Decision, para. 197.

(85) Article 2 of the Law 11/1/1958: “Any person who commits an act of violence or attempted violence with intent either to provoke civil war or sectarian conflict by arming Lebanese citizens or urging them to take up arms against one another, or to engage in incitement to murder, pillage or vandalism, shall be liable to the death penalty.”

(86) Dr. Mohamed El-Fadel, op. cit., p. 97.

conspirators must also include the means and tools they want to use to commit the crime. Otherwise, the agreement would be incomplete and the conspiracy would not stand.<sup>(87)</sup>

120. It should be noted that the agreement, when it comes to the purpose and the means, may not necessarily take place at the same time. Conspirators may first agree on the purpose of the agreement and an argument about the possible means of execution might then arise. If this situation lasts for some time, the crime of conspiracy is not regarded as established until after those means have been agreed upon. In other words, if a conspiracy is unearthed at the stage where an argument about the means is in progress, it is not regarded as established. Unlike Article 314 LCC which governs the crime of terrorism, Article 270 LCC does not provide a list of means to be used to commit the felony agreed upon by the conspirators.

*a. The Nature of the Means*

121. These means, which must be agreed upon, may include the human resources and the material means such as the weapons or explosives to be used to carry out the purpose of the conspiracy. However, a precise determination of the means is not required. If the conspirators agree that they will use a means described as terrorist, it is sufficient to say that they agree on the means to execute the agreement.

122. In its decision, the Appeals Chamber went back to the conspiracy to commit a terrorist act and considered that the agreement must include the means meeting the requirements of Article 314 LCC which are liable to create a public danger.<sup>(88)</sup>

*b. Specification of the Means*

123. It is not necessary that the conspirators have planned in detail the execution of the planned crime. The Appeals Chamber agreed that it suffices that they have agreed on the weapons or equipment to be used.<sup>(89)</sup> It should be noted that even though at times these could be unrealistic, implausible, or ineffective, the agreement is still considered established.

124. In some cases, it could be inferred that since the conspirators had agreed on assassinating a politician, they had agreed on the means to execute the conspiracy. Like in the Chamoun case, and as the Court of Justice had considered, “his assassination would be an effective means of causing sedition in the country and fighting between Lebanese, which was the aim of the conspirators”.<sup>(90)</sup> Therefore, the agreement to assassinate a political figure can be considered as a determination of the means by which to achieve the purpose of the conspiracy,

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

(88) AC 16 February 2011 Decision, para. 197.

(89) AC 16 February 2011 Decision, para. 199.

(90) Conseil Judiciaire, décision No. 8, 31/05/1969, recueil des jurisprudences du conseil judiciaire, Dr. Samir Alia, p. 169.



which was to “shake up Lebanon” in the above case. This shows that the very object of the agreement involves, in certain circumstances, the determination of the means to execute the conspiracy.

125. In its decision, however, the Appeals Chamber seems to have restricted the means to be used to carry out the aim of a conspiracy to the physical sense, meaning the use of weapons or devices, rather than “means” in the broader sense as demonstrated above in the Chamoun case.

### **a) The Moral or Intentional Element (Mens Rea)**

#### ***i. General Intent***

126. Conspiracy is an intentional crime. The participants in the crime of conspiracy must be driven by a criminal intent. For the offence of conspiracy to be established, they must possess a general intent; knowledge that the agreement in which he is participating is against the law. If the participant in a criminal agreement thought that in reality the object of the agreement was lawful conduct, the general intent is not established. In other words, criminal intent does not materialize if a co-conspirator believed that the conspiracy, which afterwards turned out to be unlawful, was instead lawful.

127. This general intent can be inferred. Nevertheless, the Justice Council held in a decision in 1958 that carrying weapons is not always evidence of intent to conspire, in that the carrying of weapons is usually entrenched in those respects, particularly in electoral situations, and intent to conspire cannot be inferred simply from the fact that weapons are being carried.<sup>(91)</sup>

#### ***ii. Special Intent***

128. Criminal intent must relate to the object of the conspiracy, meaning that the perpetrators are aware of the fact that the purpose of conspiracy is to engage in criminal conduct against State security. Here lies an additional “special intent” whereby not only are perpetrators aware of the purpose of this criminal agreement, but they are also willing to take part in the commission of the agreed upon crime against State security.

129. Regarding the nature and scope of this additional “special intent”, Lebanese doctrine and jurisprudence are conflicting. When it comes to the first, some commentators claim that there exists the necessity that the criminal agreement is in relation to crimes specifically defined as crimes against State security.<sup>(92)</sup> If the crime agreed upon is an act of terrorism for instance, the conspirator must therefore have had the intent to participate in the criminal agreement in addition to the intent to commit an act of terrorism. Lebanese jurisprudence, on the other hand, only requires that the accused intended, by his

(91) The Justice Council, decision No. 9, 29 November 1958, published in Dr. Samir Aliyah, *Ijtihadat al-majlis al-`adli fil-jara'im al-waqi'ah `ala amn al-dawlah* (1949-1977), Entreprise Universitaire d'Etudes et de Publications, Beirut, 1987, p. 171.

(92) Naquib, *ibid.*; Ph. Nasr, *Droit pénal spécial, infractions et peines*, édit. Sader 2009 p. 533.

participation in a criminal agreement, the commission of a crime against State security without his will being directed towards the commission of a particular crime.

130. In the Appeals Chamber 2011 decision, there are contradictory statements regarding the intentional element. First, the Chamber stated that “the intent must relate to the object of the conspiracy”, which could be understood to mean the intent to commit the underlying crime to which the conspiracy relates. In other words, the Chamber first considers that the criminal intent of the conspirators must include the will to commit the crime agreed upon. However, it then cited a Lebanese book on the subject and stated that the mere existence of the agreement fulfils the criminal intent.<sup>(93)</sup> This means that once the agreement is complete, both the material element and the intentional element are established.

131. Since the criminal agreement is part of the material element of the crime of conspiracy, and based on what the Appeals Chamber considered, the *actus reus* of conspiracy is enough to satisfy the *mens rea* requirement, in that the *actus reus* and the *mens rea* are as one because they occur simultaneously. This is fundamentally incorrect as a matter of law.

### **B. The Nature of the Crime of Conspiracy**

132. Regarding the nature of the crime of conspiracy, meaning whether it is a continuing or discrete offence, is a matter of debate in Lebanese jurisprudence. Some see it is a continuing offence because it continues to stand as long as the participants remain in agreement to pursue the aim agreed upon. They consider that since conspiracy is the criminal agreement itself, as long as the conspirators are still in agreement and their wishes coincide,<sup>(94)</sup> the crime of conspiracy is still ongoing and the State security is still jeopardized. Therefore, this continuing crime of conspiracy remains until either the execution of the object of the agreement or the renunciation of the conspirators where the agreement ceases to exist.

133. The second opinion held by jurisprudence is that conspiracy is a discrete offence that occurs with the initial agreement. Also considering that conspiracy is the criminal agreement itself to commit a felony against State security by specific means, once all of these elements are established, so is the crime of conspiracy. This means that once there is a meeting of wills, it does not matter whether or not the agreement is maintained; the conspiracy is complete. If further discussions occur or more persons join at a later stage, the offence of conspiracy is merely renewed as it had already existed from the initial agreement. This renewal requires that the substance of the agreement, its purpose and the means to be used to carry out that purpose are one.

(93) AC 16 February 2011 Decision, para. 200.

(94) Dr. Mohamed al-Fadel, op. cit., p. 98; Dr. Abd al-Fatih Mustafa al-Saifi, *Qanun al-‘uqubat al-lubnani, jara’im al-I’tida’ ‘ala amn al-dawlah wa ‘ala al-amwal*, Beirut, 1972, p. 130; Dr. Ali Muhamed Ja’far, op. cit., 2000, p. 36.

134. On that account, even though the majority of jurisprudence holds the first opinion, the question of whether conspiracy is continuous or not is a matter of fact that is re-assessed on a case-by-case basis.<sup>(95)</sup>

135. In its decision, the Appeals Chamber considered that conspiracy can be a continuing crime as conspirators can join it later and not from the moment of establishment.<sup>(96)</sup> Later it held that as soon as there is a merger of wills, the crime of conspiracy is complete.<sup>(97)</sup> Therefore, a completed crime can have a continuing character. This means that conspiracy can be both continuing and discrete at once.

### **C. Cumulative Convictions for Conspiracy and the Underlying Offence**

136. According to doctrine and the majority of the Lebanese Case Law, it does not seem possible to convict a person for both, conspiracy to commit a crime against State security and for the commission of that crime as well.

137. According to Atef Naquib: “Where a person participating in a conspiracy goes beyond preparatory acts to the commencement of execution, his act becomes an attack against State security and is punishable according to the penalty for the attack and not the penalty for conspiracy”.<sup>(98)</sup>

138. This is also what the Court of Justice ruled on 26 October 1994. According to the court: “conspiracy only ends with the execution of the agreed crime or by the renunciation of the execution of the crime; the agreement which has materialized through preparatory acts remains a conspiracy; if the conspirators go beyond the preparation stage to the beginning of the execution stage, the conspiracy becomes an attack against State security, and the conspirators are convicted as perpetrators of an attack and not as perpetrators of a conspiracy.”<sup>(99)</sup> In other words, once the crime agreed upon in the conspiracy is executed, the agreement is materialized and conspirators are thus convicted for the result of the conspiracy which is the actual execution of the crime against State security.

139. However, to be convicted just for the commission of the crime, there is a condition that the conspirators, or at least some of them, have carried out the crime themselves for it is possible to be done by someone who was not part of the criminal agreement.

### **D. Punishment**

140. In the Lebanese Law, the punishment for conspiracy varies according to the intended offence. For example, if the offence is a felony against international law, we must refer to Article 289 LCC governing this crime where it states that the

(95) Dr. Atif al-Naquib, *Muhadarat fil-huquq al-jaza'iyah al-khassah*, Faculty of Law, Lebanese University (1982-1983), p. 26; Dr. Philoméne Joachim Nasr, op. cit., p. 535.

(96) AC 16 February 2011 Decision, para. 196.

(97) AC 16 February 2011 Decision, para. 200.

(98) Naquib, *Droit pénal spécial*, Cours polycopié de l'Université Libanaise, p. 33.

(99) Bseibess, *Jurisprudence de la Cour Criminelle 1963-1996* p. 230, V. Complot, p. 232.

penalty would be a minimum of one year's imprisonment. For the crime of a conspiracy to commit a felony against the Constitution, the penalty would be banishment or compulsory residence according to Article 305 LCC. However, if the purpose of the conspiracy is the commission of a felony causing civil strife or an act of terrorism, Article 7 of the Law of 11/1/1958 which temporarily suspended the application of Articles 313 and 315 LCC states that the punishment would be hard labour for life.

### **E. Exemption from Punishment**

141. In order to discuss the possibility of an exemption from punishment for the crime of conspiracy under the Lebanese Law, we refer to Article 272 LCC.<sup>(100)</sup> This article states that in order to benefit from exemption of punishment, a conspirator must report the conspiracy to authorities before the commencement of any preparatory act to its execution. If he does so after an act was committed or had begun, he will only benefit from mitigation.

142. According to the above article, mitigation may be applicable in three cases: when a conspirator provides information to the authorities after the commencement of a preparatory act; when information is provided after the commencement of the execution of the felony which is the object of the conspiracy; and lastly when the conspirator gives information which facilitates the arrest of other participants in the conspiracy, either before prosecution or after its commencement.

143. It should be noted that if a conspirator participates in the execution, he does not benefit from the prescribed exemption from punishment nor mitigation. Also, these provisions of exemption and mitigation do not apply to instigators but to perpetrators, accomplices and accessories.

### **III. Similarities and Differences Between Criminal Association and Conspiracy**

144. After having demonstrated the provisions of both the crime of criminal association and the crime of conspiracy according to the Lebanese Law, it is noticeable that there is a fine line separating these two quite similar crimes. Therefore, we shall first recapture the similarities between them and then show where that fine line lies between them.

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(100) Article 272 LCC: "Anyone who takes part in a conspiracy against state security and who reports it to the authorities before the commencement of any act preparatory to its execution shall be exempt from punishment. If such an act was committed or had begun, the ground of excuse shall only have a mitigating effect. An offender who reports a conspiracy or another felony against state security to the authorities before its completion or who brings about the arrest of other offenders or of persons whose hiding place is known to him – even after proceedings have commenced – shall also be entitled to mitigation. The provisions of this article shall not apply to an instigator."

### A. Similarities

i. Both of these crimes necessarily require two or more persons.<sup>(101)</sup> As it is stated in Articles 335 LCC and 270 LCC that govern them each, and as considered by the Appeals Chamber in both of its decisions mentioned above, at least two persons must be involved.

ii. Both are forms of criminal agreement that require the merger of wills of the participants.<sup>(102)</sup> Conspiracy is said to be purely an idea reflected in an agreement and criminal association can be manifested in a written or oral agreement.

iii. In both crimes, there is a collective element; a collective responsibility. Some commentators characterize the crime of criminal associations as a "crime of collective membership or affiliation"<sup>(103)</sup> as opposed to other offenses that are essentially individual in character. As for conspiracy, it is also said that there is this collective element which sets a conspiracy apart from other offences.

iv. Not all participants in the criminal association<sup>(104)</sup> or conspiracy<sup>(105)</sup> need to be identified in order to prosecute a known member. As is the case for the crime of conspiracy, an individual can be prosecuted under Article 335 LCC if it is established that he or she has agreed with others, even though they remain unidentified, to commit the felonies mentioned in the article, as long as the existence of the group and its activities and goals are clearly established.<sup>(106)</sup>

v. The criminal conduct in both, criminal association and conspiracy, is the psychological order since it is based on criminal intention. The psychological behavior is manifested by the agreement to commit a crime, either against State security or public security, or by the revelation which constitutes the proof of the intention.

vi. The assassination of a political figure is neither an element of conspiracy nor of criminal association as defined in Articles 270 and 335 LCC, and nothing in these provisions suggests so. Conspiracy and criminal association are criminalized regardless of whether or not they target a political figure.<sup>(107)</sup>

(101) AC Decision, 16 February 2011, para. 195.

(102) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 84.

(103) Judge Farid Zoghbi, « *Crimes Contre la Sécurité Intérieure de l'Etat* », in la Loi Pénale au Liban, Volume 10, Sader, p.187, Beirut 1995.

(104) 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.

(105) See Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 328/2013, 5 December 2013, in AlMoustashar-Majmou'at Al-Moussannafat lil Kadi AfifChamseddine ("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.

(106) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 40.

(107) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 88.

vii. Both are punished independently of the execution of the criminal agreement. The reason behind it is that in both cases, the crime is the complete agreement itself and not its execution. Even though this matter was debatable when it comes to criminal association, the Appeals Chamber did consider this approach.

viii. In both crimes, a person can be held liable even if he joined the criminal agreement later and not from the initial establishment. In its 2011 decision, the Appeals Chamber considered that in the case of conspiracy, an agreement is established when there is a “merger of wills” which is required both for the original conspirators and those joining later.<sup>(108)</sup> Similarly, for the crime of criminal association, it is considered that even if the accused had not participated in the establishment of a criminal association but had joined or entered into the agreement at a later time, he can still be held liable and bears criminal responsibility.

ix. As is the case for the crime of criminal association, the law does not impose a requirement that the criminal object of the conspiracy is specified.

x. No structure is needed in either criminal association or conspiracy. Even though, as demonstrated above, this matter is debatable regarding the first crime. As for conspiracy, it is established that it is not necessary that the criminal agreement is structured and that the roles are allocated to each of the different participants.

## **B. Differences**

145. While similar, “criminal association” and “conspiracy” remain two separate crimes under Lebanese law as it is said in the Appeals Chamber 2017 decision.<sup>(109)</sup> The differences between these two crimes will be demonstrated as follows:

i. Article 270 LCC, which governs the crime of conspiracy, only defines the crime of conspiracy without providing a penalty. As a result, the penalty of an act of conspiracy would be that of the crimes that are the object of conspiracy. For example, in the case of a conspiracy with the view of committing an act of terrorism, the penalty would be the one stated in Article 314 LCC which governs the crime of terrorism.

On the other hand, the provision of criminal association provides a penalty for this crime in Article 335 LCC, independently of the crime committed.

ii. Conspiracy is only established if its purpose is to commit a crime against State security. There are two categories: (i) The crimes against the external security of the State and (ii) The crime against the internal security of the State.

Criminal association, on the other hand, is considered to be a crime against public security. Article 335 LCC states that the agreement must have as an object the commission of felonies against persons or property, or to undermine the authority of the State, its prestige or its civil, military, financial or economic institutions.

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(108) 2011 AC Decision on the Applicable Law, para. 196.

(109) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 83

It can therefore be concluded that, even though criminal association is harder to prove, the scope of application of the crime of conspiracy is narrower as it is restricted to a specific type of felony which is that directed against State security.

iii. When it comes to conspiracy, the agreement should include the means that the conspirators are planning to use to commit the crime, according to the wording of Article 270 LCC.

By contrast, Article 335 LCC does not require the predetermination of the means to be used as it does not refer to the “means” of achieving the purpose of a criminal association when defining the crime. The crime is established whether or not the members of the association agreed on the means, unlike the crime of conspiracy.

However, in practice it may be critical as proof of the crime<sup>(110)</sup>. For instance, as the Appeals Chamber considered in its 2017 decision, the identification of the means used to perpetrate the underlying offence 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.<sup>(111)</sup> 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<sup>(112)</sup>. 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 prove that the agreement was to commit terrorism.

iv. A conspiracy is not a form of criminal association, nor is a criminal association a form of conspiracy.<sup>(113)</sup>

v. In the case of conspiracy, the commission of the crime agreed upon leads to the incrimination for that crime alone and not for the crime of conspiracy.

However, in the case of criminal association, the commission of the crime agreed upon leads to concurrence of offences. In other words, the perpetrator will be incriminated for both, the crime of criminal association and the offence that was committed as a result of it.



(110) 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.

(111) Lebanese Criminal Code, Arts 636-637.

(112) Lebanese Criminal Code, Arts 638-640.

(113) AC Interlocutory Decision on the Applicable Law, 18 October 2017, para. 90.