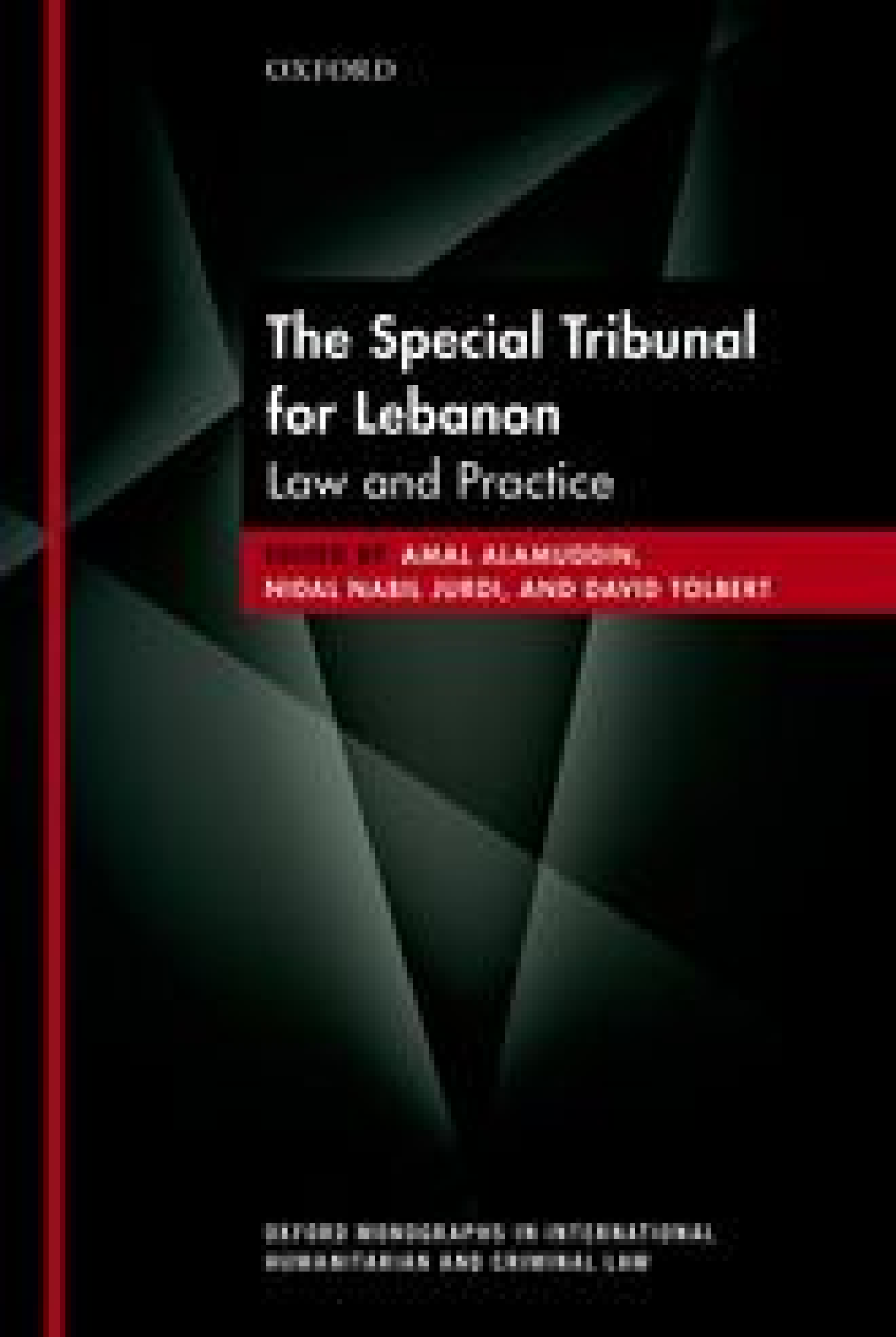
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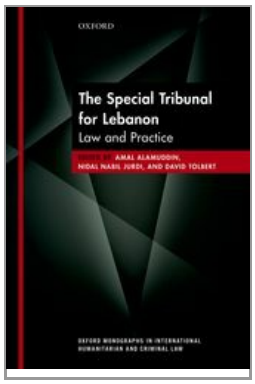

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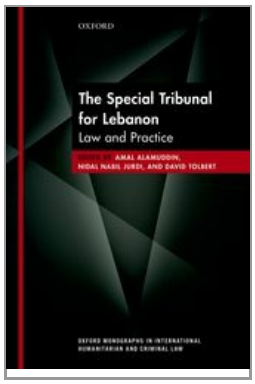

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International

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(p.x) International Criminal Court

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Hybrid

Extraordinary Chambers in the Courts of Cambodia

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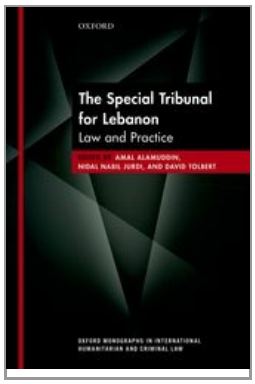

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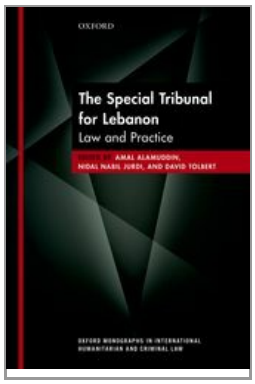

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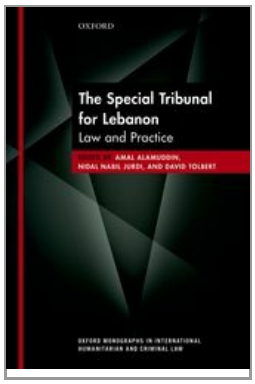
- ACHR
  Arab Charter on Human Rights
- Ad hoc Tribunals
  ICTY and ICTR
- AfCHPR
  African Convention on Human and Peoples' Rights
- AmCHR
  American Convention on Human Rights
- ECCC
  Extraordinary Chambers in the Courts of Cambodia
- ECHR
  European Convention on Human Rights
- ICC
  International Criminal Court
- ICCPR
  International Covenant on Civil and Political Rights
- ICTR
  International Criminal Tribunal for Rwanda

- ICTY
  International Criminal Tribunal for the former Yugoslavia
- MoU
  Memorandum of Understanding
- RPE or Rules
  Rules of Procedure and Evidence
- SCSL
  Special Court for Sierra Leone
- SPSC
  Special Panel for Serious Crimes in East Timor
- STL or the Tribunal
  Special Tribunal for Lebanon
- UN
  United Nations
- UNIIIC or the Commission
  United Nations International Independent Investigation Commission
- UNTAET
  United Nations Transitional Administration in East Timor



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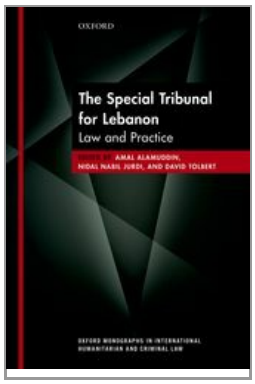

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Introduction: A Very Special Tribunal

David Tolbert

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[–] Abstract and Keywords

This introductory chapter discusses the establishment and the unique challenges faced by the Special Tribunal for Lebanon. The Tribunal, established in the wake of the February 2005 bombing that killed former Lebanese Prime Minister Rafiq Hariri and twenty-two others, has faced issues that other hybrid courts and tribunals have not had to deal with. For instance, security concerns forced the Tribunal to be located in The Netherlands and rather than Lebanon itself, thus undermining one of the primary rationales of a hybrid tribunal, namely being close to affected communities and putting it in a position to have a direct impact on victims and national systems. An overview of the subsequent chapters is also presented.

Keywords: international criminal tribunal, Lebanon, criminal justice, international law, Rafiq Hariri

The Special Tribunal for Lebanon is the most recent of the modern international tribunals established to hold individuals criminally accountable for serious crimes. In a number of

important ways, it is markedly different from other international tribunals and in this sense quite 'special'. International criminal tribunals have taken a number of forms since the International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the United Nations Security Council in 1993, culminating in the creation of the International Criminal Court (ICC).[1] In addition to the ICC, these institutions include the two ad hoc tribunals, the ICTY and the International Criminal Tribunal for Rwanda (ICTR), both created by the UN Security Council under Chapter VII of the Charter of the United Nations,[2] as well as several courts established by means of agreements between the United Nations and the countries where mass atrocities were commited. These include the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). These latter courts are often referred to as 'hybrid' or mixed courts, in that they are composed of both national and international judges, prosecutors, and other court personnel.

In addition, there have been other hybrid judicial approaches established outside the above channels, particularly through UN peacekeeping missions, as in the case of the Special Panels for Serious Crimes in East Timor (SPSC) and the Regulation 64 Panels in Kosovo, and in the case of the Bosnia State Court by other international actors (ie the Office of the High Representative) and national authorities. Unlike the ad hoc Tribunals, these hybrid courts have been located in the country where the crimes were committed with the express purpose of having an impact on the affected communities by being closer and more accessible to victims and the **(p.2)** general populace than the ad hoc Tribunals which were located far from the scenes of the crimes over which they have jurisdiction.

It is against this international legal context that the massive bomb that killed former Lebanese Prime Minister Rafiq Hariri and twenty-two others in February 2005 exploded. In a sense, international criminal justice was at the crest of its modern peak when the assassination occurred and it is hardly a surprise that, as national and international actors reacted to this tragic and highly destabilizing event, they turned to the international justice toolbox. In hindsight, however, the limitations of scope placed on the Tribunal?s jurisdiction have raised a number of questions and concerns about the efficacy of the Tribunal. Moreover, criminal justice processes for serious crimes generally require certain preconditions to be met. Even the ICTY, which until its recent troubles has won considerably praise for its work, only began to make serious progress a decade after its creation under far more auspicious circumstances than ever existed in Lebanon, for example a negotiated peace accord between all the parties, the lure of the European Union, and the presence of an international administration in Bosnia-Herzegovina, where most of the crimes occurred.

Thus, in many respects, it is hardly surprising that the Special Tribunal for Lebanon (the 'Tribunal' or 'STL') has faced a difficult existence, given the fractured nature of the Lebanese polity and the context in which it has had to work, including a political landscape riven by sectarianism and a long and continuing history of political assassinations. Due to these factors, the Tribunal has faced issues that other hybrid courts and tribunals have

not had to deal with. For example, due to legitimate security concerns it is located in The Netherlands and not in Lebanon itself, thus undercutting one of the primary rationales underpinning a hybrid tribunal, namely being close to affected communities and putting it in a position for its work to have a more direct impact on those victims and national systems. The Tribunal now appears to be fated to conduct only one trial that will, controversially, be a proceeding *in absentia* after considerable cost and controversy.

The question of selective justice also looms large over the Tribunal and its legacy. While international justice institutions always face issues of prioritization and selection of those they investigate and indict in virtually every instance, as their capacities are limited and the decisions that they make are the subject of considerable debate, the establishment of the Tribunal raises this issue to a stark level. Unlike the other international and hybrid tribunals which have jurisdictions limited to certain crimes, time frames, and territorial borders, the subject matter jurisdiction of the Special Tribunal for Lebanon is limited to one primary terrorist event and certain 'connected cases'. The crimes covered by the STL's mandate essentially relate to this one event in a multi-faceted and long-term conflict encompassing many crimes and abuses on all sides. Thus, the very narrow jurisdiction of the Tribunal means that it fails to address a litany of atrocities that occurred during an on-going struggle that had broken into armed conflict at **(p.3)** certain stages even though it is clear that the situation in Lebanon cries out for accountability, as the large number of assassinations committed with impunity in its recent history amply demonstrates.

Thus, the Tribunal will, in the eyes of some, be an expensive and imperfect effort in the search for accountability. However, even if this is ultimately the Tribunal's fate in the eyes of history, and it is early, I would argue that it is too early to make judgement at this stage, there are many important innovations and steps that have been undertaken in the creation of the Special Tribunal for Lebanon which call for scrutiny, study, and reflection. These are a myriad of issues and innovations—some might say enough to make one dizzy. They include complex issues related to the establishment of the Tribunal, including the role of the UN Security Council, the Tribunal's relationship with the UN International Investigation Commission ('UNIIIC' or 'Commission'), its mandate as the first international tribunal with jurisdiction over terrorism and important legal issues related thereto, innovations regarding the participation of victims in the proceedings, the establishment of a separate and independent defence office, the provision for trials *in absentia*, and a number of other developments. Whatever the rest of the Tribunal's mandate holds, these developments warrant examination in some depth, particularly as there is little doubt that hybrid tribunals will be under consideration for the future, during and after conflicts and in transitional societies more generally. Indeed, as I write these words, US Secretary of State John Kerry and others have spoken of a possible tribunal for Syria,[3] and there will no doubt be other calls in the future for hybrid courts and tribunals.

In order to reflect properly on the Tribunal and examine its work thus far, the editors looked far and wide for an array of practitioners and academics who know the work of the Tribunal well and, in a number of cases, have deep experience with the Tribunal as well as

with a variety of other international and hybrid courts and tribunals. In selecting authors for the topics that are covered in this volume, the editors are cognizant that they themselves are each associated with the Tribunal in some way or capacity. For myself, I was the Registrar of the Tribunal for a period of time during 2009–10. Having been engaged in the work of an institution does not necessarily make one less critical of it: there are many examples that run contrary to this precept and such experience can also give important insights into the issues related to that institution's work and functioning. Nonetheless, we have endeavoured to look for a variety of authors with various points of view on the Tribunal and its work. This diversity of voices is intended to draw out the many questions and concerns that arise in respect of the Tribunal and its work.

The circumstances of the birth of an institution are almost always important in understanding its mandate and idiosyncrasies. This is particularly relevant in the case of the Special Tribunal for Lebanon, which was conceived as a hybrid tribunal **(p.4)** in the mode of the SCSL, with an agreement posited between the United Nations and Lebanon establishing the Tribunal and the obligations of the two parties. However, due to a political stalemate in Lebanon, the agreement never obtained the signature of the President of the Republic of Lebanon, leading to the extraordinary step of the United Nations Security Council, under the leadership of France and the United States, adopting a resolution under Chapter VII of the UN Charter to create the Tribunal. Not only did this step raise a number of legal questions, it has contributed to the many charges that the Tribunal is politicized or is influenced as much by politics as law.

To look at these important developments surrounding the Tribunal's birth, we have the excellent guidance of two individuals who were deeply involved in the creation of the Special Tribunal for Lebanon. Nicholas Michel, Legal Counsel of the United Nations during the establishment of the Tribunal, guides the reader through the maze of discussions and negotiations that led to the drafting of the initial agreement and the role of key actors and their various inputs. His unique viewpoint gives fresh insights into the negotiating process and to some of the reasoning behind the approaches taken to the Tribunal's structure. Michel's insider account makes it indeed clear that national actors were instrumental in shaping the direction and nature of the Tribunal. In Chapter 3, one of those key national actors, Bahije Tabbarah, fleshes out this national contribution in greater detail, with a particular focus on the all-important political issues that impacted on and affected the shape of the Tribunal, thus giving insight into the national dynamics at play.

Another aspect of the Special Tribunal for Lebanon is that it had a predecessor institution in the UNIIC, which was established by the UN Security Council under Chapter VII of the UN Charter, and conducted extensive investigations into the explosion that killed Hariri and twenty-two others. This approach has echoes of the path taken in the establishment of the ICTY, with the 'Bassiouni Commission',[4] also created by the UN Security Council, which conducted investigations and collected evidence. There are also numerous examples at the national level where commissions of inquiry have been followed by criminal prosecutions. However, it is fair to say that the UNIIIC was a more

comprehensive and complex effort than the Bassiouni Commission and most other international investigative commissions. Moreover, the last Commissioner of the UNIIIC moved over to become the Chief Prosecutor of the Tribunal, together with a significant *accoutrement* of staff. Thus, the relationship between these two institutions is important in understanding the investigation approach and prosecutorial strategy taken at the Tribunal and it also contains insights and lessons learned for the future. My co-editor, Amal Alamuddin, who worked both at the UNIIIC and in the STL Office of the Prosecutor, brings her considerable expertise and experience to bear on these important questions in Chapter 4.

(p.5) Of course, a key element of the UNIIIC's work became the focus of the work of the Tribunal, as its subject matter jurisdiction included, indeed focused on, the crime of terrorism. This approach contrasts with the other international and hybrid tribunals and courts which were limited in their subject matter jurisdiction to crimes against humanity, war crimes, and genocide (and, potentially and at least in theory, in the case of the ICC, to the crime of aggression). Despite many international debates and, obviously, a great deal of discussion on terrorism in recent years, crimes coming under the rubric of terrorism or acts of terror remain controversial and often involve complex issues of motive and intent. Moreover, the Tribunal's statute provides for the application of the national law relating to terrorism,[5] thus putting the Tribunal's international judges in the unusual position of interpreting and applying the domestic law of Lebanon, an exercise that poses a number of difficulties and issues. Nidal Jurdi, a co-editor of this volume, takes on these issues in Chapter 5, many of first impression, utilizing both his knowledge in this area of the law and his extensive experience in Lebanon itself.

While the law applied by the Tribunal is that of Lebanon, the question of the modes of liability to be applied by the Tribunal in establishing individual criminal responsibility is less straightforward. Those who follow the work of the other international courts and tribunals hardly need to be reminded of these issues and are keenly aware of the jurisprudence of other international criminal tribunals in this regard. These issues are further complicated at the STL by the question of the interaction of national and international law on this sometimes complex subject. In Chapter 6, Philippa Webb takes a lively approach to guiding the reader through these complexities, arguing that, in essence, the Tribunal has taken a hybrid approach to the application of international and Lebanese approaches to modes of liability. She points to concerns regarding the approach adopted by the STL Appeals Chamber, namely that its lack of clarity in terms of applying international and domestic law and its turn away from the approaches adopted by other international tribunals may lead to fragmentation of the field and run contrary to the principle of legality.

Other concerns are raised in the stimulating chapter by Dov Jacobs, who criticizes the judges' role in setting 'the field of play', ie the trial process. He argues that the STL judges have shown scant regard for the other organs of the Tribunal and have little concept of the concerns of the victims or of Lebanese society. Moreover, Jacobs contends that the STL judges 'arguably control the process far more than in [any] other

international tribunal, whether it be in relation to the (absent) accused, the victims or the Prosecutor'. In addition to a number of trenchant criticisms of the approaches adopted by the judges, Jacobs is particularly critical of the use of trials *in absentia*, arguing that this procedure simply undermines the search for justice and illustrates the weakness of the Tribunal, which should be highlighting the national authorities' inability to deliver the accused rather than going through the motions of trials without the accused.

(p.6) Coming from a very different point of view, Paola Gaeta, in Chapter 12, gives a strong legal defence of trials *in absentia*, drawing distinctions between trial by default and classic trials *in absentia* and making arguments to support the use of these proceedings that even the most entrenched common law lawyer cannot ignore. Of course, the points of view of Jacobs and Gaeta have different origins, with Jacobs focused on the broader messages that a trial *in absentia* sends, while Gaeta is primarily concerned with delivering a coherent legal analysis of the issues surrounding this divisive issue. Nonetheless, the different positions of the authors provide the reader with contrasting points of view to consider and reflect on, which is precisely the effect we were seeking as editors.

There are other issues that come into focus, if not tension, in the remaining chapters of this endeavour. The independent Defence Office, which unlike that at the other international tribunals, is a separate organ of the court and not a part of the Tribunal's Registry, has been hailed as an important innovation by some commentators and defence counsel. Nonetheless, in the view of John Jones and Miša Zgonec-Rožej in Chapter 10, the plight of the defence is in some respects worse than at other international tribunals. They do find considerable merit in the creation and work of the Defence Office, which provides important support to defence counsel. However, Jones and Zgonec-Rožej are sharply critical of the Tribunal's Appeal Chamber's holding that it does not have the power or authority to review the UN Security Council's creation of the Tribunal itself, a position that undercuts a key argument raised by defence counsel. Their language is strong: 'This highly restrictive, even antediluvian, approach adopted by the Appeals Chamber departs from the evolving practice of various international or regional judicial bodies…and runs contrary to the historic *Tadić* jurisdiction decision of the… ICTY.' As usual, there is no lack of controversy when it comes to the STL. What is not in question though is that the approach in terms of defence rights at the STL differs substantially from other international tribunals.

Whatever view one takes of these important debates, it is clear that, in order to make progress in investigations, the respective parties need the cooperation of states to obtain evidence and also access to witnesses, as well as other cooperation, to make the judicial process (and hence the Tribunal itself) function. Such cooperation is essential to all international and hybrid courts and tribunals, particularly those operating, like the STL, outside the country where the alleged crimes were committed. While at first glance, the STL may appear to be in a better position than some other international and hybrid tribunals, given that it was created pursuant to a Chapter VII UN Security Council resolution, Göran Sluiter shows, in Chapter 7, that this is actually not the case. After

reviewing the specific legal cooperation regime, which in reality obliges only Lebanon to cooperate with the Tribunal, Sluiter explores a number of interesting legal approaches, which utilize various international anti-terrorism treaties and laws that might strengthen the STL's hand in seeking such cooperation.

The effects of the STL's peculiar status are not only experienced by the parties but also have a significant impact on the non-judicial functioning of the Tribunal. The STL Registrar's position as the chief administrator of the Tribunal is also **(p.7)** deeply impacted and hampered by the STL's odd legal status and institutional positioning. While the Registrar faces many of the same issues that chief administrators of other international and hybrid tribunals and courts experience, unlike the ad hoc Tribunals' Registrars, s/he operates in a country that falls beyond the direct reach of the Security Council resolution that created the Tribunal. Therefore, s/he must rely on the good will of the host country as well as other states to provide cooperation and assistance to the Tribunal on a variety of fronts relating to its functioning. Moreover, while the STL Registrar confronts many of the challenges, such as witness protection, security, funding, supporting field operations, that other hybrid court registrars or administrators have experienced, working on these issues from outside the country where these activities are carried out can be particularly challenging. Further complicating the task of the work of the Registry is the shifting political landscape in Lebanon, which has experienced a number of governments, including considerable stretches of caretaker government, which have only limited territorial control of the national territory. In this sense, the STL Registrar has more in common with the early days of the ICTY Registrar, who faced a very hostile audience in much of the former Yugoslavia. However, without the full backing of the United Nations system (notwithstanding the UN Security Council establishing the STL), the operational situation of the STL Registrar is very difficult indeed. Evelyn Anoya and I explore some of these issues in chapter 11.

One of the groundbreaking developments in international criminal justice since the advent of the ad hoc Tribunals has been the role of victims in international proceedings. Victims have moved from the margins of the process, serving solely as witnesses in the ICTR and ICTY, to a more participatory role in the ICC proceedings and in some of the other hybrid courts, notably the ECCC, as well as being able to receive reparations or compensation at the ICC from its Trust Fund for Victims. The STL continues this trend, allowing for the participation of victims in the process but not directly for compensation. Judge Howard Morrison, currently a judge at the ICC and previously on the bench at STL, and Emma Poutney cast a sceptical eye on these developments in international criminal law in Chapter 9. In the STL context, they argue that care must be taken for such steps not to undermine the defence or to re-traumatize the witnesses. Theirs is an interesting 'against the grain' argument, which is shared by a number of others and is thus a contribution to the general debate about the role of victims in international criminal proceedings.

The substantive chapters of this collection are rounded out with a discussion on the regulation of counsel and ethics by current STL Registrar Daryl Mundis and Pascal

Chenivesse. In Chapter 13, they tackle the complex relationship between the ethical and professional standards required by a counsel's own domestic system and those laid down by an international tribunal. Although many of these issues have arisen in other international and hybrid tribunals and courts, defence counsel practising at the STL face the novel question of what the ethical obligations of counsel are when he or she is representing an accused being tried *in absentia*. The Tribunal will deal with the first international trials where the accused are not actually present since the Nuremberg Military Tribunal tried Martin Bormann **(p.8)** (who was presumed dead) *in absentia*. What is the ethical obligation of defence counsel when he/she has no instructions from his/her client? While national systems have wrestled with this situation, the question has not fully been addressed in the international context, much less when dealing with novel charges such as terrorism.

This book concludes with a stimulating and insightful discussion by Professor Harmen Van der Wilt, who looks at the long-term contribution and drawbacks of the Tribunal in Chapter 14, 'The Legacy of the Special Tribunal for Lebanon'. In his article, Professor Van der Wilt tackles a number of issues and questions. He first looks at whether the STL will contribute to the development of Lebanese criminal law, looking particularly at the infusion of international law concepts into Lebanese domestic law in the decisions of the STL Appeals Chamber. Although he is generally supportive of the Appeals Chamber's rulings, Professor Van der Wilt wonders if the Appeals Chamber's approach 'pushes the concept [of terrorism] too far' and argues that the decision will probably not resonate in Lebanese law. He then turns to the vexing question of selective justice and the mandate of the STL. While all international tribunals wrestle with this issue, Professor Van der Wilt demonstrates that the limited nature of the STL's mandate puts the Tribunal in a category separate from other international courts and tribunals, indeed in a category of its own. His interesting suggestion is that, by drawing on the historical context in Lebanon surrounding the Hariri assassination, the prosecutors could try to partially address the pervasive criticism regarding selective justice. He contends that by bringing the historical context into the proceedings, including the acts and interventions by such actors as Israel and the Palestinian Liberation Organization, the on-going conflict could be acknowledged, even though there would be no criminal accountability imposed for these events due to the limited jurisdiction of the Tribunal. While I cannot do justice to Professor Van der Wilt's adroit argumentation in a few sentences and he raises some questions that will require more discussion and reflection, he makes one of the few constructive suggestions that any commentator has made to escape the conundrum of selective justice that confronts the Tribunal.

I am particularly pleased that Professor Van der Wilt closes with a discussion on justice and history and the underlying purposes of an international criminal trial, which issue was brought to the fore by Hannah Arendt in her famous book, *Eichmann in Jerusalem: A Report on the Banality of Evil*, where she argued that the trial should be about the guilt or innocence of the accused and not an attempt to write history.[6] This argument is countered by Lawrence Douglas and others, who posit that such trials should have a pedagogical purpose and/or effect.[7] It is a fascinating discussion, and we are indebted to

Professor Van der Wilt for putting these issues on the table.

(p.9) Thus, we come back to complex and difficult questions, which course through virtually every chapter of this book. The creation and operation of the Tribunal raises all of the 'usual' issues and questions regarding international justice. Moreover, given the STL's unusual history, structure, and the various innovations engrafted onto its statute, issues are put on the table that have never been faced before. All of these matters, whether quite technical, such as legal issues on a wide variety of fronts that will be looked to for lessons both positive and negative for the future, or much broader questions of politics and international law, transitional justice approaches, or questions regarding the real impact on the ground after the expenditure of considerable resources, come to the fore in this unique institution. While some of the questions elicit negative responses, nonetheless the Tribunal holds a number of lessons for future efforts to address crimes of terror–in addition to–other serious crimes for practitioners and scholars on virtually every front as well as provide a measure of accountability in a country and region that are marked by impunity.

A very 'special' tribunal indeed.

Notes:

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([1]) (ICC Statute) (Rome, 17 July 1998, 2187 UNTS 90). The ICC is a treaty-based court, which has jurisdiction over genocide, crimes against humanity, and war crimes that occur in (or are committed by the nationals of) the 122 countries that have accepted the Court's jurisdiction. It also has jurisdiction over situations referred to it by the UN Security Council and other one-off acceptances of the ICC's jurisdiction by non-party states (under article 13(b) of the Rome Statute of the ICC).

([2]) (UN Charter) (San Francisco, 26 June 1945, 1 UNTS XVI).

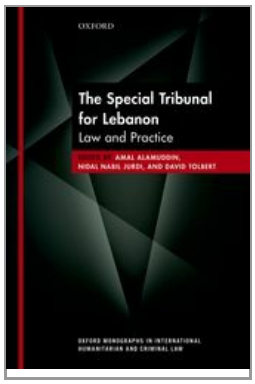
([3]) This would be highly and dangerously premature at this stage, see Paul Seils, 'Towards a Transitional Justice Strategy for Syria,' (ICTJ, September 2013) <http://ictj.org/sites/default/files/ICTJ-Syria-Analysis-2013_0.pdf> accessed 25 February 2014.

([4]) The shorthand version of the Commission's name, as it was chaired by M. Cherif Bassiouni; the formal name of the commission was United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Violations of International Humanitarian Law in the Former Yugoslavia.

([5]) Attachment to SC Res. 1757, UN Doc. S/RES/1757 (2007) [Statute of the Special Tribunal for Lebanon], art 2.

([6]) Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking 1963).

([7]) Lawrence Douglas, *The Memory of Judgment; Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press 2001).



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The Creation of the Tribunal in its Context

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[–] Abstract and Keywords

This chapter discusses the negotiation process leading to the establishment of the Special Tribunal for Lebanon. It covers the context of the creation of the tribunal; the negotiation of the bilateral agreement and the statute of the tribunal; the shift from a treaty to a Security Council resolution; and some novel features of the tribunal.

Keywords: international criminal tribunal, Lebanon, negotiation, Security Council, bilateral agreement

2.1 Introduction

The purpose of this chapter is to present the negotiation process that led to the creation of the Special Tribunal for Lebanon ('STL' or 'the Tribunal') in its context and, in so doing, to explain some of the Tribunal's most controversial and misunderstood elements.

I do my best to keep a critical distance on some controversial issues, but I have to recognize that this is challenging for at least two reasons. First, I was directly involved in

the process through leading the United Nations' team in the Secretariat and the Organizations' delegation to all the negotiation sessions and visits to the Lebanese authorities in Beirut. Secondly, I am obviously still bound by a duty of confidentiality. Nothing significant will be hidden but I have to refrain from attributing positions or statements made by representatives of states or political movements whenever they were communicated in a confidential setting.

Although I am aware of the various controversies surrounding the establishment and the functioning of the Tribunal, be they political or academic, I do not attempt to retroactively justify decisions made in the process. I hope instead to make a useful academic contribution by offering a personal account of a challenging but fascinating process that I was given the opportunity to play a part in, together with an excellent team. My account is based essentially on official documents, taking into account my recollection of meetings, discussions, and events.

The chapter will successively examine the context of the creation of the Tribunal (Section 2.2) and then discusses in more detail the negotiation of the bilateral agreement between the United Nations and the Lebanese Republic, including the Statute of the Tribunal (Section 2.3), the shift from a treaty to a Security Council resolution (Section 2.4), and some specific features of the Tribunal's legal design (Section 2.5).

(p.11) 2.2 The Context of the Creation of the Tribunal

It has become relatively common to hear, among other views, that the Special Tribunal for Lebanon was created to respond to the killing of one single individual, a rich friend of powerful international leaders, as an internationalized tribunal instituted for the prosecution of a crime under the domestic law of Lebanon. Such a caricature is very far from the facts. It is impossible to properly understand the Special Tribunal for Lebanon, in particular the decision to create it, the process of its establishment, and some of its specific features, without a good grasp of the Lebanese context at the time of the decision to create the Tribunal.

At least two fundamental elements must be kept in mind. First, Lebanon as a nation is a community of communities much more than a people unified by a common religion or culture. Painful events throughout the history of the country have repeatedly led to the adoption and subsequent adjustment of carefully considered checks and balances between communities, with due consideration for regional elements. Secondly, the civil war in Lebanon (1975–90), its causes, the way in which the conflict ended, and the circumstances of the post-conflict rebuilding are all essential elements for an adequate understanding of the situation. Several leaders of armed groups and factions are still playing an important role in the political life of the country. More importantly, Syria has always constituted a crucial factor in the history of Lebanon, in particular in the context of the end of the civil war and during the post-conflict period until the withdrawal of its troops in 2005.

It is similarly important to mention the sequence of events that occurred in the five months before the killing of former Prime Minister Rafiq Hariri, as well as during the ten

months between the bombing and the Lebanese government's request that a tribunal with an international character be created with the assistance of the United Nations. Even though a mere chronology of events does not provide an adequate analysis, it does offer, as a first step, an essential perspective on the time frame and the succession of essential relevant facts.[1]

During the summer of 2004, Lebanese political life was focused on a growing crisis related to the prospect of an approaching presidential election and, more specifically, on the controversy surrounding the issue of a potential extension of the mandate of the incumbent President Emile Lahoud. On 26 August, as part of the established scheme of the sensitive relationship between Lebanon and Syria, Prime Minister Hariri met with President Bashar Al-Assad in Damascus to discuss **(p.12)** the extension of the term of the Lebanese President. A few days later, on 2 September 2004, the Security Council adopted Resolution 1559 (2004). 'Mindful of the upcoming Lebanese presidential elections', it, *inter alia,*

> 1. Reaffirms its call for the strict respect of the sovereignty, territorial integrity, unity, and political independence of Lebanon;
> 2. Calls upon all remaining foreign forces to withdraw from Lebanon;
> 3. Calls for the disbanding and disarmament of all Lebanese and non-Lebanese militias;…[and]
> 5. Declares its support for a free and fair electoral process in Lebanon's upcoming presidential election conducted according to Lebanese constitutional rules devised without foreign interference or influence.[2]

Paragraph 2 calls for the withdrawal of Syrian forces, while paragraph 3 refers mainly to the disarmament of Hizbollah's armed component. On 3 September 2004, the day after the adoption of Resolution 1559 (2004), the Lebanese Parliament decided to extend President Lahoud's term. On 7 September, Economy Minister Marwan Hamadeh and two other ministers resigned from the Cabinet in protest against the constitutional amendment allowing for the extension of the presidential term. On 1 October, former Minister Hamadeh was seriously injured in an assassination attempt. On 4 October, Rafiq Hariri resigned as Prime Minister. His decision is to be seen in the context of his very tense relationship with the Syrian leadership. He envisaged playing a meaningful role in the upcoming parliamentary elections, to be held a few months later. He was killed in a massive blast on 14 February 2005, together with twenty-two other individuals. A number of people were injured. Contrary to widespread perceptions, it was not this event that prompted the Lebanese Government to request the creation of an internationalized tribunal. It took ten more months and a series of serious developments for that request to be made.

On 15 February, the day after the Hariri attack, the Security Council, in a Presidential Statement,[3] condemned the 'terrorist bombing', called on the Lebanese Government to bring 'the perpetrators, organizers and sponsors' to justice, and noted 'the Lebanese Government's commitments in this regard'. The Council also expressed its concern about the 'possible impact [of the murder] on on-going efforts by the people of Lebanon to

solidify Lebanon's democracy, including the upcoming parliamentary elections', as well as about 'the potential for further destabilization of Lebanon'. In conclusion, 'the Security Council request[ed] the Secretary-General to follow closely the situation in Lebanon and to report urgently on the circumstances, causes and consequences of this terrorist act'.

After this statement and before the Lebanese request for the creation of a special tribunal was made, four major developments took place.

First, an international independent investigation commission ('UNIIIC' or 'the Commission') was established by the Security Council, on 7 April 2005, 'to assist **(p.13)** the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices'.[4] The decision to establish the UNIIIC followed a Report by the Mission of Inquiry into the Circumstances, Causes and Consequences of the 14 February Beirut Bombing, a mission mandated by the Secretary-General pursuant to the statement by the President of the Security Council of 15 February 2005.[5] The Mission came to the conclusion that 'there was a distinct lack of commitment on the part of the Lebanese authorities to investigating the crime effectively, and that this investigation was not carried out in accordance with acceptable international standards'. Underlining the conclusion that 'the Lebanese investigation process suffers from serious flaws and has neither the capacity nor the commitment to reach a satisfactory conclusion',[6] and sharing its view that 'the Lebanese investigation lacks the confidence of the population necessary for its result to be accepted', the Mission concluded that 'to uncover the truth, it would be necessary to entrust the investigation to an international independent commission,…with the necessary executive authority to carry out interrogations, searches and other relevant tasks'.[7] The UNIIIC became fully operational on 16 June 2005.[8]

A proper understanding of the role of the Commission, and of the way in which it initially performed its mandate, requires further explanation. There was no prospect of the creation of a special tribunal at that time. Furthermore, the Security Council requested the Commission 'to complete its work within three months of the date on which it commenced its full operations', while authorizing the Secretary-General 'to extend the Commission's operation for a further period not exceeding three months'.[9] The Secretary-General made use of his power and extended the operation of the Commission in a first step until 25 October 2005,[10] and in a second one until 15 December 2005.[11] In this first phase of its existence, the Commission submitted two reports to the Security Council, on 19 October and 10 December 2005 respectively.[12] The first report prompted the Security Council to adopt, by a unanimous vote, Resolution 1636 (2005) on 31 October 2005. After **(p.14)** 'determining that this terrorist act and its implications constitute a threat to international peace and security' and 'acting under Chapter VII of the Charter of the United Nations', the Council took a number of decisions, 'as a step to assist in the investigation', compelling all states to take some specific measures, and Syria to fully and unconditionally cooperate with the Commission.[13] The second report coincides with the end of the maximum duration of the mandate of the Commission as initially set by the Security Council.[14]

The second major development to be noted relates to the immediate political consequences of the shock created throughout the Lebanese society by the massive bombing of 14 February 2005, including two huge demonstrations in Beirut. The first one took place on 8 March 2005, and was organized by pro-Syrian groups, including Hizbollah. A major counter-demonstration gathered an even greater number of participants on 14 March 2005. Legislative elections were held a few months later, towards the end of the spring. A coalition of movements under the heading of The Rafiq Hariri Martyr List won the majority of the seats in Parliament.

A third significant development occurred in April 2005 when the Syrian troops left Lebanon, under intense political pressure from inside as well as from various components of the international community, including the Security Council. The withdrawal put an end to twenty-five years of an open post-conflict military presence of Syria in the country.

The fourth development that must be taken into account, as a decisive factor, which led to the request by the Lebanese Government that a special tribunal be created, is the continuation of the series of killings that started with the failed assassination attempt against former Minister Marwan Hamadeh on 1 October 2004. A number of individuals, including political, cultural, and media personalities, well known for their political orientations, were either killed or seriously injured by several explosions throughout the spring, summer, and autumn of 2005.[15] The killing of journalist and Member of Parliament Gibran Tueni by a bomb in Beirut on the morning of 12 December 2005 became a defining moment. It is not a coincidence that 12 December 2005 is also the date of the letter by which the Secretary-General submitted the second UNIIIC report[16] to the Security Council.

On the day of that bombing, the Lebanese Government met and decided to ask the Security Council, through the Secretary-General, 'to establish a tribunal of an international character' and 'to expand the mandate of [UNIIIC], or create an independent international investigation commission, to investigate the assassination **(p.15)** attempts and assassinations and explosions that took place in Lebanon starting with the attempt on the life of Minister Marwan Hamade on 1 October 2004'.[17] The expression 'tribunal of an international character'[18] was intended, at this early stage, to suggest the creation of a hybrid tribunal rather than a tribunal on the model of those created by the Security Council as subsidiary organs. It was understood that, based on its experiences with the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the Council might not necessarily want to go down the same route.

The preceding contextual elements amply demonstrate that the creation of a special tribunal was not requested solely to respond to the killing of one single individual, former Prime Minister Hariri, on 14 February 2005. The context indicates far broader peace and security dimensions and implications. The discussion of the legal basis of the tribunal must take these elements into consideration if it is to be consistent.

2.3 The Negotiation of the Bilateral Agreement and the Statute of the Tribunal

2.3.1 The mandate

The formal decision by the Security Council 'to establish a tribunal of an international character' as requested by the Lebanese Government was not made immediately. It was preceded by an exploratory phase. On 15 December 2005, the Security Council, acting under Chapter VII of the Charter, adopted Resolution 1644 (2005) by a unanimous vote.[19] While acknowledging 'the Lebanese Government's request that those eventually charged with involvement in this terrorist attack be tried by a tribunal of an international character', the Council took a first step by requesting the Secretary-General 'to help the Lebanese Government identify the nature and scope of the international assistance needed in this regard'.[20]

In addition to giving this preliminary mission to the Secretary-General, the Council decided 'to extend the mandate of the Commission, as set forth in resolutions 1595 (2005) and 1636 (2005), initially until 15 June 2006'.[21] This **(p.16)** extension, and the prospect of the creation of a special tribunal, changed the nature of the work of the Commission. The legal regime and methodology of work of an investigative body whose existence is limited to a period of three months, with the sole prospect of an extension of a maximum of three months (as per Resolution 1595), cannot be the same as those of a fully-fledged investigation commission entrusted with an (almost) open-ended mandate, as well as powers and responsibilities close to those of the office of a prosecutor in charge of investigations. UNIIIC's mandate was subsequently extended several times until 28 February 2009, the eve of the beginning of the functioning of the Tribunal.[22] UNIIIC continued to benefit from the special powers it derived from Chapter VII of the UN Charter, an advantage that was not to be granted to the Prosecutor of the Tribunal when he took up his duties the day after the Commission was disbanded.

In the same Resolution 1644 (2005), the Council took another important decision in addressing the issue of other crimes committed in Lebanon (sometimes referred to as the 'connected cases'), as requested by the Government.[23] The Commission was initially only authorized to investigate the Hariri assassination, but in this resolution the Commission was asked 'to extend its technical assistance as appropriate to the Lebanese authorities with regard to their investigations of the terrorist attacks perpetrated in Lebanon since 1 October 2004'.[24] The Council, however, did not take the additional step at this stage 'to expand the mandate of the Commission to include investigations of those other attacks', but it requested the Secretary-General in consultations with the Commission and the Lebanese Government to present recommendations to this end.[25]

Pursuant to the exploratory mandate that was given to the Secretary-General on 15 December 2005 by paragraph 6 of Resolution 1644 (2005), a UN delegation that I had the privilege to lead engaged in thorough consultations with the Lebanese authorities with a view to exploring, without prejudice to future possible negotiations, the main issues to be addressed in a subsequent phase. The delegation went to Beirut on 26 and 27 January 2006. The atmosphere was very tense due to more bombings with deadly

consequences and the political turmoil and intense emotion this created. Public opinion was extremely focused and sensitive to every development related to our mission. At that time, the President of the Lebanese Republic, as well as a number of opposition political leaders, had been marginalized by large segments of the international community. My delegation and the UN representatives in Lebanon wanted to make clear however, without any possible doubt, that a criminal accountability mechanism would have to be exclusively judicial in nature, ie independent, impartial, and respectful of the highest standards of criminal justice. We decided therefore to meet all the relevant leaders without any consideration of their role in difficult phases of the recent or remote Lebanese history or for their affiliation and political orientation. We met with the Lebanese President, the Prime **(p.17)** Minister, and the Speaker of the National Assembly, as well as with other leaders. Following this mission, we had extensive talks with a Lebanese delegation at the United Nations Headquarters in New York from 24 to 28 February 2006. On 21 March 2006, the Secretary-General submitted his report to the Security Council, presenting, as requested, the modalities of the international assistance needed for the establishment of a tribunal of an international character.[26]

Before reviewing and assessing several possible features of the mechanism to be created, the report offers reflections on possible options with respect to the nature of the tribunal and its founding instrument. Referring to the mandate he received from the Security Council 'to help the Lebanese Government to explore the requirements for a tribunal of an international character', the Secretary-General states that the Council 'reflected a shared assumption that a purely national tribunal would not be able to effectively fulfil the task'.[27] Based on our consultations with the Lebanese authorities, the option of creating an exclusively international tribunal did not seem to correspond to the needs either. As a consequence, it appeared 'that the establishment of a mixed tribunal would best balance the need for Lebanese and international involvement in the work of the tribunal'.[28] The interlocutors were obviously aware of the precedent of the Special Court for Sierra Leone, a court established under a bilateral agreement between Sierra Leone and the United Nations.[29] The issue of the founding instrument was thoroughly discussed with the Lebanese representatives. There was a common understanding, in conclusion, 'that it would be most appropriate to establish the tribunal through an agreement concluded between Lebanon and the United Nations'.[30] The report added that 'such an approach would also not exclude the need for the Council to take complementary measures to ensure the effectiveness of and cooperation with the tribunal'.[31]

Based on the Secretary-General's report of 21 March 2006, the Security Council unanimously decided on 29 March 2006,[32] by Resolution 1664 (2006), to request that he 'negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice, taking into account the recommendations of his report and the views that have been expressed by Council members'.[33] The Secretary-General was also requested to report to the Council on the implementation of the **(p.18)** resolution, in particular on the draft agreement negotiated with the Lebanese Government.[34]

2.3.2 The negotiation process

The purpose of the negotiation was to draft a bilateral treaty between Lebanon and the United Nations on the establishment of a special tribunal for Lebanon, as well as the statute of the tribunal to be attached to the treaty as an annex and an integral part of it.

The institutional architecture was to be inspired by the model of the Special Court for Sierra Leone. This does not mean that there was a will to simply replicate this model. It was obvious to the negotiators that they wanted to tailor the new tribunal to the specificities of the concrete situation as well as to take into account the legal culture of Lebanon and lessons to be learned from the experience in Sierra Leone and at other international or internationalized tribunals. The Sierra Leone model was to serve as a reference with respect to the type of founding instrument and the hybrid character of the mechanism.

The negotiation process was faced with serious challenges. Most of these challenges are not specific to the Lebanese situation. A number of them relate to the establishment of criminal accountability mechanisms in any conflict or post-conflict situation. The first one to be addressed was the reality and the perception of the risk of a political instrumentalization. International(ized) criminal justice always takes place in a context which is very politically sensitive. In such a context it is simply not realistic to expect an environment devoid of any risk of politicization, or else international courts would never be created and justice would never be done. The negotiators must, however, devote the greatest care to the need for institutional safeguards to ensure the highest possible degree of independence, impartiality, and fairness. In that respect, a specific challenge also resulted from the temporal, personal, and subject matter jurisdiction of the proposed tribunal as it was determined by the Security Council's mandate.

Every ad hoc tribunal is confronted by certain risks of selectivity, be they real or perceived. The danger is not only that the mechanism is selective in terms of its mandate, or that it performs its work in a selective manner, but also that opponents instrumentalize the perception of selectivity. That is again an aspect that the negotiators have to bear in mind.

Another difficulty comes from unrealistic expectations, often conflicting ones, which are almost impossible to manage in a totally satisfactory way. The establishment of a criminal accountability mechanism cannot be expected to solve the political problems at the source of the violence, or even rapidly to have a fully preventative effect against the risk of a repetition of acts of violence. In the short term at least, they can only have a very limited impact. Therefore communication, transparency, and outreach are key elements in the process of the creation of such **(p.19)** a tribunal. The many challenges facing the negotiators were amplified by the evolving political and security situation in the country and by the impact this had on the support given to the process by the various components of the political spectrum and segments of public opinion in Lebanon.

Additional challenges of a somewhat more technical nature resulted from various elements: (a) the need and the will to take into account the Lebanese legal culture,

distinct from the common law culture which had largely influenced the drafters of the founding legal instruments for other international(ized) tribunals, in particular (for good reasons) for the Special Court for Sierra Leone; (b) the instruction given by the Security Council to take into account 'the views that have been expressed by Council members';[35] and (c) the pre-existence of a fully fledged international investigation commission endowed with Chapter VII powers, working with the prospect of becoming part of the Office of the Prosecutor.

There were two distinct phases in the negotiation of the agreement and the statute, the first one from April to mid-July 2006, and the second one from mid-August 2006 to the signature of the treaty at the beginning of 2007. The first period was marked by rapid progress in a constructive and dynamic atmosphere. The second one was deeply affected by the armed conflict between Israel and Hizbollah in the summer of 2006 and its political aftermath.

Immediately after the adoption of Resolution 1664 (2006) on 29 March 2006, experienced staff members of the UN Office of Legal Affairs in New York started drafting an agreement and a statute with a view to preparing a solid basis for further exchanges with a Lebanese delegation.[36] The first formal negotiation session took place at the end of May 2006 in New York. Substantial progress was achieved in a very collaborative spirit. A second session was planned with the objective of completing a draft to be submitted for consultation to the respective executive authorities. This session was held in The Hague over five days, between 3 and 7 July 2006. The UN delegation was composed in such a way as to integrate the experience of two international judges and take into account the lessons to be learned from the functioning of existing international tribunals. Throughout the negotiation process, interested members of the Security Council were kept informed and their views were duly taken into consideration, in accordance with Resolution 1664 (2006).

By the end of this July negotiating session the task was successfully completed. A draft agreement and a draft statute were agreed upon at the level of the delegations. The work was achieved in a record time of about three months. Despite all the difficulties and challenges, the task of the negotiators was supported by a succession of unanimous Security Council decisions, including Resolution 1664 (2006) and also, even more importantly, approval by the so-called National Dialogue in Lebanon. At the beginning of March 2006, Nabih Berry, the Speaker of the National Assembly and leader of Amal, a small party allied with Hizbollah, had taken the initiative of **(p.20)** gathering all representative components of the Lebanese political spectrum with a view to easing tensions in the country. A series of meetings took place over the following months. The first agenda item on which the National Dialogue was able to agree, by consensus, was to support the creation of the tribunal of an international character.[37]

But five days after the end of the July negotiation session, on 12 July 2006, Hizbollah guerrillas kidnapped two Israeli soldiers in a cross-border raid.[38] The abduction started a crisis, which soon broke out into a fully fledged armed conflict between Hizbollah and Israel, with devastating consequences for the whole of Lebanon, including the

destruction of civil infrastructure far from the combat zones. The fighting came to an end after Security Council Resolution 1701 (2006) was adopted on 11 August 2006. Even though Hizbollah had suffered important losses, the fact that it was not defeated was interpreted and perceived by large segments of the population in Lebanon as a victory over Israel. These developments emboldened the opposition (particularly Hizbollah), making it more assertive and prompting it to request an increased share of power within the Lebanese political system, including in the Government. By the autumn of 2006, Hizbollah requested the resignation of the government and the formation of a national unity government.

It was in that atmosphere that a UN delegation I was honoured to lead went to Beirut on 6 September 2006 in order to present the draft agreement and statute to the Prime Minister and to the Minister of Justice for their consideration. The situation in the country was marked by growing political tensions. The security situation was seriously problematic. A lengthy period of intense political confrontation was starting. Over the following weeks, the UN team continued working on the basis of the observations made on the occasion of its visit to Beirut.

The process reached a turning point in November 2006. On 10 November, the Secretary-General transmitted to the Prime Minister of Lebanon the draft 'agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon', to which was attached the Statute of the Tribunal. On 13 November, the Prime Minister sent a letter to the Secretary-General informing him 'that the Lebanese Council of Ministers had agreed in its session of that date to the draft and looked forward to the completion of the remaining steps leading to the establishment of the tribunal'.[39] The convening of the government for the purpose of approving these documents prompted six ministers, out of a total of twenty-four, from Hizbollah, Amal, and the Free Patriotic Movement to resign or, at least, suspend their participation in the Council of Ministers.[40] The on-going political crisis in Lebanon was reflected in the fact that **(p.21)** 'by a *note verbale* dated 14 November 2006, the Permanent Mission of Lebanon forwarded to [the Secretary-General] a copy of observations made by the President of the Lebanese Republic, including a challenge to the decision of the Council of Ministers'.[41]

As requested by Resolution 1664 (2006),[42] the Secretary-General also submitted to the Security Council the draft agreement negotiated with the Lebanese Government, in a report dated 15 November 2006.[43] This report briefly summarizes the negotiation process and analyses the main features of the tribunal as defined in the draft agreement and statute. It also informs the Council of both the approval by the Council of Ministers, and the challenge by the President.[44]

The Security Council met on 20 November 2006 in order to consider the report of the Secretary-General in informal consultations. After hearing an introductory statement [45] that I had been invited to present, the members of the Council engaged in substantial exchange of views. As a result of their consideration of the issue, the President of the Council, on behalf of its members, sent a letter dated 21 November 2006 to the

Secretary-General[46] with the following statement: 'The members of the Security Council have carefully considered your report…submitted in accordance with resolution 1664 (2006), as well as the attached presentation by your Legal Counsel.'[47] The letter continues:

> They welcome the conclusion of the negotiation with the Government of Lebanon, as requested in resolution 1664 (2006). The members of the Security Council are satisfied with the Agreement annexed to the report, including the Statute of the Special Tribunal.…[They] invite you to proceed, together with the Government of Lebanon, in conformity with the Constitution of Lebanon, with the final steps for the conclusion of the Agreement.

Both the Secretary-General and the Security Council were aware that the agreement given by the Council of Ministers indicated their support for the negotiated texts but was not intended to by-pass the National Assembly in its power to formally approve such a treaty and to authorize the government to ratify it.[48]

On 21 November 2006, the day following the meeting of the Council, in a tragic development that can hardly be considered as coincidental, the Minister of Industry of Lebanon, Pierre Gemayel, was assassinated in Beirut. He was the son of a former President of Lebanon and the nephew of a President of Lebanon who had been killed while in office.

(p.22) At this stage in the process, the UN delegation decided to remain open to any sign of good will that could contribute to a reduction of tensions in the country and pave the way for a renewal of the constructive dialogue that had brought the parties together in the spring of 2006 and led to general support, by consensus, of the process of the creation of a tribunal with an international character. The two political blocs, however, remained caught in the controversy over the composition of the government and the quest by Hizbollah and its allies for an increased share of power. Under these circumstances, it was considered that there were no reasons to delay further the signature of the agreement. Keeping in mind the invitation addressed to the Secretary-General by the Security Council 'to proceed, together with the Government of Lebanon, in conformity with the Constitution of Lebanon, with the final steps for the conclusion of the Agreement',[49] both parties agreed at the end of January 2007 that the time had come to sign the Treaty as a first step towards the fulfilment of the constitutional requirements for it to be approved by the National Assembly and ratified. It must be recalled that the Government was supported by a majority in parliament. The agreement was signed by Lebanon and by the United Nations on 23 January and 6 February 2007, respectively.

2.4 From a Treaty to a Security Council Resolution

The situation in Lebanon with respect to the prospect of the establishment of the Tribunal was monitored closely by the Secretary-General, as well as by the Security Council, in the period following the signature of the Treaty, especially in February and March 2007.[50]

At that time, the Lebanese parties continued to be at an impasse. As a result, the ratification process was faced with serious obstacles. On 3 April 2007, seventy members of parliament, a majority, submitted to the Secretary-General a petition describing their unsuccessful attempts to have the parliament convened and requesting that all necessary measures be taken to establish the Tribunal. Subsequently, the Government urged the Secretary-General to put the matter before the members of the Security Council to examine alternative ways to ensure the establishment of the Tribunal. In light of this situation, the Secretary-General dispatched me to Beirut on a mission that took place from 17 to 21 April 2007, and he took up the issue himself with Syrian officials on the occasion of a visit to Damascus on 24 April 2007. My mandate, as set out by the Secretary-General, was to assist the Lebanese authorities and the Lebanese parties on their way to the ratification of the bilateral agreement.[51]

(p.23) While in Beirut, I met with the President of the Republic, the Prime Minister, the Speaker of the National Assembly, and a number of ministers, members of parliament, and other senior political leaders, from all the main components of the Lebanese political spectrum, belonging to the majority and to the opposition. I met with some of them twice. We had thorough discussions and explored creative ways out of the stalemate. I also regularly briefed a large crowd of journalists who followed me during the whole mission.

It did not come as a surprise that all the members of the majority supported the ratification of the treaty.

None of the representatives of the opposition opposed the creation of the Tribunal. On the contrary, they all supported in principle the establishment of a tribunal to prosecute the perpetrators of the bombing that killed former Prime Minister Hariri. The attitude of the opposition parties, however, reflected different approaches. One component was supportive but wanted amendments to the agreement and was ready to share with the United Nations their comments on the substance. Another, while stating that it had no objection to the establishment of the Tribunal, referred to the reservations of others in general terms, without indicating any. Hizbollah publicly stated its unwillingness to discuss the establishment of the Tribunal, and to share with the United Nations its proposals for amendments to the Treaty and/or the statute, until an agreement in principle had been reached for the creation of a government of national unity that would provide them with a blocking or controlling share of the seats in the cabinet. The argument for not sharing their comments with the United Nations was that such comments should be provided to and dealt with only by a government that enjoyed constitutional legitimacy.

The Speaker of Parliament made public his view that the real problem in the prevailing crisis was not the Tribunal but the composition of the government, and that the Tribunal could be agreed to if the parties could reach an accord on the creation of a government of national unity. He stated that he would not call parliament to vote on the agreement because he considered the Government and therefore its actions, such as forwarding the bilateral agreement to the National Assembly for ratification, to be deprived of constitutional legitimacy. In his view, the Government's lack of legitimacy derived from the

resignation of Shia members from the cabinet.

For its part, the Government firmly denied a lack of legitimacy or constitutional validity, and expressed its concern at the refusal of the Speaker to convene the Assembly or even to receive documents from the government. The constitutional system was therefore unable to bring about the conclusion of the agreement, even though a majority of MPs supported it. And the implication was that the majority could be defied with impunity and leave the way open for future attacks that would further weaken Lebanon's security and stability.

Finally, on 14 May 2007, the Prime Minister of Lebanon sent a letter to the Secretary-General in which he referred to the refusal of the Speaker of Parliament to convene a session of the National Assembly and to the expression of support demonstrated for the Tribunal by a parliamentary majority together with its readiness to formally approve the Treaty in parliament if only a session could be **(p.24)** convened.[52] Referring to my recent visit to Beirut, the Prime Minister stated that '(a) for all practical purposes the domestic route to ratification had reached a dead end, with no prospect for a meeting of parliament to complete formal ratification; and that (b) despite their stated support for the establishment of a tribunal, the opposition has declined to discuss with Mr Michel any reservations they may have on any of the agreed statutes'.[53] The Government, he continued, 'believes that the time has come for the Security Council to help make the Special Tribunal for Lebanon a reality'. He asked the Secretary-General to put the request before the Security Council as a matter of urgency and concluded: 'Further delays in setting up the Tribunal would be most detrimental to Lebanon's stability, to the cause of justice, to the credibility of the United Nations itself and to peace and security in the region.'[54] In his covering letter to the Council, the Secretary-General concurred with the Prime Minister 'that, regrettably, all domestic options for the ratification of the Special Tribunal now appear to be exhausted, although it would have been preferable had the Lebanese parties been able to resolve this issue among themselves based on a national consensus'.[55]

On 15 May 2007, the President of Lebanon addressed a long letter to the Secretary-General and requested that it be circulated to the members of the Security Council.[56] Referring to the Prime Minister's letter of the previous day, the President denied the legitimacy of the Government, complained about what he called 'falsification and distortion of the facts' by the Prime Minister, recalled that he had submitted his written comments on the draft agreement and statute, and denounced the violation of constitutional provisions in the process of negotiating and approving the instruments creating the Tribunal, as well as 'the tyranny of a ruling clique that disregards the imperatives of national reconciliation and communal existence and resorts to seeking power through an outside force over its people and institutions'. 'The approval of the Tribunal directly by the Security Council', he said, 'would constitute a transgression of the constitutional mechanism that had been completely ignored, thus increasing anxiety about its being politicized or used for political purposes, which would ultimately rob it of its capacity to produce the juridical results expected of it, resulting in dire consequences for the

stability and civil peace of the country.'[57]

On 30 May 2007, faced with the prospect of a protracted stalemate, the Security Council adopted Resolution 1757 (2007). The resolution was adopted by a vote of **(p.25)** ten in favour, zero against, and five abstentions (China, Indonesia, Qatar, Russian Federation, and South Africa).[58] It was the first time that the Council had not been united on this issue. Previously, for more than two years since the beginning of 2005, it had always demonstrated an impressive unanimity or consensus at each stage, starting with its condemnation of the bombing that took the life of former Prime Minister Hariri and other attacks, to the various steps concerning the investigation or the creation of the tribunal. The abstentions were not an expression of a lack of support for the Tribunal. As stated by the abstaining members, they reflected rather a reluctance to see the Council take a bold measure that had the effect of bringing into force bilaterally negotiated provisions.[59] Indeed, acting under Chapter VII of the Charter, the Council decided to offer a (limited) choice to the Lebanese parties. Either the government would notify the United Nations before 10 June 2007 in writing that the legal requirements for entry into force of the agreement and its annex have been complied with, or the provisions concerning the creation and functioning of the Tribunal would enter into force on that date. The somewhat convoluted text of the Resolution led to misunderstandings. Paragraph 1(a) of Resolution 1757 (2007) reads as follows:

> [The Security Council] 1. *Decides*, acting under Chapter VII of the Charter of the United Nations, that (a) The provisions of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19 (1) of the annexed document before that date…

A risk of confusion resulted from the title and the nature of 'the annexed document, including its attachment'. The title of the document in the annex to the Resolution is 'Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal'. Its attachment is the 'Statute of the Special Tribunal for Lebanon'. After the 10 June 2007 deadline elapsed without notification by the Lebanese authorities, 'the provisions of the annexed document' entered into force. This wording was carefully selected by the authors of the Resolution in order to indicate that it was not the agreement that would enter into force as such but the provisions of the document. It would be erroneous therefore to state that the Security Council decided to act as a substitute for the national parliament and to replace the parliamentary approval with its own decision. Such interference with the law of treaties would have been daring. The consequence of this drafting relates to the nature of the applicable provisions. They do not constitute treaty law. They are rules of the Security Council. The legal regime of treaties does not apply to them. Why then did the Security Council leave the title as it was? Simply because, at the date of the adoption of Resolution 1757 (2007), it was still theoretically possible for the agreement to enter into force as such, until 10 July 2007. That **(p.26)** understanding of paragraph 1 of Resolution 1757 (2007) was clearly confirmed by the Appeals Chamber of the Special Tribunal for Lebanon.[60]

Another risk of confusion must be avoided. The reference to Chapter VII can be misunderstood. It must be noted first that it is only referred to in paragraph 1 and therefore does not apply to the other paragraphs of the resolution. Contrary to a frequent perception of the role of a reference to Chapter VII in a Security Council resolution, the purpose of its inclusion in this resolution was not to create a legal basis for sanctions or other coercive measures. Rather, the expected impact of the reference to Chapter VII is to confer a legally binding character on the provisions concerning the Tribunal, with the primacy attached to them by virtue of article 103 of the Charter. An explicit reference to Chapter VII should lift any uncertainty as to whether the necessary conditions for a provision adopted by the Security Council have a legally binding character exist. There is no doubt about the mandatory nature of a provision adopted by the Security Council acting under Chapter VII whenever the relevant paragraph starts with a verb indicating the will of the Council to take a compelling measure—for instance the verb *decides,* which was used in this case.

It must be underlined, finally, that the entry into force of the rules on the establishment of the Tribunal, on 10 June 2007, must be distinguished from the beginning of the functioning of the Tribunal, in accordance with article 19 of the document annexed to the Resolution. UNIIIC continued its investigation after the adoption of Resolution 1757 (2007). The Special Tribunal for Lebanon started functioning on 1 March 2009.[61]

2.5 Some Legal Novelties of the Tribunal

The Special Tribunal for Lebanon has a number of novel features. The purpose of the following section is to identify, and give a brief introduction to, some of the features that gained the greatest attention in the course of the negotiation process and the establishment of the Tribunal.

2.5.1 The nature of the Tribunal

The Special Tribunal for Lebanon possesses most of the characteristics of a hybrid tribunal. In the first place, it was conceived to be a hybrid tribunal. Its legal basis was expected to be a bilateral agreement between the United Nations and Lebanon, on the model of the agreement between the United Nations and Sierra Leone. Many of its features reflect that approach: applicable substantial and procedural **(p.27)** law; composition of the chambers; nationality of magistrates; funding; management committee; cooperation obligations for the territorial state; and so on.

On the other hand, the decisive source of the legally binding character of the relevant provisions and their entry into force is a paragraph, in a Security Council resolution, adopted under Chapter VII of the Charter. In that respect, the tribunal differs from other hybrid tribunals. Does this circumstance make it an international tribunal of the same nature as the two tribunals created by the Security Council (ICTY and ICTR)? The answer must be negative. The Security Council did not intend to replicate the model of tribunals as subsidiary bodies for at least two reasons: the drafting of paragraph 1 of Resolution 1757 (2007) reflects the desire of the Council as much as possible to respect the components of the original model; and the funding of the tribunal is typical for a

hybrid tribunal, rather than for a subsidiary body of the Council, which would be funded through assessed contributions from the budget of the United Nations.

The Appeals Chamber of the Special Tribunal for Lebanon has held that the Tribunal is 'an independent institution created by the Security Council outside of the United Nations system'.[62] This assertion is substantiated in a footnote with the following explanation:

> The Tribunal is not part of the United Nations, as demonstrated by its operating mechanisms. For instance, although following the United Nations common system in several areas of its work, the Tribunal is not funded through the United Nations budget approved by its General Assembly. While created by a Security Council Resolution, the Tribunal is not an organ of the United Nations. The Convention on Privileges and Immunities of the United Nations (13 February 1946, I UNTS 15) does not apply *per se* to the Tribunal. Thus, the Tribunal does not enjoy a status similar to that of ICTY and ICTR. It is a separate subject of international law.[63]

While it is correct to state that the Tribunal is not an organ of the United Nations, one can question whether it is outside the United Nations 'system', in particular because there is no commonly agreed definition of what that system is.

2.5.2 Jurisdiction and applicable law

Another novelty in the Tribunal's founding documents arises from the provisions defining the jurisdiction of the Special Tribunal for Lebanon. The Statutes of other international(ized) tribunals list categories of crimes committed on specified territories or by nationals of certain countries, whereas in the STL's case jurisdiction is defined by reference to specific events (bombings or other attacks). This approach poses particular challenges in respect of the selection of the events to be included (types of events, authority to decide, criteria for inclusion, procedure, etc). Realities, as well as perceptions, are important. The stakes are high. Will the selection be understood? Will it strengthen the credibility of the tribunal or undermine it?

(p.28) The drafting of article 1 of the Statute could have been different. For instance, it could have included all the attacks perpetrated between 1 October 2004 and 12 December 2005,[64] or until the creation of the Tribunal, possibly leaving open the subsequent inclusion of later events under certain conditions. Such a concept would have conveyed a more adequate perception of the reality of what happened in Lebanon during that period. It would have prevented the erroneous assumption that the creation of the Tribunal was exclusively justified by the killing of one prominent individual, contrary to what is clearly demonstrated by a careful study of the evolving historical circumstances during the critical period. The actual drafting was the result of a compromise that was reached with due consideration for the instruction given by the Security Council in Resolution 1664 (2006) to 'tak[e] into account…the views that have been expressed by Council members'.[65] It must be recognized though that, despite the unfortunate message conveyed by the wording as it stands, the essential independence of the STL was ultimately safeguarded in the sense that the Tribunal alone can decide, based on legal criteria, the inclusion of any of the attacks that occurred between 1 October 2004

and 12 December 2005.

In addition to the reference to specific events, the extent of the jurisdiction of the Tribunal also depends, to some extent, on the identification of the applicable law. In the case of the Special Tribunal for Lebanon, the applicable law is a reflection of its hybrid nature. Being rules of the Security Council, the provisions annexed to Resolution 1757 (2007) are formally rules of international law. Some of them, however, refer to the domestic Lebanese law, in particular article 2 of the Statute concerning the applicable criminal law and article 28(2), referring to the Lebanese Code of Criminal Procedure.

While the references to Lebanese law clearly indicate a will to give a Lebanese character to the Tribunal to the extent possible, the distinction between Lebanese law and international law is not always easy to navigate. For instance, the reference to the Lebanese Code of Criminal Procedure is expected to provide guidance to the judges, who are instructed to also take into account 'other reference materials reflecting the highest standards of international criminal procedure' and to keep in mind the need 'to ensur[e] a fair and expeditious trial'.[66] In addition, the Statute itself contains a number of rules of procedure and evidence, in particular with respect to the rights of defendants and victims, and to the conduct of proceedings, which are drawn from the rules governing other international criminal courts.[67] The possibility of trials *in absentia* would likely not have been envisaged if it had not been part of the Lebanese **(p.29)** legal culture, but the modalities of such trials were then tailored to conform to international standards.[68]

Similarly, the reference to the Lebanese Criminal Code in article 2 of the Statute, a provision directly linked to the determination of the subject matter jurisdiction of the tribunal, cannot be interpreted as being exclusive of any international law dimension. An explicit exception is to be found, for instance, in article 3 of the Statute, which intentionally defines individual criminal responsibility in specific terms. A much more difficult and sensitive issue relates to the notion and nature of 'acts of terrorism', referred to in article 2(a) of the Statute in reference to the provisions of the Lebanese Criminal Code. Confronted with the difficulty of determining the law applicable to the crimes falling within the jurisdiction of the Tribunal, the pre-trial judge made use of the power to submit questions to the Appeals Chamber. On 16 February 2011, the Chamber issued an interlocutory decision on the applicable law.[69] On terrorism, the answer of the Chamber was as follows:

> The Statute clearly refers to provisions of the Lebanese Criminal Code only, and not to Lebanese law in general or to international law. The Tribunal, when applying the notion of terrorist acts, should therefore look at Article 314 of the Lebanese Criminal Code. However, a proper construction of Lebanese law leads to the conclusion that, when interpreting Article 314 and other relevant provisions of the Lebanese Criminal Code, international law binding upon Lebanon may not be disregarded. Article 314 of the Lebanese Criminal Code shall be interpreted in consonance with international law.[70]

This interlocutory decision was intended to guide the work of the pre-trial judge. Since it was elaborated at a stage when there was no possibility for the accused to participate, it might be revisited in the future. Nevertheless, it demonstrates the complexity of the issue. One could add that the Appeals Chamber was asked to determine the applicable law and not to decide whether acts of terrorism under Lebanese law, in addition to being domestic crimes, could simultaneously have the nature of international crimes. The fact that crimes are defined as such under domestic legislation does not necessarily imply that they cannot also have the nature of international crimes. The underlying issue is whether the customary international law regime of international crimes could apply. For the time being, this question remains abstract and it could very well continue to remain so. In any case, the reference made to the Lebanese Criminal Code in the Statute was not intended to exclude the taking into consideration of international law, nor the qualification of the crimes as international crimes in addition to their domestic character.

With respect to the subject matter jurisdiction and the applicable law, it is worth noting, finally, why the statement I made to the Security Council on 20 November 2006, on the occasion of informal consultations of the Council, was eventually **(p.30)** annexed as an addendum to the Report of the Secretary-General of 15 November 2006. The latter was intended to submit to the Council for its consideration the draft agreement and statute that resulted from the negotiations with the Lebanese government. The report indicated that the drafters had considered whether to include in the Statute a legal basis for a possible determination by the judges that the fourteen attacks amounted to crimes against humanity and made reference to the jurisprudence of international criminal tribunals as well as to the Rome Statute of the International Criminal Court.[71] The report concluded: 'However, considering the views expressed by interested members of the Security Council, there was insufficient support for the inclusion of crimes against humanity within the subject-matter jurisdiction of the tribunal. For this reason, therefore, the qualification of the crimes was limited to common crimes under the Lebanese Criminal Code.'[72] I was informed that one member of the Security Council considered these sentences to be confusing, even sounding like an invitation to the judges to disregard political objections. I therefore included in my statement explicit comments on the applicable criminal law, with the following conclusion: 'The text of the statute, the language of the report, the preparatory work and the background of the negotiations clearly demonstrate that the tribunal will not be competent to qualify the attacks as crimes against humanity.'[73] The aforementioned member of the Council stated that he was only prepared to welcome the conclusion of the negotiation and join the Council in expressing its satisfaction with the agreement, if my statement was attached as an addendum to the report of the Secretary-General. The other members of the Council agreed. That is how and why it was done.

2.6 Conclusion

It is my hope that the presentation of the context of the creation of the Tribunal, as well as of the negotiation process and the successive developments that eventually led to its establishment offer a useful contribution to a better understanding of the fundamental decisions that were made and of some of the novel features of the institution that

resulted.

It is much too early to try to assess the impact of the creation and the functioning of the Tribunal. True, there are already lessons to be learned and there will be others in the future, but the process is still unfolding and many developments remain to be made. One thing is already clear, however. Without the work of the United Nations' International Independent Investigation Commission over more than three-and-a-half years, without the Office of the Prosecutor of the Special Tribunal for Lebanon carrying out its mission, and without the prospect of trials starting in a few months' time, there would be continued criminal impunity for the perpetrators of the bombing that killed the former Prime Minister and others, as **(p.31)** well as for the perpetrators of all the other attacks that took place in Lebanon between 1 October 2005 and 12 December 2005. Why? Certainly not because there would be a shortage of competent investigators, prosecutors, or judges in Lebanon. There is a judicial system in place in the country, which is indeed capable of competently performing ordinary tasks. It is widely recognized, however, that this system cannot cope with crimes of this type. Investigators, prosecutors, or judges willing to accomplish their tasks professionally and independently in such context would constantly run the risk of losing their lives. Several tragic events are telling in that regard. Where do the criminal procedures stand in the 'connected' cases that potentially fall within the jurisdiction of the tribunal but have not (yet) been taken up by the prosecutor or the judges?

There is a long way to go on the path towards a general culture of criminal accountability. Much progress has been achieved over the past twenty years, but lessons must be learned and a lot remains to be done. Still, striving for the end of impunity must be taken seriously, at the domestic level in the first place, but with an efficient contribution from the international community whenever it becomes necessary.

Notes:

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([1]) A general chronology of events in Lebanon is to be found in Security Council Report, 'Chronology of Events' <http://www.securitycouncilreport.org/chronology/lebanon.php?page=all&print=true> accessed 14 October 2013. See also Chronology of Events: mid-2004 to September 2005 in Annex to Letter Dated 20 October 2005 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2005/662 (2005) [Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005)] 7ff. For a very detailed description of the political context in general and during the months immediately preceding the killing of former Prime Minister Hariri, see 'Report of the Fact-Finding Mission to Lebanon

Inquiring into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Rafik Hariri', UN Doc S/2005/203 (2005) para 6ff.

([2]) SC Res 1559, UN Doc S/RES/1559 (2004), preamble para 6 and paras 1–3, 5.

([3]) Statement by the President of the Security Council, UN Doc S/PRST/2005/4 (2005).

([4]) SC Res 1595, UN Doc S/RES/1595 (2005), para 1.

([5]) Fact-Finding Mission Report (n1).

([6]) Fact-Finding Mission Report (n1) Executive Summary, paras 3, 7.

([7]) Fact-Finding Mission Report (n1).

([8]) Letter Dated 16 June 2005 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2005/393 (2005).

([9]) SC Res 1595 (n4) para 8.

([10]) Letter Dated 9 September 2005 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2005/587 (2005).

([11]) Letter Dated 20 October 2005 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2005/662 (2005) [Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005)]. This extension was also requested by the President of the Council of Ministers of the Lebanese Republic in Letter Dated 14 October 2005 from the Chargé d'Affaires ai of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General, UN Doc S/2005/651 (2005).

([12]) Annex to Secretary-General's Letter 20 October 2005 (n11); Annex to Letter Dated 12 December 2005 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2005/775 (2005) [Second Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005) and 1636 (2005)].

([13]) SC Res 1636, UN Doc S/RES/1636 (2005), preambular paras 19, 21 and paras 3, 11.

([14]) SC Res 1595 (n4) para 8. With the two extensions authorized by the Secretary-General, the mandate of the Commission as initially set by the Security Council ended on 15 December 2005.

([15]) See Chronology of Events: mid-2004 to September 2005 in UNIIIC First Report (n1) 7 ff. See also Annex II to Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, UN Doc S/2006/893 (2006) 34 [Attacks Perpetrated in Lebanon Since 1 October 2004].

([16]) Annex to Letter Dated 12 December 2005 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2005/775 (2005) [Second Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005) and 1636 (2005)].

([17]) This request was conveyed in Letter Dated 13 December 2005 from the Prime Minister of the Republic of Lebanon Addressed to the Secretary-General. See Annex to the Letter Dated 13 December 2005 from the Chargé d'Affaires ai of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General, UN Doc S/2005/783 (2005). The Prime Minister of Lebanon had already conveyed to the Secretary-General, on 5 December 2005, the request of his Government that the work of the Commission be extended 'for a further period of six months from 15 December 2005, with the possibility of an additional extension in the light of the progress of the investigations', see Annex to the Letter Dated 5 December 2005 from the Chargé d'Affaires ai of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General, UN Doc S/2005/762 (2005).

([18]) In French: 'tribunal à caractère international' and not 'tribunal international', as some documents erroneously translate.

([19]) Record of the Security Council's 5329th Meeting, UN Doc S/PV.5329 (2005).

([20]) SC Res 1644, UN Doc S/RES/1644 (2005), para 6.

([21]) SC Res 1644 (n20) para 2.

([22]) SC Res 1686, UN Doc S/RES/1686 (2006); SC Res 1748, UN Doc S/RES/1748 (2007); SC Res 1815, UN Doc S/RES/1815 (2008); SC Res 1852, UN Doc S/RES/1852 (2008).

([23]) Prime Minister's Letter Dated 13 December (n17).

([24]) SC Res 1644 (n20) para 7.

([25]) SC Res 1644 (n20) para 7.

([26]) Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1644 (2005), UN Doc S/2006/176 (2006).

([27]) Report Pursuant to Paragraph 6 of Resolution 1644 (n26) para 5.

([28]) Report Pursuant to Paragraph 6 of Resolution 1644 (n26) para 5.

([29]) Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002, 2178 UNTS 138).

([30]) Agreement between the United Nations and the Government of Sierra Leone on the

Establishment of a Special Court for Sierra Leone (n29) para 6.

([31]) Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (n29) para 6.

([32]) Record of the Security Council's 5401th Meeting, UN Doc S/PV.5401 (2006).

([33]) SC Res 1664, UN Doc S/RES/1664 (2006).

([34]) SC Res 1664 (n33) para 3.

([35]) As stated in the negotiation mandate, see SC Res 1664 (n33) para 1.

([36]) On this first phase of the negotiation, see Secretary-General's Report on the Establishment of the STL (n15) paras 3–4.

([37]) See Chronology of Events in Security Council Report (n1).

([38]) Chronology of Events in Security Council Report (n1).

([39]) Secretary-General's Report on the Establishment of the STL (n1) para 54.

([40]) Secretary-General's Report on the Establishment of the STL (n1) para 54. See also, Annex to the Letter Dated 16 May 2007 from the Secretary-General to the President of the Security Council, UN Doc S/2007/286 (2007) [Letter Dated 15 May 2007 from the President of Lebanon Addressed to the Secretary-General] para 6.

([41]) Secretary-General's Report on the Establishment of the STL (n1) para 54.

([42]) SC Res 1664 (n33) para 3.

([43]) Secretary-General's Report on the Establishment of the STL (n1).

([44]) Secretary-General's Report on the Establishment of the STL (n1) para 54.

([45]) Addendum to Secretary-General's Report on the Establishment of the STL (n1), UN Doc S/2006/893/Add.1 [Statement by Mr Nicolas Michel, Under-Secretary-General for Legal Affairs, the Legal Counsel, at the Informal Consultations held by the Security Council on 20 November 2006].

([46]) Letter Dated 21 November 2006 from the President of the Security Council Addressed to the Secretary-General, UN Doc S/2006/911 (2006).

([47]) See Section 2.5.2 below, 'Jurisdiction and applicable law'. It should be noted that it is exceptional for such a presentation to be attached to a report of the Secretary-General. The special motive for that decision by the Council will be described later.

([48]) Statement by Mr Nicolas Michel (n45).

([49]) Letter Dated 21 November 2006 (n46).

([50]) The following description of the situation and comments on the developments in the country largely draw from a briefing I gave to the Security Council on 2 May 2007 on the occasion of a meeting devoted to informal consultations (unofficial document). The Security Council briefly refers to this briefing in the preamble of SC Resolution 1757, UN Doc S/RES/1757 (2007), para 10.

([51]) Contrary to some ill-intentioned comments in the domestic media, I was not mandated to explore the option of the Security Council making use of its Chapter VII powers.

([52]) Annex to Letter Dated 15 May 2007 from the Secretary-General to the Security Council, UN Doc S/2007/281 (2007) [Letter Dated 14 May 2007 from the Prime Minister of Lebanon to the Secretary-General].

([53]) Annex to Letter Dated 15 May 2007 (n52).

([54]) Annex to Letter Dated 15 May 2007 (n52).

([55]) Letter Dated 15 May 2007 from the Secretary-General to the Security Council, UN Doc S/2007/281 (2007) [Letter Dated 14 May 2007 from the Prime Minister of Lebanon to the Secretary-General]. [NB I have repeated the full citation because this refers to the letter and n52 refers to the Annex.]

([56]) President of Lebanon's Letter Dated 15 May 2007 (n40).

([57]) President of Lebanon's Letter Dated 15 May 2007 (n40).

([58]) Record of the Security Council's 5685th Meeting, UN Doc S/PV.5685 (2007).

([59]) Record of the Security Council's 5685th Meeting (n58) 2–5 (statements made respectively by the representatives of Qatar, Indonesia, South Africa, China, and Russia).

([60]) STL, Decision on the Defence Appeals Against Trial Chamber's 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/AC/AR90.1, Appeals Chamber, 24 October 2012, paras 24–31.

([61]) On the various steps taken by the Secretariat of the United Nations towards the beginning of the functioning of the tribunal, see a brief summary in United Nations Audiovisual Library of International Law, 'Statute of the Special Tribunal for Lebanon' <http://legal.un.org/avl/pdf/ha/abunal/abunal_ph_e.pdf> accessed 14 October 2013.

([62]) Appeals Chamber Decision on Jurisdiction and Legality (n60) para 39.

([63]) Appeals Chamber Decision on Jurisdiction and Legality (n60) note 156.

([64]) As listed, on the basis of Annex to Letter Dated 14 March 2006 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2006/161 (2006) [Third Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005)] 34.

([65]) SC Res 1664 (n33) para 1.

([66]) Attachment to SC Res 1757, UN Doc S/RES/1757 (2007) [Statute of the Special Tribunal for Lebanon] art 28(2).

([67]) Statute of the STL (n66) arts 15ff, 18ff.

([68]) Statute of the STL (n66) art 22; Secretary General's Report on the Establishment of the STL (n1) para 33.

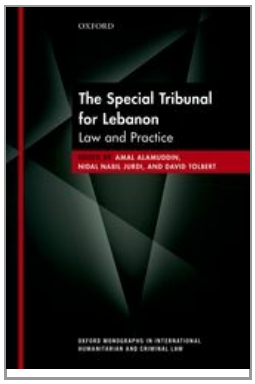
([69]) STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *Prosecutor v Ayyash et al*, Case No STL-11-01/I/AC/R17bis, Appeals Chamber, 16 February 2011.

([70]) STL, Interlocutory Decision on the Applicable Law (n69) para 147.

([71]) Secretary-General's Report on the Establishment of the STL (n1) paras 23–4.

([72]) Secretary-General's Report on the Establishment of the STL (n1) para 25.

([73]) Statement by Mr Nicolas Michel (n45) 2.



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The Legal Nature of the Special Tribunal for Lebanon

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[–] Abstract and Keywords

This chapter discusses the unique legal nature of the Special Tribunal for Lebanon (STL). The STL is a *sui generis* international institution. Its uniqueness lies in the way in which it was established, in its narrow mandate restricted to one attack and crimes connected thereto, and in the mixture of common law and inquisitorial procedural rules which permit the holding of trials *in absentia*. The STL is not a treaty-based international tribunal because its founding instrument is not a treaty duly ratified by Lebanon. Neither is it a tribunal integrated into the Lebanese court system, although the Tribunal does have jurisdiction over a crime that occurred on Lebanese territory and its applicable law is that of Lebanon. The Statute of the STL reflects the paradox of a tribunal of an international character, which tries a purely domestic crime on the basis of domestic legislation.

Keywords: international criminal tribunal, political process, judicial process, domestic law, Lebanese law

3.1 Introduction: The Context for the Establishment of a *Sui Generis* International Tribunal

On 14 February 2005, a bomb constructed from approximately 2,500 kg of TNT exploded in downtown Beirut killing twenty-two individuals and injuring 220. Amongst the dead were the former Prime Minister, Rafiq Hariri, and the former Minister, Bassel Fleyhan.[1]

In the immediate aftermath, the management and investigation of the attack was assigned to the jurisdiction of the Lebanese Military Court, with Judge Rasheed Mezhar assuming responsibility for crime scene management and the preservation and collection of evidence by local authorities.[2] The case was subsequently transferred to the Judicial Council, which had jurisdiction over acts affecting the security of the state.

It is in this context that the UN Security Council began to act, triggering a process that would eventually culminate in the establishment of a *sui generis* international criminal tribunal, neither a fully fledged organ of the UN nor part of the Lebanese judicial framework. The unique legal nature of the Special Tribunal for Lebanon ('STL' or 'the Tribunal') is primarily the result of the political process that brought it into being. Its legal nature was subsequently confirmed in two important decisions on the legality and jurisdiction of the Tribunal, rendered by the court itself.

(p.33) 3.2 The Political Process that Established the STL as the Primary Influence on its Unique Legal Nature

3.2.1 From fact-finding mission to the UN International Independent Investigation Commission

Less than forty-eight hours after the explosion that killed Hariri, the President of the UN Security Council issued a statement on behalf of the Council, after consultation with its members.[3] The statement repeatedly described the explosion as a terrorist act within the meaning of Security Council Resolutions 1566 (2004) and 1373 (2001). The President expressed the Security Council's grave concern at the potential destabilizing effect the explosion might have on Lebanon and called for the perpetrators, organizers, and sponsors of the 'heinous terrorist act' to be brought to justice. Finally, the Security Council requested the Secretary-General to monitor the situation closely and 'to report urgently on the circumstances, causes and consequences of this terrorist act'.

A few days thereafter, the Secretary-General announced that he was sending a fact-finding mission to Beirut to gather such information as necessary for him to report to the Security Council in a timely manner. The mission submitted its report within one month of having first commenced inquiries into the assassination of Rafiq Hariri.

The most important conclusion reached by the mission, and which was to determine the following steps that were taken, was that the Lebanese investigation process 'has neither the capacity nor the commitment to reach a satisfactory and credible conclusion'.[4] Accordingly, the mission recommended entrusting the investigation to an international independent commission with the necessary executive authority to carry out its tasks. This recommendation was subsequently endorsed by then Secretary-General Kofi

Annan.[5]

Following the Lebanese Government's approval of the establishment of an investigative commission and its expression of readiness to cooperate fully with any such commission within the framework of Lebanese sovereignty and its legal system,[6] the Security Council adopted Resolution 1595 on 7 April 2005. The Resolution established the UN International Independent Investigation Commission ('UNIIIC' or 'the Commission'), whose mandate was to assist the Lebanese authorities in their investigation and identification of the terrorist act's perpetrators, sponsors, organizers, and accomplices. The Resolution further called on the Lebanese Government to ensure that the findings and conclusions of the Commission's investigation were taken fully into account.

(p.34) The UNIIIC was headed successively by Detlev Mehlis, Serge Brammertz, and Daniel Bellemare. The Commission issued eleven reports during its operation from 20 October 2005 to 2 December 2008.[7]

3.2.2 The scarcity of available options

The political climate during the operation of the Commission was such that, by the end of 2005, several assassinations and attempted assassinations had been directed against politicians, political activists, and journalists, in addition to terrorist bombings which claimed the lives of innocent people and caused physical and material damage in several areas of Lebanon. The Future Parliamentary Bloc, which was headed by the late Rafiq Hariri and which constituted one-third of the members of the Lebanese Parliament, issued a memorandum on 10 October 2005 to the foreign ambassadors in Lebanon, including the representatives of the permanent members of the Security Council seeking support for the establishment of an **(p.35)** international tribunal that would put an end to the chain of terrorist acts committed in Lebanon and in other countries in the Middle East.

There were relatively few options available to the Government. The case was too complex to be handled by the regular Lebanese judicial system, although it had already been referred to the Judicial Council, a special tribunal having jurisdiction over criminal cases that the Government considers affects the public security of the state.

On the international level, there were even fewer options. The International Criminal Court (ICC), which was established by the entry into force of the Rome Statute on 1 July 2002, currently only has subject matter jurisdiction over acts of genocide, crimes against humanity, and war crimes that are of sufficient gravity.[8] Arguably, acts of terrorism fall outside the ICC's jurisdiction.[9]

On the other hand, the ad hoc tribunals—the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—were established in response to the commission of large-scale and grave international crimes in those countries alone.

Neither of these scenarios was therefore appropriate for Lebanon.

3.2.3 Concluding in favour of a mixed tribunal established by agreement between Lebanon and the UN

The sole remaining option for having those responsible for the killing of Rafiq Haririr and twenty-two others tried by an international tribunal was to establish it as a tribunal of international character based on an agreement between the United Nations and Lebanon upon the request of the latter. The assassination of Member of Parliament, Gebran Tueni, by a car bomb on 12 December 2005 in an industrial suburb of Beirut increased the call for an international process to be set in motion and prompted the decision of the Lebanese government to request one that very day.

Following a meeting held the day of Gebran Tueni's death, the Lebanese Government addressed two requests to the UN Secretary-General in a letter dated 13 December 2005.[10] The first was to request the establishment of an international tribunal with a mandate to try those responsible for the assassination of Rafiq Hariri. The second request was to expand the mandate of the Commission so that it could investigate the terrorist attacks that had taken place in Lebanon since 1 October 2004. The requests of the Lebanese Government also coincided with the submission of the Commission's first report to the Security Council.

(p.36) In response to the Lebanese requests, the Security Council, in its meeting of 15 December 2005, and acting under Chapter VII of the UN Charter,[11] authorized the Commission to extend its technical assistance 'as appropriate' to the Lebanese authorities in relation to the terrorist attacks perpetrated in Lebanon since 1 October 2004. The Security Council also requested the Secretary-General to help the Lebanese Government identify the nature and scope of the international assistance needed to try those eventually charged with the terrorist attack against Rafiq Hariri before an international tribunal.[12]

The Secretary-General had already stated in his report of 21 March 2006 to the Security Council that a purely national tribunal would not be able to effectively fulfil the task of trying those accused of the attack.[13] However, a purely international tribunal did not appear to him appropriate either, as it would have the effect of removing Lebanese responsibility for seeing justice done regarding a crime that primarily and significantly affected Lebanon. Therefore, the establishment of a mixed tribunal would, in the opinion of the Secretary-General, best balance the need for Lebanese and international involvement in the work of the tribunal.

The Secretary-General recalled the experience of the United Nations over the past thirteen years, which revealed three different types of founding instruments for international or internationally assisted tribunals. A variety of tribunals have been established: by Security Council resolution; by international treaty; by national statute; or by agreement between the United Nations and the state concerned. A key lesson from these experiences was that the interested state should be involved in the establishment of the tribunal. After thorough discussion, the Secretary-General concluded that it would be most appropriate to establish the tribunal through an agreement concluded between Lebanon and the United Nations. It would be up to the

Lebanese authorities to determine whether national legislative action were needed for the conclusion of such an agreement. However, such an approach would not exclude the need for the Security Council to take complementary measures to ensure the effectiveness of, and also cooperation with, the tribunal.

In Resolution 1664 of 29 March 2006, the Security Council endorsed the report of the Secretary-General and requested the latter to negotiate an agreement with the Government of Lebanon aimed at establishing an international tribunal based on the highest international standards of criminal justice.

3.2.4 Negotiating a draft agreement and statute for the STL

Initial consultations took place in Beirut in January 2006, at which time several issues were raised by the Lebanese authorities, including the right of the Tribunal to try accused persons *in absentia*. Although trials *in absentia* were unprecedented in **(p.37)** international criminal courts, the UN experts advised the Lebanese authorities that the idea needed careful consideration so as to sufficiently protect the rights of the accused persons and they requested details of the content of Lebanese criminal laws.

Subsequently, lengthy negotiations continued in New York and The Hague at the experts' level for several months until a draft agreement establishing a Special Tribunal for Lebanon and a statute were agreed upon.[14]

The main features of these two documents were analysed in the report of the Secretary-General to the Security Council of 15 November 2006.[15] The legal nature of the proposed tribunal was also examined in the said report, which stressed that the Tribunal would be a treaty-based organ. It would be neither a subsidiary organ of the United Nations nor a part of the Lebanese court system.

The drafts were forwarded formally on 9 November 2006 to the Prime Minister of Lebanon by the Secretary-General. The Government was convened three days later in an extraordinary session to review the draft founding instruments of the Tribunal and approve them.

The President of the Republic opposed this decision in a letter to the Council of Ministers relying on article 52 of the Lebanese Constitution, which provides that the President of the Republic negotiates international treaties in agreement with the Prime Minister.[16] The President also noted that, as he had received the drafts only a few days ago, he needed more time for their review before he could be in a position to comment. The President's opposition came at the same time as the resignation of five Shiite members of the Council of Ministers who, although they accepted the establishment of the Tribunal in principle, resigned because they felt that they had not been adequately consulted.

The Government approved the draft agreement and the Statute of the Tribunal, without the support of the President of the Republic or the resigning Ministers. Immediately thereafter, the Prime Minister informed the Secretary-General that the Council of Ministers had agreed to the draft and that he looked forward to the completion of the

remaining steps leading to the establishment of the Tribunal. The observations of the President of Lebanon, including a challenge to the decision of the Council of Ministers, were also forwarded to the Secretary-General.

In an addendum to the November 2006 report of the Secretary-General, Nicolas Michel, then Under-Secretary-General for Legal Affairs to the Security Council, provided additional information to the Security Council regarding the negotiations **(p.38)** that led to the preparation of the drafts.[17] First, he emphasized the fact that the Lebanese negotiators were designated by a consensus decision of the Government of Lebanon, under the leadership of the President of the Republic himself. Secondly, both the principle and the substance of the negotiations benefited from the unanimous support of the Lebanese national dialogue for the establishment of the Tribunal. Thirdly, the Lebanese constitutional process for the conclusion of an agreement with the United Nations had not been completed. Major steps remained to be taken, mainly the formal approval by the Government of Lebanon, which is the prerequisite for the signature of the treaty, its submission for parliamentary approval and, ultimately, its ratification. Absent such formal approval by the Government, the Republic of Lebanon had not entered into an internationally binding commitment.

On 21 November 2006, the President of the Security Council addressed a letter to the Secretary-General advising him that the members of the Council were satisfied with the agreement and the Statute of the Tribunal, and that they invite him to proceed to the conclusion of the agreement with the Government of Lebanon, 'in conformity with the Constitution of Lebanon'.

That same day, Pierre Gemayel, the Lebanese Minister of Industry, was assassinated at close range whilst driving his car in Jdeideh, northern Beirut. Gemayel belonged to the same majority coalition as Gebran Tueni and his assassination had the effect of accelerating the process of approval of the Tribunal's founding documents by the Lebanese Government. Indeed, in its meeting of 25 November 2006, the Government approved the agreement with the United Nations together with the Statute of the Tribunal and decided to transfer the documents to Parliament requesting its authorization for ratification.

However, this acceleration of the approval process did not prevent the controversy that arose with respect to the legitimacy of the Government and the legality of its decision to establish the STL. On the one hand, the President of the Republic considered that transferring the drafts to Parliament without passing them through the Presidency was a breach of the Constitution and an unacceptable interference with his own prerogatives. On the other hand, the Speaker of the House of Parliament challenged the legitimacy of the Government acting without the now resigned Shia community representatives, thus violating article 95 of the Constitution, which provides that the religious communities shall be represented in an equitable manner in the formation of the Cabinet. Based on this argument, the Speaker decided to boycott the Government and declared that, as long as the Government was without the Shiite ministers, he would not accept any petition or draft emanating from it.

The confrontation between the Government and the then opposition—the March 8 coalition[18]—took a serious turn when the latter ordered a sit-in in front **(p.39)** of the offices of the Prime Minister at the Grand Sérail, which lasted several months, accompanied by huge demonstrations in the streets and squares of Beirut.

In response, the Government published the agreement and the Statute of the Tribunal in the *Official Gazette* on 14 December 2006. It also empowered the Director General of the Ministry of Justice to sign the agreement on behalf of the Lebanese Republic, which he did in Beirut on 22 January 2007. The same document was signed by Nicolas Michel, on behalf of the United Nations in New York on 6 February 2007. Almost simultaneously, this author was requested, as a Member of Parliament, to draft a petition in the name of the majority to call on the House Speaker to hold a special meeting of Parliament to discuss the agreement. The said petition, which was signed by 70 MPs, is an important document, as it was referred to by the Prime Minister in his letter to the UN Secretary-General and was specifically mentioned in the Security Council resolution establishing the Tribunal. The signatories of the petition emphasized that they represented the absolute majority of the Members of Parliament and stated that they had examined the agreement published in the *Official Gazette* and the Statute of the Tribunal. They added the following:

> Convinced that ratifying the Agreement and proceeding with the establishment of the Tribunal of international character would reduce the existing tension and facilitate reaching a solution to the political crisis from which the country and the citizens have been suffering for a long time,
>
> The undersigned Members of Parliament
>
> Call on the House Speaker to hold a special meeting of the Parliament as soon as possible to discuss the above-mentioned Agreement.
>
> And declare here and now that, after having reviewed the texts published in the Official Gazette, they agree on the provisions of the Agreement on the establishment of a Special Tribunal for Lebanon and on the Statute of the said Tribunal as approved by the Council of Ministers and they request the government to ratify them according to established rules.

The petition, dated 20 December 2006, was handed by four MPs to the Secretary-General of Parliament, who refused to receive it on the pretext that the agreement and the annexed Statute had not yet been referred to the Parliament. Faced with this refusal, the MPs had no other choice but to forward the petition by mail.

In his letter dated 14 May 2007 to the UN Secretary-General, the Prime Minister of Lebanon referred to the parliamentary petition in these terms:

> As you will have also seen from the communication from members of parliament, a parliamentary majority has expressed its support for the Tribunal and readiness to

formally ratify it in the parliament if only a session could be convened.[19]

The Prime Minister added that the time had come for the Security Council to help make the Special Tribunal for Lebanon a reality. He also hinted that a binding decision regarding the Tribunal on the part of the Security Council would be fully consistent with the importance the United Nations had attached to this matter from the outset.

(p.40) 3.3 The Founding Instrument of the STL: Security Council Resolution 1757

3.3.1 The terms of Security Council Resolution 1757

On 30 May 2007, the Security Council, acting under Chapter VII of the UN Charter, issued Resolution 1757 (2007). The Resolution was adopted by ten favourable votes while five states abstained, namely Qatar, Indonesia, South Africa, China, and the Russian Federation.[20]

Qatar's representative was of the opinion that submitting the text under Chapter VII went beyond the designated aim of endorsing the establishment of the Tribunal, especially in light of the 'complicated and delicate political situation in Lebanon'. Qatar was apprehensive that the draft under Chapter VII would not bring stability to the country.[21]

The Indonesian representative pointed out that, if adopted, the Resolution would bypass constitutional procedure and national processes contrary to the UN Charter, which stressed that nothing contained therein authorizes the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any state.[22]

South Africa believed that it was inappropriate for the Security Council to impose such a tribunal on Lebanon, particularly under Chapter VII. By resorting to such a measure, the Council was contravening its own mandate under the Charter. Adopting the text as it stood might also politicize international law.[23]

For China, the tribunal was essentially a domestic matter for Lebanon. By invoking Chapter VII, the Resolution was arbitrarily deciding on the Statute's entry into force, which would create a precedent of Security Council interference in the internal affairs of a sovereign state.[24]

The Russian Federation was more categorical. Its representative said that a basis for adopting the Resolution under Chapter VII did not exist. He added that this measure had been invoked in the establishment of the Tribunals for the former Yugoslavia and for Rwanda, which both dealt with crimes against humanity and genocide, which was not the case for Lebanon. Security Council action at this stage, before negotiations had been concluded in Lebanon, could be seen as interfering in Lebanese affairs. He added that the hasty tabling of a vote on a resolution with considerable legal shortcomings had forced Russia to abstain.[25]

The Security Council, in order to strengthen its position and avoid appearing as if it was

interfering with Lebanese internal affairs or imposing the Tribunal on **(p.41)** Lebanon against its own will, recalled several important facts. The Resolution began by recalling the Lebanese request of 13 December 2005 to establish a tribunal of an international character to try all those responsible for the terrorist act that was committed on 14 February 2005. It further recalled the negotiations and consultations that took place between January 2006 and September 2006 in Beirut, New York, and The Hague between the legal counsel of the United Nations and authorized representatives of the Government of Lebanon. It also recalled that the agreement on the establishment of the Tribunal was signed by both the Government of Lebanon and the United Nations. Most importantly, the Resolution referred to the aforementioned letter of the Prime Minister of Lebanon, which itself referred to the fact that the parliamentary majority had expressed its support for the Tribunal.

The Resolution also referred to the briefing by legal counsel, Nicholas Michel, in which he noted that the constitutional process is facing serious obstacles but that all parties concerned had nevertheless reaffirmed their agreement, in principle, to the establishment of the Tribunal.

Finally, it is important to focus on the wording of the Resolution, which provides that:

> The *provisions* of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19(1) of the annexed document before that date.[26]

In anticipation of any lack of cooperation from Lebanon, either in the choice of the seat of the Tribunal or in the contribution to the expenses of the Tribunal, the Resolution foresaw alternate solutions:

> If the Secretary-General reports that the Headquarters Agreement has not been concluded as envisioned under Article 8 of the annexed document, the location of the seat of the Tribunal shall be determined in consultation with the Government of Lebanon and be subject to the conclusion of a Headquarters Agreement between the United Nations and the State that hosts the Tribunal;
>
> If the Secretary-General reports that contributions from the Government of Lebanon are not sufficient to bear the expenses described in Article 5(b) of the annexed document, he may accept or use voluntary contributions from States to cover any shortfall.[27]

In his report of 4 September 2007, the Secretary-General advised the Security Council that since no notification had been received from the Lebanese Government, the provisions of the agreement and the Statute entered into force on 10 June 2007.[28]

(p.42) 3.3.2 The extent of cooperation by the Lebanese authorities with the Secretary-General in the implementation of Resolution 1757

Pursuant to article 8 of the annex to Security Council Resolution 1757, the Tribunal was to have its seat outside Lebanon for various reasons. Its location is subject to the conclusion of a headquarters agreement between three parties, ie the United Nations, the Government of Lebanon, and the hosting state. In his September 2007 report, the Secretary-General highlighted the efforts that he had undertaken to obtain the acceptance of the Government of the Netherlands to host the STL.[29] The headquarters agreement was negotiated by a delegation led by the legal counsel of the United Nations and the agreement itself was concluded on 21 December 2007 between the United Nations and the Kingdom of the Netherlands alone. However, the said agreement stated in its preamble that 'the Lebanese Republic has expressed its gratitude to the Kingdom of the Netherlands for its willingness to host the Special Tribunal for Lebanon and has been consulted' in this respect.[30]

The appointment of judges is the responsibility of the Secretary-General, who appoints the Lebanese judges from a list of twelve persons presented by the Government of Lebanon upon the proposal of the Lebanese Supreme Council of the Judiciary. Indeed, the Government of Lebanon forwarded its proposals to the Secretary-General on 10 July 2007.

The Deputy Prosecutor, on the other hand, is appointed by the Government of Lebanon in consultation with the Secretary-General and the Prosecutor. In practice, the Lebanese Government forwarded to the Secretary-General a list of suggested names and the Deputy-Prosecutor was ultimately appointed by decree on 12 June 2009.[31]

As far as the funding of the Tribunal is concerned, Lebanon, which bears forty-nine per cent of the expenses, has continuously met its contribution despite the political changes in the governing majority.

The idea of a Management Committee, which would provide advice and policy direction on the operation of the Tribunal including on questions of efficiency, was agreed by the Lebanese Government. The Government also agreed to entrust the United Nations, in consultation with the Government, with establishing the said committee and drafting its terms of reference.

The establishment of the Tribunal took almost two years, during which time the judges of the Tribunal were appointed, the financial means for its operation were received, and the staff recruited and appointed. The Tribunal was inaugurated and started functioning on 1 March 2009.

(p.43) The Security Council relied heavily on the cooperation of Lebanon to implement the necessary steps for the establishment of the Tribunal during this period. Except for the Headquarters Agreement with the host state of the Tribunal, which was not signed by the Lebanese Government, Lebanon complied with all other obligations of the agreement by taking the required steps. As reported in the decision of the Trial Chamber, Lebanon presented a list of twelve persons to be appointed as judges by the Secretary-General and appointed a Deputy Prosecutor. Lebanon also recognized the

judicial capacity of the Tribunal to enter into agreements with states by concluding a Memorandum of Understanding (MoU) with the Tribunal on 17 June 2009, a MoU with the Prosecutor on 5 June 2009, and a third MoU with the Defence Office on 28 July 2010.[32] Lebanon has also contributed to financing the Tribunal, facilitated the establishment of the Tribunal's Beirut field office, generally complied with requests for assistance from the Tribunal, and has referred to the Tribunal's jurisdiction the cases related to the 14 February 2005 attack.

It took more than two years before the Prosecutor filed his first indictment against Salim Jamil Ayyash, which was subsequently amended to add charges against three more accused: Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra.[33] The indictment was confirmed by the pre-trial judge on 28 June 2011.[34] Following the failure by the accused persons to appear after 30 days of public advertisement, the accused were represented by counsel appointed by the head of the Defence Office.[35]

(p.44) 3.4 The Judicial Process Confirming the Legal Nature of the Tribunal: Defence Challenges to Jurisdiction and Legality

Defence counsel for the accused in the *Ayyash et al* case challenged the jurisdiction and legality of the Tribunal.[36] The Trial Chamber dismissed all defence motions on 27 July 2012 on the grounds that it was not competent to judicially review the actions of the Security Council in establishing the Tribunal.[37] The decision was appealed by defence counsel for Ayyash, Badreddine, and Oneissi.[38] On 24 October 2012, the Appeals Chamber unanimously dismissed the appeals, albeit with two dissenting opinions.[39]

What led to the dismissal of the challenge of the legality of the Tribunal? The Trial Chamber was required to decide the question of whether it had jurisdiction to review and determine its own legality as part of its '*compétence de la compétence*'. In its decision, the Trial Chamber held that 'legality' and 'jurisdiction' are separate legal concepts. Whereas a challenge to the legality of the Tribunal attacks its legal basis or foundation, jurisdiction is a judicial body's competence to adjudicate a matter before it. The Trial Chamber reached the conclusion that the Tribunal's Rules of Procedure and Evidence ('RPE' or 'the Rules') refer to challenges to 'jurisdiction' exclusively and therefore the motions of the defence do not fall within the definition of a 'preliminary motion'.[40]

However, for the sake of fairness, and in line with the Statute's guarantees for the accused to be tried by a court 'established by law'—a right which is non-derogable and absolute—the Trial Chamber went on to discuss its own legality. The reasoning which led the Trial Chamber to ultimately dismiss the defence claims can be summarized as follows.

(p.45) It is legally indisputable that the intended agreement establishing the Tribunal was not adopted as a treaty under Lebanese constitutional law. Rather, the Tribunal is a creation of the Security Council, which may create judicial bodies and which has already created ad hoc criminal tribunals. The sole legal basis establishing the Tribunal is Security Council Resolution 1757, which provided that the *provisions* of the draft agreement

would enter into force, rather than the draft agreement itself. For the Trial Chamber, the seemingly semantic difference is essential in understanding and interpreting the foundation of the Tribunal. Consequently, it was not necessary to examine the issues related to the violation of the Lebanese Constitution.

Accordingly, 'the Tribunal is purely a creature of a Security Council Resolution' and, since the Tribunal is not vested with any power to review the actions taken by the Security Council, it may not review its own legality.[41]

The Appeals Chamber, with two dissenting opinions, confirmed the conclusions reached by the Trial Chamber. It maintained that the wording of Resolution 1757 does not make reference to the entering into force of the draft agreement that was concluded between Lebanon and the UN but never ratified by the former, but rather refers to its provisions. It added that there is no indication that the Security Council considered replacing Lebanon's consent to the draft agreement by implementing it as an agreement, rather than exercising its powers under Chapter VII to bring into force the provisions of the draft agreement by virtue of their inclusion in a Security Council resolution.[42]

The Appeals Chamber noted that such an approach is not unprecedented. In several other instances, and in particular with respect to terrorism, the Security Council has brought into force the provisions of a non-binding document, agreed to by the parties but not ratified according to the procedure in place. In such cases, the Security Council simply imposed binding legal consequences extracted from the substance of the document under its Chapter VII powers.[43] It is, therefore, irrelevant that the term 'agreement' was maintained in the annex to Security Council Resolution 1757. What is important is the content of the Resolution, which intended to effect the provisions of the annex, regardless of minor terminological discrepancies.[44]

In summary, for the Appeals Chamber, the Tribunal was not established by international agreement or treaty, but by Resolution 1757 adopted pursuant to Chapter VII of the UN Charter. Lebanon, as a founding member of the United Nations, gave its consent to be bound by Chapter VII decisions. Consequently, the Trial Chamber did not err in not considering the alleged violations of the Lebanese Constitution.

On the other hand, the Appeals Chamber noted that the Security Council had broad discretion to characterize a particular situation as a threat to international peace and security. In previous resolutions, the Security Council had done so with **(p.46)** respect to the terrorist act of 14 February 2005, which killed Prime Minister Hariri. Nothing in the UN Charter gives any of the other organs of the United Nations the power to review the Security Council's actions.[45]

The Appeals Chamber recalled that the only known exception is the ICTY Appeals Chamber's interlocutory decision on jurisdiction in *Tadić,*[46] wherein the Chamber, by majority, decided that it had the authority to examine the appeal against its jurisdiction even though such appeal was based on the invalidity of the ICTY's establishment by the Security Council. However, the STL Appeals Chamber found that, although they may

generally rely on the jurisprudence of other international courts, a majority of the chamber was not persuaded by the reasoning in *Tadić* and declined to follow it.[47]

Moreover, the Appeals Chamber held that the Special Tribunal, *as a body not integrated in the United Nations system*, cannot pretend to possess the power to supervise any of the organs of the United Nations in the discharge of their mandate under the Charter.[48]

From a review of the decisions on legality and jurisdiction rendered by the Trial Chamber and the Appeals Chamber, together with the dissenting opinion of Judge Baragwanath, one can detect the way in which the Tribunal defines its own legal nature.

For the Trial Chamber, since the 'agreement' between the United Nations and the Lebanese Republic was not adopted under Lebanese constitutional law, Security Council Resolution 1757 is the sole legal basis of establishing the Tribunal. Lebanon's actions in complying with the draft agreement derive, not from the draft agreement itself, but rather from the binding effect of a Security Council Resolution. Accordingly, 'the Tribunal is purely a creature of a Security Council Resolution'.[49] It will cease to exist if the Security Council resolves to abolish it.

The Appeals Chamber was even more explicit on this subject. Its decision identifies the Tribunal as an independent institution created by the Security Council outside the United Nations system. The decision also later refers to the Tribunal not being part of the United Nations. This conclusion is borne out by several factors. First, the Tribunal is not funded from the United Nations budget as approved by the General Assembly. Secondly, whilst it was created by a Security Council resolution, the Tribunal is not an organ of the United Nations. Thirdly, the Convention on Privileges and Immunities of the United Nations[50] does not apply per se to the Tribunal. Finally, and most importantly, the Appeals Chamber concluded that the Tribunal does not enjoy a status similar to that of the ICTY and ICTR. It is a separate subject of international law.

(p.47) Judge Baragwanath, in his dissenting opinion, concurs with the assertion of the Trial Chamber that the Special Tribunal for Lebanon is the creation of the Security Council, but for him the Tribunal is not a mere *creature*. What has been created is a court of law, a tribunal of independent judges, which suggests that they will accord to the accused the right to insist that the Tribunal is duly 'established by law'. The rule of law requires that the legality of the conduct of any body lacking plenary authority be subject to judicial review.[51]

In the light of the foregoing, it is clear that the Special Tribunal for Lebanon is not what the Secretary-General expected it to be: a treaty-based organ. Due to the political crisis in Lebanon, the agreement reached after months of negotiations between representatives of the United Nations and the Lebanese Government was never, as it should have been, ratified by the Parliament. Some in Lebanon, including the House Speaker, challenged even the legitimacy of the Government, which signed the agreement after the resignation of the Shiite ministers.[52]

Faced with this deadlock, the Security Council resorted to a subterfuge. It recalled the request of the Lebanese Government to establish a tribunal of international character to try those who will be found responsible of the bombing of 14 February 2005 and the petition signed by the majority of the Lebanese MPs approving the agreement. By virtue of its powers under Chapter VII, the Security Council ordered that the *provisions of the agreement* on the establishment of a Special Tribunal for Lebanon, not the agreement itself, should enter into force on 10 June 2007 unless the Lebanese legal requirements for the entry into force had been complied with prior to this date.

This sequence of events explains the Trial Chamber's assertion that the Tribunal is purely a creature of a Security Council resolution. The Appeals Chamber confirmed this assertion and described the Tribunal as an independent institution created outside the United Nations system. In its decision on jurisdiction and legality, the Appeals Chamber stated that the Tribunal is neither an organ of the UN nor does it enjoy the same status as other courts established by Security Council resolution.

Indeed, by virtue of article 29 of the UN Charter, the Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions. The said organs, when established, become part of the United Nations system. This was the case for the Tribunals for the former Yugoslavia and for Rwanda, which were—like the STL—created by a resolution of the Security Council acting under Chapter VII. However, unlike the STL, the ICTY and ICTR are subsidiary organs of the UN and, as such, dependant on the Security Council for administrative and financial matters. Consequently, all UN Members are bound to comply with the requests and decisions of both tribunals. Non-compliant and non-collaborative states can be referred to the Security Council for sanction.

(p.48) This was not the case for the Special Tribunal for Lebanon. The Security Council did not impose the 'agreement' on Lebanon but gave binding effect to its provisions. Furthermore, although the Tribunal was established by the Security Council acting under Chapter VII, third states are free to decide whether or not to cooperate with the Tribunal.[53] There is no reference in Resolution 1757 to an obligation on states other than Lebanon to cooperate with the Tribunal.

Neither is the STL comparable to treaty-based 'internationalized' criminal courts like the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Unlike these courts, the Special Tribunal for Lebanon does not have jurisdiction over international crimes. Rather, the Tribunal was established to try those responsible for one particular act of terrorism: the bombing that killed former Prime Minister Rafiq Hariri and others, and connected crimes. Furthermore, the Tribunal is concurrently competent with the Lebanese judicial authorities, although it has primacy over them. These features distinguish the STL from all the other hybrid international criminal courts like the SCSL and the ECCC.

During the negotiation of the Statute of the Tribunal, it was proposed that the Tribunal also have jurisdiction over crimes against humanity. The rationale was that the series of

attacks that occurred in Lebanon could be considered as 'collective' in nature. However, after consultation with the members of the Security Council, it appeared to the Secretary-General that there was insufficient support for the inclusion of crimes against humanity within the jurisdiction of the Tribunal.[54] With respect to the single crime over which the Tribunal has jurisdiction—terrorism—no internationally agreed definition exists; thus, the Statute of the Tribunal referred to the provisions of the Lebanese Criminal Code and another Lebanese criminal law as applicable law to the prosecution and punishment of the crime.[55]

The Statute of the Tribunal is also innovative with respect to the applicable procedural law. A few examples to mention include the institution of a pre-trial judge to balance the powers of the Prosecutor who investigates and indicts at the same time, the role of the judges in the conduct of the hearings, and the participation of victims in the proceedings. Most importantly, however, the applicable procedural law guarantees the power of the Tribunal to hold trials *in absentia*. **(p.49)** In this respect, the STL is the only international tribunal that departs from the traditional position of the United Nations, namely consistently requiring the presence of the accused as a condition of fair trial. Trial *in absentia* was initially requested by the Lebanese delegation during the drafting of the agreement and the Tribunal's Statute in order to ensure that the legal process was not indefinitely delayed because of the absence of some accused. The introduction of this provision was, nevertheless, accompanied by many measures aiming to guarantee a fair trial to the absentees.[56]

3.5 Conclusion

The Special Tribunal for Lebanon is a *sui generis* international institution, which should be examined and addressed as such. It is unique in the way in which it was established, in its narrow mandate restricted to one attack and crimes connected thereto, and in the mixture of common law and inquisitorial procedural rules which permit the holding of trials *in absentia*.

The Tribunal is not a treaty-based international tribunal because its founding instrument is not a treaty duly ratified by Lebanon. Neither is it a tribunal integrated into the Lebanese court system, although the Tribunal does have jurisdiction over a crime that occurred on Lebanese territory and its applicable law is that of Lebanon. The Statute of the STL reflects the paradox of a tribunal of an international character, which tries a purely domestic crime on the basis of domestic legislation.

Notes:

(*) Former Minister of Justice of Lebanon.

([1]) Report of the Fact-Finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Rafik Hariri, UN Doc S/2005/203 (2005) paras 1, 26, 30.

([2]) Fact-Finding Mission Report (n1) para 32.

([3]) Statement by the President of the Security Council, UN Doc S/PRST/2005/4 (2005).

([4]) Fact-Finding Mission Report (n1).

([5]) Letter Dated 24 March 2005 from the Secretary-General to the President of the Security Council, UN Doc S/2005/203 (2005).

([6]) Letter Dated 29 March 2005 from the Chargé d'Affaires ai of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General, UN Doc S/2005/208 (2005).

([7]) Annex to Letter Dated 20 October 2005 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2005/662 (2005) [Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005)]; Annex to Letter Dated 12 December 2005 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2005/775 (2005) [Second Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005) and 1636 (2005)]; Annex to Letter Dated 14 March 2006 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2006/161 (2006) [Third Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005)]; Annex to Letter Dated 10 June 2006 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2006/375 (2006) [Fourth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005)]; Annex to Letter Dated 25 September 2006 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2006/760 (2006) [Fifth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005)]; Annex to Letter Dated 12 December 2006 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2006/962 (2006) [Sixth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005)]; Annex to Letter Dated 15 March 2007 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2007/150 (2007) [Seventh Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005), 1644 (2005) and 1686 (2006)]; Annex to Letter Dated 12 July 2007 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2007/424 (2007) [Eighth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007)]; Annex to Letter Dated 28 November 2007 from the Secretary-General to the President of the Security Council, UN Doc S/2007/684 (2007) [Ninth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007)];

Annex to Letter Dated 28 March 2008 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2008/210 (2008) [Tenth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007)]; Annex to Letter Dated 2 December 2008 from the Secretary-General to the President of the Security Council, UN Doc S/2008/752 (2008) [Eleventh Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006), 1748 (2007) and 1815 (2008)].

([8]) (ICC Statute) (Rome, 17 July 1998, 2187 UNTS 90) arts 5–8.

([9]) See eg Richard J Goldstone and Janine Simpson, 'Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism' (2003) 16 *Harv Hum Rts J* 13; Vincent-Joël Proulx, 'Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?' (2004) 19 *Am U Int'l L Rev* 1009.

([10]) Letter Dated 13 December 2005 from the Chargé d'Affaires ai of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General, UN Doc S/2005/783 (2005).

([11]) (San Francisco, 26 June 1945, 1 UNTS XVI).

([12]) SC Res 1644, UN Doc S/RES/1644 (2005).

([13]) Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1644 (2005), UN Doc S/2006/176 (2006).

([14]) The provisions of the draft agreement which entered into force can be found in the Annex to SC Res 1757, UN Doc S/RES/1757 (2007) [Agreement Establishing the Special Tribunal for Lebanon]. This must be distinguished from the draft agreement itself, which was concluded between Lebanon and the UN and which ultimately never entered into force as it was not ratified by the Lebanese Parliament. To avoid any terminological confusion, the term 'Annex to Security Council Resolution 1757' will be used to refer to those provisions of the draft agreement which were brought into force by Security Council Resolution 1757. The Statute of the STL can be found in the Attachment to SC Res 1757, UN Doc S/RES/1757 (2007).

([15]) Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, UN Doc S/2006/893 (2006).

([16]) (Beirut, 23 May 1926).

([17]) Addendum to Report of the Secretary-General (n15), UN Doc S/2006/893/Add.1 [Statement by Mr Nicolas Michel, Under-Secretary-General for Legal Affairs, the Legal Counsel, at the Informal Consultations held by the Security Council on 20 November

2006].

([18]) The coalition earned its name from the pro-Syrian demonstration held in Beirut on 8 March 2005. Another coalition, named the 14 March coalition, is named after the demonstration held a few days later.

([19]) Letter Dated 15 May 2007 from the Secretary-General to the President of the Security Council, UN Doc S/2007/281 (2007).

([20]) The statements of the five abstaining states can be found in the Record of the Security Council's 5685th Meeting, UN Doc S/PV.5685 (2007).

([21]) Record of the Security Council's 5685th Meeting (n20) 3.

([22]) Record of the Security Council's 5685th Meeting (n20).

([23]) Record of the Security Council's 5685th Meeting (n20) 3–4.

([24]) Record of the Security Council's 5685th Meeting (n20) 4.

([25]) Record of the Security Council's 5685th Meeting (n20) 5.

([26]) Record of the Security Council's 5685th Meeting (n20) operative para 1 (emphasis added). If the Lebanese Parliament had ratified the agreement in the meantime, the Tribunal would have been, no doubt, a treaty-based organ.

([27]) Record of the Security Council's 5685th Meeting (n20).

([28]) Report of the Secretary-General Submitted Pursuant to Security Council Resolution 1757 (2007) of 30 May 2007, UN Doc S/2007/525 (2007).

([29]) Report of the Secretary-General Submitted Pursuant to Security Council Resolution 1757 (n28) para 6.

([30]) Agreement between the Kingdom of the Netherlands and the United Nations Concerning the Headquarters of the Special Tribunal for Lebanon (New York, 21 December 2007, *Tractenblad* 2007, 228).

([31]) Presidential Decree No 2233 (Lebanon) (12 June 2009).

([32]) Memorandum of Understanding between the Government of the Republic of Lebanon and the Special Tribunal for Lebanon Concerning the Office of the Special Tribunal in Lebanon (Beirut, 17 June 2009); Memorandum of Understanding between the Government of the Republic of Lebanon and the Office of the Prosecutor of the Special Tribunal for Lebanon Regarding the Modalities of Cooperation Between Them (Beirut, 5 June 2009); Memorandum of Understanding between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation (28 July 2010).

([33]) STL, Submission of an Indictment for Confirmation (Rule 68); (1) Motion for an Arrest Warrant and Order for Transfer (Rule 79); (2) Urgent Motion for Non-Disclosure of the Indictment (Rule 74); and (3) Urgent Motion for an Order for Interim Non-Disclosure of the Identities of Witnesses Pending the Implementation of Appropriate Witness Protection Measures (Rules 77 and 1I5), Case No STL-11-01/I, Prosecution, 17 January 2011 (confidential and ex parte); STL, Submission of an Amended Indictment for Confirmation (Rules 68 and 71) and Motion for Arrest Warrants and Orders for Transfer, Case No STL-11-01/PT/PTJ, Prosecution, 11 March 2011; STL, Combined Motion of the Prosecutor; (1) Submission of an Indictment for Confirmation (Rule 68), (2) Motion for Continuation of Pre-Trial Judge's Order Dated 19 January 2011 Pursuant to Rule 96(8), and (3) Motions in the Event of Confirmation of the Indictment Pursuant to Rules 74, 77 and 79, Case No STL-11-01/I, Prosecution, 6 May 2011; STL, Indictment, *Prosecutor v Ayyash et al,* Case No STL-11-01/I/PTJ, Prosecution, 10 June 2011.

([34]) STL, Decision Relating to the Examination of the Indictment of 10 June 2011 Submitted Against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 28 June 2011.

([35]) A further indictment was later unsealed in October 2013. STL Case No STL-11-01, *Prosecutor v Ayyash et al*. Confirmed Indictment of 10 June 2011; STL Case No STL-13-04, *Prosecutor v Mehri*, Confirmed Indictment Against Hassan Habib Mehri, 6 August 2013 (made public on 10 October 2013).

([36]) STL, Motion on Behalf of Salim Ayyash Challenging the Legality of the Special Tribunal for Lebanon, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Ayyash Defence, 4 May 2012; STL, Preliminary Motion Challenging Jurisdiction of the Special Tribunal for Lebanon Filed by the Defence of Mr Badreddine, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Badreddine Defence, 9 May 2012; STL, The Defence for Mr Hussein Hassan Oneissi's Motion Challenging the Legality of the Tribunal, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Oneissi Defence, 10 May 2012; STL, Sabra's Preliminary Motion Challenging the Jurisdiction of the Special Tribunal for Lebanon, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Sabra Defence, 9 May 2012.

([37]) STL, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Trial Chamber, 27 July 2012.

([38]) STL, Appellate Brief of the Defence for Mr Badreddine Against the 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Badreddine Defence, 24 August 2012; STL, Appeal Brief of the Oneissi Defence Against the Trial Chamber Decision Relating to the Defence Challenges to the Jurisdiction and Legality of the Tribunal, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Oneissi Defence, 24 August 2012; STL, Interlocutory Appeal on Behalf of Mr Ayyash Against the Trial Chamber's 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal' Dated 30 July 2012, *Prosecutor v Ayyash*

et al, Case No STL-11-01/PT/TC Ayyash Defence, 24 August 2012.

([39]) STL, Decision on Defence Appeals Against the Trial Chambers 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/AC/AR90.1, Appeals Chamber, 24 October 2012.

([40]) Trial Chamber Decision on Jurisdiction and Legality (n37) paras 27–29.

([41]) Trial Chamber Decision on Jurisdiction and Legality (n37) paras 53–55.

([42]) Trial Chamber Decision on Jurisdiction and Legality (n37) para 27.

([43]) Trial Chamber Decision on Jurisdiction and Legality (n37) para 28.

([44]) Trial Chamber Decision on Jurisdiction and Legality (n37) para 29.

([45]) Trial Chamber Decision on Jurisdiction and Legality (n37) paras 33–35.

([46]) ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadić*, Case No IT-94-1-AR72, Appeals Chamber, 2 October 1995.

([47]) Appeals Chamber Decision on Jurisdiction and Legality (n39) paras 41–44.

([48]) Appeals Chamber Decision on Jurisdiction and Legality (n39) para 50.

([49]) Trial Chamber Decision on Jurisdiction and Legality (n39) para 53.

([50]) (New York, 13 February 1946, 1 UNTS 15).

([51]) Appeals Chamber Decision on Jurisdiction and Legality (n39), Separate and Partially Dissenting Opinion of Judge Baragwanath, paras 44–68.

([52]) See Lebanese Constitution (n16) art 95, which provides that the religious communities should be represented equitably in the formation of the Government.

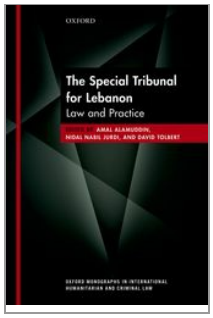
([53]) On the issue of third state cooperation with the STL, see further Göran Sluiter, 'Responding to Cooperation Problems at the STL', Chapter 8.

([54]) Secretary-General's Report on the Establishment of the STL (n15) para 25.

([55]) STL Statute (n14) art 2. For the definition of 'acts of terrorism' under Lebanese domestic law, see Criminal Code (Lebanon), Legislative Decree No 340 of 1 March 1943, art 314: 'The term "acts of terrorism" includes all acts that are intended to cause a state of alarm and have been committed by means such as explosive devices, inflammable substances toxic or corrosive products or infectious or microbial agents that are liable to pose a public threat.' See also Law of 11 January 1958 on Increasing the Penalties for Sedition, Civil War and Interfaith Struggle (Lebanon) art 6: 'All acts of terrorism shall be punishable by hard labour for life. Capital punishment shall be incurred if there were

human fatalities or if a building has been wholly or partially destroyed when a person was inside, or if the act results in the destruction, even partial, of a public building, industrial installation, ship or other structure or damage to communications or transport links'; STL Statute (n14) art 7: 'Conspiracy to commit one of the crimes mentioned in the preceding articles shall be punishable by hard labour for life.'

([56]) On the issue of trials *in absentia* at the STL, see Paola Gaeta, 'Trial *In Absentia* Before the Special Tribunal for Lebanon: Between Myth and Reality', Chapter 12.



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The UN Investigation of the Hariri Assassination

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[–] Abstract and Keywords

This chapter focuses on UN Commission created to investigate the assassination of former Lebanese Prime Minister, Rafiq Hariri, known as the UN International Independent Investigation Commission (UNIIIC). The UNIIIC paved the way for the Special Tribunal for Lebanon and established the foundations of the prosecution case. The discussions cover the UNIIIC's operations; the Commission in context; and the challenges and lessons learned for similar commissions in the future.

Keywords: United Nations, Rafiq Hariri, Lebanese prime minister, UN International Independent Investigation Commission, tribunals

4.1 Introduction

The UN investigation into the assassination of former Lebanese Prime Minister, Rafiq Hariri—known as the International Investigation Commission ('UNIIIC' or 'the Commission')—was unprecedented. For the first time in its history, the UN was involved in a terrorist 'whodunnit', with implications for the entire Middle East region. The result was a complex investigation involving 'co-location analysis' of mobile phone traffic that allowed investigators to match phones used on the day of the assassination with other phones that identified the suspects: four men associated with the Hizbollah group that is backed by Syria and Iran.[1] UNIIIC therefore paved the way for the Special Tribunal for Lebanon ('STL' or 'the Tribunal') to be created and provided the foundations of the prosecution case. Ultimately, the process has led to five indictments, although none of the suspects have been arrested to date.

Unlike some 'commissions of inquiry' created by the UN Human Rights Council, UNIIIC was created by the Security Council under Chapter VII of the UN Charter with a strong mandate and concrete enforcement powers. It was asked to identify the perpetrators of the assassination so that they could be brought to

justice. All UN Members were required to cooperate with its work, with the threat **(p.51)** of sanctions if they did not do so. The contrast with the UN Commission of Inquiry for Syria, created by the UN Human Rights Council, is striking—for over two years its investigators have not been allowed into Syrian territory to collect evidence, and are left waiting at the borders for refugees to cross over and be interviewed.[2] But UNIIIC's strong 'law enforcement' mandate and powers also created a dangerous legal vacuum, with neither the UN nor national authorities taking responsibility for the arrest and detention of suspects or the freezing of assets. The Commission was also heavily criticized for its selective mandate, slow pace, and heavy expense. The positive aspects of the UNIIIC experience should be replicated in the future, where there is real political will to investigate serious crimes at the international level. But there are also lessons to be learned from UNIIIC's failings if future commissions are to ensure that they leave a positive and lasting impact on the states concerned and that they adequately protect human rights in carrying out their work.

4.2 The UN Investigation Commission's Operations

When the bomb that killed former Lebanese Prime Minister, Rafiq Hariri, and twenty-two others exploded in downtown Beirut at midday on 14 February 2005, shock waves reverberated across the whole region.[3] Hariri was one of the region's most prominent Sunni leaders. He had headed five governments in Lebanon over a twelve-year period between 1992 and 2004. He had close contacts in governments from Riyadh to Washington, was on the Forbes top 100 richest persons list, and was the driving force behind Lebanon's post civil-war reconstruction. His removal in the most brutal manner—by a 2,500 kg bomb detonated by a suicide bomber in the middle of the day in downtown Beirut—would shift the regional balance of power. And yet his assassins would not have expected to be held to account. Accountability at the national level was almost unimaginable: political assassinations in Lebanon had gone unpunished for decades, given the weak and divided state and precarious security conditions. And since no international court has jurisdiction over terrorism, international involvement was unexpected.

But on this occasion the UN acted quickly and decisively. While creating an international court from day one would have been premature, an on-the-ground investigation was deemed essential. Within five weeks of the attack, a fact-finding mission led by Irish police officer Peter Fitzgerald had travelled to Lebanon and, on its return, reported to the UN that 'the Lebanese investigation process suffer[ed] from serious flaws and ha[d] neither the capacity nor the commitment to reach a **(p.52)** satisfactory and credible conclusion'.[4] It therefore recommended that the Security Council establish an international independent commission to uncover the truth,[5] and this recommendation was quickly endorsed by the Lebanese Government.[6]

Barely a week later, on 7 April 2005, Security Council Resolution 1595—adopted under Chapter VII of the UN Charter—established the UNIIIC. The Commission's mandate was to 'assist the Lebanese authorities in their investigation of all aspects of th[e] terrorist act' that killed Hariri and 22 others, including to help 'identify its perpetrators, sponsors, organizers and accomplices'.[7] The modalities of cooperation between the Commission and the Lebanese authorities were also set out in a Memorandum of Understanding (MoU) signed on 13 June that year. The MoU gave the Commission the power to determine its own procedures, collect documentary and physical evidence, meet and interview any civilian or state official, and have unrestricted access to all sites throughout Lebanese territory.[8]

The Commission, initially led by senior German Prosecutor Detlev Mehlis, issued its first report in October 2005.[9] Mehlis' report became the first of eleven submitted by successive Commissioners to the Security Council. As the complexity of the investigation became clear and assassinations in Lebanon continued, the Security Council decided to extend the scope of the Commission's mandate and powers. Resolution 1636, adopted in October 2005, gave UNIIIC the ability to conduct investigations with coercive powers in Syria.[10] This was followed by Resolution 1644, which allowed the Commission to 'extend its technical assistance as appropriate to the Lebanese authorities' in the investigations of other 'terrorist attacks perpetrated in Lebanon since 1 October 2004'.[11]

(p.53) By the time the Commission transferred its operations to the Office of the Prosecutor of the Special Tribunal for Lebanon on 1 March 2009, three journalists, six politicians, one army general, and a young police officer credited with deciphering the phone analysis that was key to cracking the Hariri case had all been brutally murdered in car bombs. Nine 'non-targeted' attacks on buses, at shopping centres, and other

public places had also terrorized the population. All these attacks were covered by UNIIIC's 'technical assistance' mandate,[12] and any that were 'connected' to the Hariri assassination could later be prosecuted by the Tribunal.[13] In its almost four years of activity, UNIIIC produced over 1,200 witness statements and collected thousands of gigabytes of data, including 6.5 billion call records, more than 10,000 forensic exhibits, over 40,000 pictures, and large amounts of physical evidence, including material recovered from each of the crime scenes.[14]

4.3 The Commission in Context

UNIIIC was a bold experiment by the Security Council, and it was unlike any 'fact-finding' body previously established by UN organs, in terms of its mandate, its powers, and its subsequent morphing into an international prosecution office.

Since the end of the Cold War, the idea of 'impartial, effective, politically independent, and fair international criminal justice'[15] had started to emerge and with it resort to UN-sponsored fact-finding as a tool to understand situations that threatened international peace and security.[16] Within the UN system, three types **(p.54)** of investigative bodies have been created, typically in situations in which it was thought that international crimes or serious human rights violations had occured.[17]

The first type of UN investigative body has been created by the Geneva-based Human Rights Council (HRC), generally to investigate war crimes and crimes against humanity.[18] This category includes the fact-finding mission on the Gaza conflict led by Richard Goldstone,[19] the commission on the Israeli flotilla raid,[20] and international commissions of inquiry on Libya[21] and Syria.[22]

A second type of investigation has been set up by the UN Secretary-General at the request of the relevant territorial states. This was the case for the Commission of Inquiry into Benazir Bhutto's assassination in Pakistan[23] and the Guinea Commission of Inquiry investigating the violent crackdown on demonstrators by governmental forces in Conakry on 28 September 2009.[24] A variation of this approach also led, in 2006, to the establishment of the International Commission against Impunity in Guatemala (CICIG) to assist Guatemalan institutions with the investigation and prosecution of offences committed by organized crime groups and other illegal networks. This commission was created on the basis of a treaty concluded between the UN and the state of Guatemala following extensive negotiations with the UN Secretary-General.[25]

A third set of commissions has been created directly by the Security Council to investigate crimes including genocide in the former Yugoslavia[26] and Darfur.[27] This is the category that UNIIIC also falls into.[28]

(p.55) UNIIIC's mandate was different to its predecessor UN commissions. None of the other commissions, even those created by the Security Council, dealt with terrorism. Unlike most commissions of inquiry, which have been established to deal with large-scale international crimes,[29] UNIIIC was given a mandate akin to that of a domestic law enforcement authority, involving for the first time a full-scale criminal investigation of a terrorist attack in the Middle East. Even the Bhutto Commission, the only other example of a UN-sponsored investigation into the death of a prominent individual, had a much more limited mandate, as the Commission's role was limited to 'determin[ing] the *facts and circumstances* of the assassination of former prime minister' Bhutto, rather than conducting a full criminal investigation and identifying suspects, which remained the role of the Pakistani authorities.[30]

Nor did the previous UN commissions have coercive powers as extensive as those of UNIIIC. UNIIIC could, for instance, meet and interview any civilian or state official, and have unrestricted access to all premises throughout the Lebanese territory.[31] It could designate persons as suspects, triggering travel bans and an obligation for all UN members to freeze their assets.[32] It also teamed up with Lebanese police to carry out 'search and raid operations' and seized evidence from suspects' homes.[33]

(p.56) No other commission was given similar 'teeth'.[34] Even those that were created by the Security Council under Chapter VII of the UN Charter, such as the commissions for Yugoslavia and Darfur, had limited coercive powers,[35] as did the CICIG in Guatemala.[36] Fact-finding bodies established by the Human Rights Council have even less power, relying exclusively on the voluntary cooperation of domestic governments to gather evidence.[37]

The Commission was also, uniquely, transitioned into an international prosecution body that formed part of an international court. In March 2009, UNIIIC ceased to exist and the STL simultaneously began to function. Although the Commission and the Tribunal are independent bodies, a significant portion of UNIIIC's staff transitioned into the Office of the Prosecutor and the last UNIIIC Commissioner, Daniel Bellemare, became the first STL Prosecutor. The Tribunal's start date was indeed made contingent on the progress of UNIIIC's investigation.[38] The STL Statute also provides that the evidence collected by the Commission 'shall be received by the Tribunal' and that the Prosecutor can refuse to disclose UNIIIC memoranda on the same terms as those produced by members of his office.[39]

Although the commissions for Yugoslavia and Darfur were also followed by court processes, there was no comparable continuity. The Yugoslavia commission's **(p.57)** findings led the Security Council to establish an international court—the International Criminal Tribunal for the former Yugoslavia (ICTY)[40]—but the ICTY Statute did not address how evidence collected by that Commission should be handled by the court.[41] Indeed, unlike in the UNIIIC/STL situation, the vast majority of the investigative work that ultimately led to the indictment of over 160 persons by the Tribunal was carried out by the ICTY's Office of the Prosecutor, rather than the commission that preceded it.[42] Similarly, the Darfur Commission's findings provided a basis for the Security Council to refer the case to the International Criminal Court (ICC) for prosecution[43] and the then ICC Prosecutor, Moreno Ocampo, received a sealed list of fifty-one suspects compiled by the Commission of Inquiry.[44] However, this evidence appears to have been largely ignored in the subsequent ICC investigation, sparking strong criticism from Professor Cassese, who had presided over the Darfur Commission.[45] The Lebanon experience is therefore the only one where a clear operational and institutional continuity existed between the commission's investigation and the subsequent international prosecution.

4.4 Challenges and Lessons Learnt

UNIIIC's extensive coercive powers, together with its unprecedented mandate and its subsequent 'morphing' into the STL Office of the Prosecutor, represented a bold departure from previous United Nations practice. At a basic level, this experiment worked—by the end of the Commission's life, enough evidence had been gathered to allow the Prosecutor to pursue the arrest of four suspects. And after two years of operations the court's pre-trial judge ruled that there was sufficient 'prima facie evidence' against four men linked to the Hizbollah group to confirm indictments against them. An indictment against a fifth person was later confirmed as well.[46]

(p.58) But the Commission also faced major challenges in its work that threatened its credibility and outcomes. First, there was a perception challenge: the Commission's narrow mandate led to the criticism that the investigation was politically selective. Secondly, there was a legal challenge: an 'accountability gap' that arose when persons were detained or had their assets frozen, or when witnesses lied to the Commission. And there were practical challenges that made the Commission's work slow and expensive and that led to difficulties in securing cooperation from states to obtain sensitive evidence and the arrest of suspects.

4.4.1 Perception challenge

A challenge that arose from the early days of the Commission was that its narrow mandate led some to accuse it of a lack of neutrality. Such a perception can undermine the credibility and value of the investigation and deter cooperation by some parties.

At first sight the Commission's mandate, involving an open inquiry into the unidentified authors of the attack against Mr Hariri, without any restriction as to the groups and individuals to be investigated, does not appear one-sided. But the decision to create a commission of inquiry focusing on one specific bombing has been considered partial, both because of early finger-pointing at Syria, and because other assassinations and crimes in Lebanon have gone uninvestigated and unpunished before, during, and after the Commission's life. The expansion of the Commission's mandate to cover other terrorist bombings that took place in Lebanon after 1 October 2004 only partially addressed this concern. As noted by Amnesty International:

> UNIIIC and the Special Tribunal for Lebanon mark an important break from the pattern of impunity that has so long persisted in Lebanon. Alone, however, they are an insufficient response. Unless they

> are accompanied by other measures there is a risk that they will be seen as a politically selective instrument and they will not gain the credibility and public confidence that they must have if they are truly to represent a shift towards greater respect for the rule of law in Lebanon […] If the Special Tribunal is left on its own to dispense selective justice there is even a risk that it will exacerbate the lines of political division within Lebanon and help to re-open the wounds of the past.[47]

The selectivity of the Commission's mandate was striking after the outbreak of the Israel–Lebanon war in July 2006. UNIIIC's staff had to be evacuated to Cyprus due to security concerns and by the time they returned to Beirut two and a half months later, hundreds of civilians and four UN observers had been killed in the hostilities.[48] Yet **(p.59)** the idea of employing UNIIIC's on-site staff and expertise to investigate these deaths was never seriously considered. On the contrary, when it came to crafting the STL's jurisdiction, it was decided that it could cover incidents that occurred after 12 December 2005 only with the specific authorization of the Security Council.[49] It would not be overly cynical to conclude that this was specifically designed to ensure that crimes committed during the 2006 conflict would be excluded.[50] There have also been many other fatal bombings since the STL was established—including one that targeted a senior police chief who had assisted the Commission with its investigation—which have ben met with a deafening silence at the international level.

But ultimately, this criticism relates to the process of establishing the Commission—not the Commission itself. Objections should therefore be directed at the Security Council, as there is no indication that the Commission itself was selective in the way it investigated the attacks that *were* within its mandate. International justice is by its nature selective; not every perpetrator can be prosecuted and complex questions of prioritization and resources are at the heart of an international prosecutor's job. The Security Council and states have given international courts jurisdiction over some crimes in some places and not others. This is not unique to, or a fatal design flaw of, the UNIIIC, although it is particularly striking in this case because other bombings—and even an all-out war with Israel—have been ignored while the Commission and the STL were in operation. But in designing future commissions, the UN should give consideration to the fact that their mandate needs to be as neutral and broadly defined as possible to ensure the credibility of the institution and acceptance of its findings.

4.4.2 Legal challenge: an accountability gap

4.4.2.1 Detention and asset freezing

One of the serious challenges that UNIIIC faced was the criticism that its extensive coercive powers were not subject to proper legal review. Indeed, when individuals were detained or had their assets frozen in connection with the Hariri investigation, their attempts to seek redress were hampered by finger pointing and a lack of legal process.

This accountability gap arose when certain enforcement actions were taken by Lebanon at the request of the Commission. The most problematic example is the arrest and detention of four Lebanese generals suspected of being involved in the Hariri assassination.[51] According to UNIIIC, the generals were detained in **(p.60)** September 2005 'pursuant to an arrest warrant issued by the Lebanese Prosecutor-General *based on recommendations from the Commission* that there was probable cause to arrest and detain them for conspiracy to commit murder in connection with the assassination of Rafik Hariri'.[52] Although the generals were ultimately held in a Lebanese prison for almost four years, neither the Commission nor the Lebanese authorities entertained their requests for release.

In 2007, the Beirut-based Lebanese Center for Human Rights filed a communication with the UN's Working Group on Arbitrary Detention (WGAD) on behalf of the four generals and four other Lebanese nationals who were, at the time, detained in connection with the Hariri investigation.[53] The communication noted that the detainees had been imprisoned for almost twenty months without any charge or trial[54] and alleged that they had been subjected to mistreatment and kept in inadequate conditions of detention.[55] The petition also highlighted that the detainees were denied an opportunity to resort to a court because a 'grey area' existed as to whether Lebanese courts had authority to rule on the legitimacy of UNIIIC-recommended detentions.[56]

UNIIIC and the Lebanese authorities essentially blamed the other. The head of the UNIIIC stated that the detainees were under the 'exclusive competence of the Lebanese authorities…so it is up to the Prosecutor-General and the investigation judge to decide [on their release]';[57] while the Government contended that the suspects' custody was 'dependent on the development of the inquiries conducted by the International Investigation Commission'.[58] The WGAD **(p.61)** ultimately issued an Opinion finding that Lebanon had violated articles 9 and 14 of the International Covenant on Civil and Political Rights, but that it had no authority to rule on the legality of UNIIIC's actions.[59]

It was not until 2009, when the STL began to function as a court, that the legal responsibility for the four detained generals was 'internationalized'. In one of his first judicial acts, the STL pre-trial judge issued an order confirming that, since April 2009 when the Lebanese authorities formally transferred the *Hariri* file to it, the detainees were under the legal authority of the Tribunal, even though they continued to be held in Lebanon.[60] The STL Prosecutor then requested that the four generals be released based, amongst other things, on the 'inconsistencies in the statements of key witnesses and of a lack of corroborative evidence to support these statements'.[61] As a result, the pre-trial judge ordered the generals' immediate release.[62]

But the pre-trial judge's release order did not address whether, in the four years since their arrest, the four Generals had been detained under the authority of UNIIIC or of the Lebanese Government, or which body should bear responsibility for any human rights violations suffered by the detainees during that period.[63] The jurisprudence of international criminal tribunals suggests that the answer to these questions hinges on what the Lebanese authorities were asked to do and whether they were under an international obligation to do it. In other words, the legal responsibility of an international organ for a suspect's detention by state authorities is only engaged when the detention takes place 'at the behest of' or in a 'concerted action with' the international court.

For instance, in the International Criminal Tribunal for Rwanda (ICTR) case against *Barayagwiza*, the accused complained that his detention at the hands of Cameroonian authorities was illegal and that the ICTR was responsible for it. The Appeals Chamber reached the conclusion that, during the relevant periods of detention, Mr Barayagwiza had been held in the 'constructive custody' of the Tribunal because the Tribunal had formally requested his provisional detention by Cameroon and Cameroon was under an international obligation to comply with this request by virtue of article 28 of the ICTR Statute, adopted by the Security **(p.62)** Council acting under Chapter VII.[64] On this basis, the ICTR was responsible for the deprivation of liberty that followed.[65]

This decision can be contrasted with the ICTR Trial Chamber's ruling in *Rwamakuba*, when Prosecutor Goldstone had written to the Namibian Attorney-General informing him that ICTR prosecutors were looking into a possible case against Dr Rwamakuba and noting 'I would be grateful, if your laws permit this, that Dr Rwamakuba be kept in detention until [a decision on his possible prosecution is made]'. This wording was not considered sufficient to make the Tribunal legally responsible for the Accused's ensuing detention in Namibia.[66]

The ICC and the Extraordinary Chambers in the Courts of Cambodia (ECCC) have adopted a similar standard for the attribution of state conduct to an international tribunal. In *Lubanga*, the ICC held that the ICC Prosecution would only be responsible for human rights violations associated with Mr Lubanga's arrest and detention in Congo if his detention was the result of a 'concerted action' between the Congolese authorities and the ICC Prosecutor.[67] It clarified that '[m]ere knowledge on the part of the Prosecutor of the investigations carried out by the Congolese authorities is no proof of involvement…in the way they were conducted'.[68] The ECCC Pre-Trial Chamber also indicated that the ECCC could be held responsible for the acts of a third party committed 'on behalf of' or 'in concert with organs of the ECCC'.[69]

The relationship between UNIIIC and the Lebanese authorities in relation to the four generals' arrest and detention falls somewhere between these judicial precedents—the Commission displayed more than 'mere knowledge' of the situation as in *Lubanga;* but its actions may have fallen short of a formal request for action invoking Lebanon's international law obligations to comply, as was the case in *Barayagwiza*. Although the wording of UNIIIC's communications to the Lebanese authorities is not public, the Commission has stated

that 'the Lebanese authorities arrested and detained [the four generals] pursuant to arrest warrants issued by the Lebanese Prosecutor General *based on recommendations* from the Commission'.[70] Elsewhere, however, it is stated that the generals' arrest was '*at the* ***(p.63)*** *suggestion of the Commission*'[71] and that 'although the Commission was qualified to make proposals to the Lebanese authorities regarding the arrest of persons allegedly involved in the assassination, it remained the autonomous decision of the Lebanese authorities to proceed with such actions'.[72]

While the wording of the request made by UNIIIC to the Lebanese authorities may therefore leave some doubt as to where legal responsibility lies, it is clearly unsatisfactory that no decision was ever made as to what relief should be offered to detainees who fall into this legal black hole.

4.4.2.2 Obstruction of justice by 'false witnesses'

Other legal challenges for the Commission arose in the context of the transition from investigation to prosecution (ie from UNIIIC to the STL). These related to obstruction of justice.

From its very first report, the Commission highlighted its awareness that it had 'interviewed people whose agenda was to point the Commission not in the direction […] the evidence would lead it, but in the direction the particular individual(s) wanted the Commission to go'.[73]

In the first stages of its investigation, the Commission appeared to rely extensively on statements provided by two witnesses, Hussam Taher Hussam and Mohammad Zuhair Siddiq, indicating that the Hariri murder was the result of a conspiracy between four Lebanese generals and the senior Syrian officials who appointed them.[74] Shortly after the publication of these findings in UNIIIC's first report, Hussam Hussam reportedly stated on Syrian media that his testimony had not been truthful and that he had been instructed and paid to mislead the Commission.[75] At the same time, the German magazine, *Der Spiegel*, published an article calling into question Siddiq's credibility.[76] The unreliable nature of these witnesses' evidence appears to have been confirmed by the STL itself. Although he did not mention them by name, in April 2009 the STL pre-trial judge ordered the release of the four Lebanese generals on the basis that 'some witnesses had modified their statements and one key witness had expressly retracted his original statement incriminating the persons detained'.[77]

(p.64) When calls were made to hold the 'false witnesses' accountable,[78] the question arose as to which body was competent to investigate and prosecute persons who willingly misled the Commission for obstructing the administration of justice. The answer appears to be: none.

The STL took the view that it lacked jurisdiction to proceed against individuals who gave false testimony to UNIIIC,[79] unless the UN Security Council and the Lebanese government agreed to expand its mandate to cover this.[80] At the same time, the Lebanese authorities, which had proceeded against some individuals for false testimony in the early days of the Commission's mandate,[81] felt they could no longer do the same after the *Hariri* case had been transferred to the STL.[82] The relevant provision of the Lebanese Criminal Code, article 408, criminalizes the provision of false testimony 'before the judicial authority or a military or administrative jurisdiction' only. As UNIIIC did not fall within these categories,[83] and the Lebanese authorities had relinquished jurisdiction over the *Hariri* case to the STL, domestic proceedings under article 408 were no longer considered an option.[84]

This legal vacuum eventually led the STL to amend its Rules of Procedure and Evidence to clarify that a witness can commit contempt even if they do not testify at trial.[85] Under rule 60*bis*(A)(i), the Tribunal can now hold in contempt any person who 'during questioning' knowingly and willfully makes a statement which he knows is false and which he knows *may be* used as evidence in STL proceedings.[86] This extended the reach of contempt proceedings at the STL to the statements taken by investigators **(p.65)** instead of being limited to testimony at trial. But the amendment only applies prospectively and could not therefore be relied on to address misleading evidence given before UNIIIC, or even to STL investigators prior to 30 October 2009.[87] This experience suggests that, in the future, the legal repercussions of lying to investigators should be clearly defined from the beginning of a Commission's life.

4.4.3 Practical challenges

4.4.3.1 Changing mandate, procedures, and staff

Despite the large number of fact-finding bodies established to date, the UN has developed a limited institutional memory in this field. There are no standard operating procedures that apply to all fact-finding missions, and no official procedures for taking statements, preparing reports, or storing data and evidence. As noted by UN fact-finding expert Cherif Bassiouni, investigation bodies have to 'reinvent the wheel'[88] every time. This was confirmed by the second UNIIIC Commissioner, Serge Brammertz, who commented that '[c]urrently we build each commission from the ground up, which delays the deployment of investigators and potentially undermines the quality of the results'.[89]

There is also no centralized roster of potential staff members with suitable expertise and independence.[90] UN regulations created difficulties with hiring qualified staff quickly enough, and the Security Council extensions of the Commission's mandate in six-month increments sometimes made it difficult to retain those who had been brought on board. These practical issues caused an administrative 'headache' throughout UNIIIC's life.[91] Ultimately, too many of the Commission's resources had to be invested in the development and implementation of standard procedures and in seeking the recruitment of suitable personnel, at the expense of progress in the investigation itself. This is one of the reasons the Commission was criticized for being slow and expensive.

UNIIIC was also less efficient than it could have been because its mandate was changed repeatedly in the course of the Commission's life. Its work eventually included a 'technical assistance' role in twenty cases other than the *Hariri* case, but **(p.66)** investigators were working in the dark as they did not know whether the evidence being collected was for use in a domestic trial or an international one.

The idea of establishing an international court to act upon UNIIIC's findings was proposed from the Commission's early days but it took years to become a reality. On 13 December 2005, Fuad Siniora, then Prime Minister of Lebanon, requested that the Security Council 'establish a tribunal of an international character' to try those suspected of assassinating Hariri.[92] But until Resolution 1757 was passed 18 months later,[93] UNIIIC had to operate under significant uncertainty as to the nature of the judicial proceedings (if any) which would follow its investigation. It took another two years before the court's Rules of Procedure and Evidence were adopted. And the question of which cases (other than *Hariri*) would be tried internationally rather than domestically was still open when UNIIIC's mandate ended on 28 February 2009, and it is still open today.[94]

The Commission therefore attempted to ensure that, in collecting evidence, including through interviews of suspects and witnesses, it complied with both international and Lebanese law standards and requirements, but this was not always possible. As noted in UNIIIC's fifth report:

> There are certain differences between the standards and procedures for conducting interviews under Lebanese law and those that arise under international law. On one hand, the Commission considers that it should respect all due international standards. On the other hand, it is aware of the responsibility to ensure that the testimonial, forensic or other evidence that it collects during the course of its work on all the cases shall be admissible before any Lebanese court in which any accused persons may ultimately be tried.[95]

The procedural differences between the two regimes are not inconsequential. For instance, at the STL suspect interviews must be audio or video-recorded,[96] whereas in the Lebanese system they do not need to be. At the ICTY, the Appeals Chamber has held that, where a recording of an interview was not available, written notes of its contents could not be admissible as evidence at trial.[97] If a similar view were adopted by the STL, this could potentially mean that much of the evidence **(p.67)** collected by UNIIIC could not be introduced. It is therefore not surprising that the Commission's standard operating procedures were substantially revised after the Statute of the STL was adopted.[98]

It will often be unclear at the outset of an international investigation whether or not an international judicial process will follow. But the earlier the investigators and lawyers are aware of this, the better. And once it is clear that an international court will be created, it may be helpful to adopt an existing set of rules of

procedure and evidence (such as those that apply at the International Criminal Court), at least on key issues, so that the rules on matters like the admissibility of statements are clear. In addition, since some of the cases (other than *Hariri*) were unlikely to be tried internationally, it would have been preferable for the Commission's 'technical assistance' mandate to include capacity-building measures for the local police and judiciary. This omission is all the more glaring considering that UNIIIC was deployed in Beirut for almost four years at a cost of up to 30 million dollars per year but left little 'know-how' behind in a country that is still under attack.[99] Following the recent assasination of former Minister Mohammad Shatah, for instance, Lebanese police authorities had to request technical assistance from the US FBI.[100]

4.4.3.2 Lack of cooperation by key states

Securing the cooperation of Lebanese authorities and third states also proved to be a challenge for the Commission. UNIIIC was mandated to investigate a series of terrorist attacks, a task which usually requires the extensive use of coercive measures and access to sophisticated intelligence analysis such as cell site surveys, satellite imagery, and communications intercepts. As noted by former UNIIIC Commissioner and STL Prosecutor, Daniel Bellemare '[t]he perpetrators are part of a network that is still in existence…they are sophisticated and the collection of evidence is a difficult task'.[101]

UNIIIC's robust legal framework for cooperation—enabling it to request assistance from any UN member state and in theory seek sanctions from the Security Council under Chapter VII of the UN Charter in the case of non-compliance—was an important tool for the success of its investigation. Support by the relevant **(p.68)** Lebanese authorities appears to have been forthcoming from the early days[102] and, after the Security Council clarified in Resolution 1636 (2005) that Syria was under a Chapter VII duty to cooperate fully with the Commission, the level of assistance provided by the Syrian Arab Republic started to be 'generally satisfactory'.[103] Cooperation from third states was also, in general, forthcoming.

But there were limits. Third states often did not have a domestic legal basis for complying with Commission requests, particularly when such requests would ordinarily require coercive measures or a court order (for instance, to gather phone records or other data). Many states have legislation in place to regulate requests for assistance from international criminal tribunals,[104] but no equivalent provision for international investigative bodies. As a result, some states assessed that the provision of assistance or information to UNIIIC was to take place under the mutual assistance legal framework, a voluntary framework negotiated between states to regulate their cooperation in criminal matters. These sets of voluntary rules were, in some cases, inadequate to the situation at hand and did not reflect the compulsory nature of cooperation with UNIIIC required under the relevant Security Council resolutions.[105] In addition, some states proved reluctant to share key intelligence with the Commission,[106] and there was a view by some that UN bodies are generally 'leaky ships' that cannot be trusted with such sensitive information. This may be the reason why prosecutors have not gathered sufficient evidence against suspects 'higher up the chain' than those who have been indicted.

The most serious consequence of the lack of cooperation with the investigation is that the arrest of four individuals indicted for the Hariri attack has so far been impossible.[107] The Lebanese Public Prosecutor reported to the STL that the Lebanese authorities had exerted their 'utmost efforts' to secure capture,[108] but cited the 'delicate and sensitive political and security situation in Lebanon' as the source of 'difficulties in executing the arrest warrants'.[109] The Prosecutor-General also explained that 'it is most likely that [the suspects] are receiving help from their relatives *and others who share common political views or religious or regional* **(p.69)** *affiliations*',[110] a possible veiled reference to Hizbollah, the group that is associated with the four accused, and its state sponsors. Indeed, after the Tribunal gave the Lebanese authorities 30 days to arrest the four men indicted for the Hariri attack, Hizbollah leader Hassan Nasrallah exclaimed in a passionate speech that the four indictees were 'group members' and 'brothers who have an honourable history', adding that the authorities 'cannot find [the accused] or arrest them in 30 days […] 30 years or 300 years'.[111] One of the four accused, Mustafa Badreddine, has since reportedly been spotted in Syria by rebel groups, who claim he is now fighting for Syrian President Bashar al Assad.[112] But according to Assad, 'the international tribunal concerns only Lebanon and the UN' and '[a]ny cooperation requested from Syria which could compromise our national sovereignty is rejected'.[113]

The challenge of cooperation is one of the most difficult to address because it comes down to political will and expediency. But the UNIIIC experience shows that providing a firm legal basis for cooperation is a useful backdrop for encouraging maximum assistance from states, especially if the Security Council threatens—and enforces—sanctions in the event of non-complianec. Member states should also ensure that their national laws permit and encourage their officials to work with investigative commissions that may be created in the future.

4.4.4 Recommendations and lessons learned

UNIIIC had features that were unprecedented for UN commissions and that were key to its success. But the challenges it faced as a result of its unique nature there are also some important 'lessons learned' about how such a commission could be improved in the future. Key recommendations include the following.

• When establishing a new investigation commission, the UN should provide a clear mandate and avoid phrasing it in a way that is not neutral or may be seen to prejudge the outcome of its investigation. The temporal and geographical scope of the mandate should also be such that it is not—and does not appear to be—arbitrary or politically selective.
• A commission investigating international crimes should be given 'teeth'—this means that Chapter VII powers should be used to ensure maximum cooperation by relevant states.
• States should be encouraged to adopt specific legislation to regulate requests for assistance from new bodies of this nature in a flexible manner. Such legislation should include a clear duty to provide all information and documentation requested whenever the state is under a Chapter VII obligation to do so.
(p.70) • The framework of interaction between the commission and state authorities—including the detention of suspects—should be formalized at the outset. This should clarify what legal remedy is available if coercive actions are taken, including when suspects are detained or have their assets frozen.
• The standard of proof and anticipated judicial follow-up to the commission should be clarified as soon as possible so that evidence can be collected in line with the procedures applicable at the relevant court, whether domestic or international. Where a new international court is to be created, it may be advisable to clarify that an existing court's rules of procedure will apply. This allows investigators to know the applicable rules earlier in the process and avoids accusations that the umpires are 'writing their own rules' by drafting a new set of procedures once the court is in session.[114]
• The framework to prosecute witnesses who mislead the investigation should also be clarified in the early days of a commission's operation. In most cases, the most appropriate forum for such prosecutions will be the courts of the territorial state, whether or not the 'core' crime investigated by the commission goes on to be tried before an international tribunal. Where required, specific domestic legislation may need to be adopted to confirm or establish the domestic courts' jurisdiction in such cases.
• The UN institutional memory in this field should be strengthened,[115] and the creation of an independent body, on a permanent or 'standby' basis, would be a welcome development.[116] This body could be mandated to carry out fact-finding missions itself or simply to perform coordinating functions for existing commissions of inquiry (eg by drafting common standard operating procedures and administering a roster of suitable candidates who have been pre-screened and could be deployed at short notice). This would enable the UN to act more quickly and decisively when it is necessary to gather evidence in the face of an attack and to proceed more consistently and professionally across different investigations in the field.[117]
• Fact-finding efforts should also, whenever possible, be coupled with capacity-building activities in the affected state. Closer working relationships can and should be established by 'embedding' national and international staff in each **(p.71)** other's offices,[118] something which was successfully implemented in other contexts, such as the former Yugoslavia.[119] This improves cooperation networks and leaves a lasting impact on the state's abilities to respond to similar atrocities in the future.

4.5 Conclusions

The UN Commission created by the Security Council to investigate the Hariri assassination and other killings in Beirut was in many ways unique. It had an unprecedented mandate—the criminal investigation of a terrorist attack, extensive coercive powers, and it was ultimately transitioned into the prosecutorial arm of an international tribunal.

The Commission faced serious challenges. It was accused of being slow and expensive. And it was accused of being selective, of courting 'false witnesses', and of allowing an 'accountability gap' to persist when it came to violations of suspects' human rights. These challenges affected the level of support the Commission has received and will ultimately undermine its legacy. The Commission also faced difficulties in securing key cooperation from states. This has meant that certain evidence going 'up the chain of command' has been difficult to access and that none of the accused could be arrested.

But, ultimately, the Commission did succeed in discharging its mandate. It gathered evidence that eventually led an STL judge to approve indictments against five persons. The trial will be *in absentia* but there is at least a process of accountability. This would not have been the case without international involvement: the security conditions and fractured political context in Lebanon after Hariri's murder made a credible national investigation impossible.[120]

At the same time it would have been premature, in February 2005, for the UN to create an international court. Unlike situations involving mass atrocities, there was a risk in this case that court proceedings might never take place if the investigation did not lead to the identification of one or more suspects. The establishment of UNIIIC was therefore a logical step in the path leading to the creation of the STL. Without it, the Tribunal would not have existed, and the Hariri attack would **(p.72)** have simply remained another anonymous terrorist crime in Lebanon's—and the region's—troubled history.

It is unfortunate that since the Commission was dispatched to Lebanon in 2005, no further investigative bodies have been created by the Security Council.[121] The idea was raised for Syria but never seriously considered given the political divisions on the Council. And yet one of most important lessons that should be learned from the UNIIIC experience is that where states are unwilling or unable to carry out their own investigations of crimes that constitute a threat to international peace and security, the Security Council should act to ensure that victims know the truth and that those responsible for crimes can be held to account.

Notes:

* Barrister, Doughty Street Chambers, London, specializing in international law and human rights. Formerly Legal Adviser to the UNIIIC Commissioner in Beirut; senior member of the Office of the Prosecutor at the Special Tribunal for Lebanon.

** Trainee solicitor; formerly intern within the Office of the Prosecutor at the Special Tribunal for Lebanon.

([1]) Ali al-Musawi, 'STL's Credibility May be Affected if Prosecutor Fails to Hand Over False Witness' Documents—Roux to "Assafir": Defence Teams Began Their Investigations to Challenge The Indictment' <http://www.stl-tsl.org/en/media/selected-interviews/interviews-with-francois-roux/roux-to-assafir-defence-teams-have-launched-their-investigations-to-overturn-the-accusation> accessed 2 December 2013: 'The prosecutor says there are people who committed the crime including the four accused affiliated to "Hezbollah". He is not accusing "Hezbollah" as a political party but rather directs accusation fingers to these four persons, from "Hezbollah" for their involvement in the crime.' See also Dexter Filkins, 'The Shadow Commander', *The New Yorker* (New York, 30 September 2013).

([2]) Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc A/HRC/24/46 (2013) paras 5–6. The UN Fact-Finding Mission on Gaza, among others, found itself in a similar situation when Israel refused to grant access to its territory, as noted in the Mission's Second Report, see Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law Established Pursuant to Council Resolution 13/9, UN Doc A/HRC/16/24 (2011) para 13.

([3]) Statement by the President of the Security Council, UN Doc S/PRST/2005/4 (2005).

([4]) Report of the Fact-Finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Hariri, UN Doc S/2005/203 (2005) 3.

([5]) Report of the Fact-Finding Mission to Lebanon (n4) para 62.

([6]) Letter Dated 29 March 2005 from the Chargé d'Affaires ai of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General, UN Doc S/2005/208 (2005).

([7]) SC Res 1595, UN Doc S/RES/1595 (2005) para 1.

([8]) Annex to Letter Dated 20 October 2005 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2005/662 (2005) [Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005)] para 5.

([9]) First UNIIC Report (n8).

([10]) SC Res 1636, UN Doc S/RES/1636 (2005), para 11(b).

([11]) SC Res 1644, UN Doc S/RES/1644 (2005), para 7. The Commission was subsequently mandated by the Secretary-General to provide technical assistance (on the specific request of Lebanese authorities or the President of the Security Council) in respect of incidents that occurred after this date. This was the case, for instance, in relation to the shooting of Minister Pierre Gemayel on 21 November 2006 (see Letter Dated 22 November 2006 from the President of the Security Council Addressed to the Secretary-General , UN Doc S/2006/915 (2006) and Annex to Letter Dated 12 December 2006 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2006/962 (2006) [Sixth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005)] paras 80ff) or the assassination of MP Antoine Ghanem on 19 September 2007 (see Letter Dated 21 September 2007 from the President of the Security Council Addressed to the Secretary-General, UN Doc S/2007/557 (2007) and Annex to Letter Dated 28 November 2007 from the Secretary-General to the President of the Security Council, UN Doc S/2007/684 (2007) [Ninth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007)] paras 75ff).

([12]) Annex to Letter Dated 2 December 2008 from the Secretary-General to the President of the Security Council, UN Doc S/2008/752 (2008) [Eleventh Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006), 1748 (2007) and 1815 (2008)] para 34. It is not clear what UNIIIC's 'technical assistance' mandate was meant to cover or why it was phrased differently from the Commission's mandate concerning the investigation of the Hariri case. Cf SC Res 1595 (n7) with SC Res 1644 (n11) and SC Res 1686, UN Doc S/RES/1686 (2006).

([13]) Attachment to SC Res 1757, UN Doc S/RES/1757 (2007) [Statute of the Special Tribunal for Lebanon] art 1 establishes the Tribunal's jurisdiction over 'other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.' The consent of the Security Council is therefore required for cases post-dating 12 December 2005.

([14]) Annex to Letter Dated 12 July 2007 from the Secretary-General to the President of the Security Council, UN Doc S/2007/424 (2007) [Eighth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005), 1644 (2005),

1686 (2006) and 1748 (2007)] para 14; Ninth UNIIIC Report (n11) paras 40 and 91; Eleventh UNIIIC Report (n12) para 33.

([15]) Mahmoud Cherif Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions' (2001) 5 Wash U J L & Poly 35, 47.

([16]) General Assembly, Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, UN Doc A/RES/46/59 (1991), art 2.

([17]) A variety of fact-finding initiatives have also been undertaken outside the UN framework, both by regional bodies and by individual states. The Tagliavini Commission established by the Council of the European Union to investigate the conflict in Georgia is but one example of the former category. The latter category includes the Bahrain Independent Commission of Inquiry.

([18]) The recent tendency of the HRC has been to appoint missions mandated to 'investigate all violations of international human rights law *and international humanitarian law*' (see eg HRC, The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly Due to the Recent Israeli Military Attacks Against the Occupied Gaza Strip, UN Doc A/HRC/RES/S-9/1 (2009) para 14, appointing the Gaza Mission), notwithstanding the limitation of the Council's own mandate to 'human rights' issues.

([19]) HRC Res 9/1 (n18).

([20]) HRC Res 14/1, UN Doc A/HRC/RES/S-14/1 (2010).

([21]) HRC Res 15/1, UN Doc A/HRC/RES/S-15/1 (2011).

([22]) HRC Res 16/1, UN Doc A/HRC/RES/S-16/1 (2011); HRC Res 17/1, UN Doc A/HRC/RES/S-17/1 (2011).

([23]) Letter Dated 2 February 2009 from the Secretary-General to the President of the Security Council, UN Doc S/2009/67 (2009); Letter Dated 3 February 2009 from the President of the Security Council to the Secretary-General, UN Doc S/2009/68 (2009).

([24]) Secretary-General Press Release, UN Doc SG/SM/12581 (2009) [Secretary-General Announces Members of Guinea Commission of Inquiry to Investigate Events of 28 September].

([25]) Agreement between the United Nations and the State of Guatemala on the Establishment of an International Commission Against Impunity in Guatemala (CICIG) (New York, 12 December 2006, 2472 UNTS 44373).

([26]) SC Res 780, UN Doc S/RES/780 (1992) para 2. See also SC Res 771, UN Doc S/RES/771 (1992); SC Res 787, UN Doc S/RES/787 (1992) para 8.

([27]) SC Res 1564, UN Doc S/RES/1564 (2004) para 12.

([28]) In some cases, different UN bodies have created investigation teams with overlapping mandates. For instance, in 2004 the Security Council created the International Commission of Inquiry on Darfur, the UN Commission on Human Rights (now the Human Rights Committee) appointed a new Independent Expert for Sudan, and the UN High Commissioner for Human Rights created its own investigation team, and fact-finding visits to the country were organized by a variety of other UN special procedures. See SC Res 1564 (n27); UN Commission on Human Rights, Report of the Independent Expert, on the Situation of Human Rights in the Sudan, Emmanuel Akwei Addo, UN Doc E/CN.4/2005/11 (2005); 'UN Rights Officials Tell Security Council International Police are Required in Sudan' *UN News Centre* (New York, 30 September 2004) <http://www.un.org/apps/news/story.asp?NewsID=12095&Cr1=#.UlyBtmTwLd0> accessed 2 December 2013; Philip Alston, 'The Darfur Commission as a Model for Future Responses to Crisis Situations' J Int Criminal Justice (2005) 3 600, 602. A similar situation arose in Libya in 2011.

([29]) The Darfur Commission was mandated to 'investigate reports of violations of international humanitarian

law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable'. See SC Res 1564 (n27) para 12. The mandate of the Yugoslavia Commission of Experts was similar but did not explicitly include the identification of suspects. See SC Res 780 (n26) para 2; SC Res 787 (n26) para 8.

([30]) Letter Dated 2 February 2009 from the Secretary-General (n23) (emphasis added). A legal opinion by the UN Secretariat compiled in preparation for the establishment of the Bhutto Commission reviewed comparable initiatives, including UNIIIC and CICIG. The Secretariat noted that CICIG did not have 'a mandate to *investigate* as such, but only to *assist* the General Prosecutor in the conduct of his investigation and prosecution into organized crime'. By contrast, UNIIIC was referred to as 'the single, and perhaps so far unique, example' of a commission established to *conduct* a criminal investigation into a 'common crime'. Note to the Chef de Cabinet, Executive Office of the Secretary-General on the establishment of a Commission of Inquiry into the Assassination of Benazir Bhutto (UN Juridical Yearbook 2008, 11 June 2008) 434 (emphasis in the original). See also eg Annex to Letter Dated 2 February 2009 from the Secretary-General (n23) [Terms of Reference of the Commission of Inquiry].

([31]) First UNIIC Report (n8) para 5.

([32]) SC Res 1636 (n10) para 3.

([33]) Searches are reported to have been carried out under the authority of the first UNIIIC Commissioner. See First UNIIIC Report (n8) para 8: 'Lebanese security forces and Commission investigators closely coordinated the house raid and search of former senior security officials, prior to their transfer under close escort to the Commission's main operating base for interviewing'; First UNIIIC Report (n8) para 10: 'Although resolution 1595 (2005) gave the Commission executive authority, the Commission to a large extent was supported by the Lebanese judicial and security authorities during search and raid operations'; First UNIIIC Report (n8) para 87: 'A number of searches were conducted and 453 crime scene exhibits were seized'; First UNIIIC Report (n8) para 91: there was a need for research into Lebanese criminal law and procedure 'in order to ensure the proper protocols for searches, arrests, suspect interviews and charging documents'. See also Annex to Letter Dated 12 December 2005 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2005/775 (2005) [Second Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005) and 1636 (2005)] para 54: 'investigators from the Commission and Internal Security Forces officers conducted a search of the private residence of General Al-Hajj'.

([34]) Even when commissions of inquiry are established with the consent of the territorial state, cooperation may not be forthcoming. The Benazir Bhutto Commission's written requests to interrogate military officials, for instance, were rejected by the government. See Edouard Fromageau, 'Collaborating with the United Nations: Does Flexibility Imply Informality?' (2010) 7 IOLR 405, 419.

([35]) In SC Res 787 (n26), the Security Council requested the Yugoslavia Commission to investigate 'ethnic cleansing' but did not grant to it specific coercive powers. The Security Council resolution establishing the Darfur Commission placed an obligation on 'all parties' to cooperate. This was interpreted as referring to both the Government of Sudan and Sudanese rebels, but not third states. See Report of the International Commission of Inquiry for Darfur to the United Nations Secretary-General (Geneva, 25 January 2005) para 27; SC Res 1564 (n27) para 12.

([36]) See Agreement on Establishment of CICIG (n25) arts 3, 6.

([37]) In the resolutions establishing such commissions of inquiry, the Human Rights Council generally 'calls upon' or 'urges' the local government to cooperate fully with and grant access to personnel from the Office of the High Commissioner for Human Rights mission. Where such cooperation is not forthcoming, the consequences for the relevant state are often limited to an 'expression of deep regret' by the HRC in its follow-up resolution. This has been the case, for instance, for the recent commissions of inquiry established for Syria (see eg HRC Res S-16/1 (n22) para 8; HRC Res S-17/1 (n22) para 10), and the Democratic

People's Republic of Korea (see eg HRC Res 22/13, UN Doc A/HRC/RES/22/13 (2013) para 6).

([38]) SC Res 1757 para 2; and Annex thereto [Agreement on the Establishment of a Special Tribunal for Lebanon] (n13) art 19(2).

([39]) STL Statute (n13) art 19; STLE RPE r 111.

([40]) SC Res 808, UN Doc S/RES/808 (1993).

([41]) Statute of the International Criminal Tribunal for the former Yugoslavia ((25 May 1993, 32 ILM 1159 (1993)).

([42]) See generally Carla Del Ponte, 'Investigation and Prosecution of Large-Scale Crimes at the International Level: The Experience of the ICTY' (2006) 4 JICJ 539, 551ff.

([43]) SC Res 1593, UN Doc S/RES/1593 (2005).

([44]) Max Du Plessis and Christopher Gevers, 'Darfur Goes to the International Criminal Court (Perhaps)' (2005), 14(2) African Security Review 23, 31.

([45]) Frank Petit, 'The Small Steps Strategy of the ICC in Darfur—Interview with Antonio Cassese' (63 International Justice Tribune, 5 March 2007); Antonio Cassese, 'Flawed International Justice for Sudan' (*Project Syndicate,* 15 July 2008) <http://www.project-syndicate.org/commentary/flawed-international-justice-for-sudan> accessed 2 December 2013.

([46]) A fifth, Hassan Habib Merhi, was indicted by the Prosecutor on 5 June 2013 and this indictment was confirmed by the pre-trial judge on 31 July 2013. On 10 October 2013, the pre-trial judge issued an order under r 76(E) of the Rules to effect service of the arrest warrant in an alternative way as attempts at personal service by the Lebanese authorities had failed. See STL, Public Redacted Indictment, *Prosecutor v Merhi,* Case No STL-13-04/I/PTJ, Prosecutor, 5 June 2013; STL, Order Pursuant to Rule 76(E), *Prosecutor v Merhi,* Case No STL-13-04/I/PTJ, Pre-Trial Judge, 10 October 2013.

([47]) Amnesty International, 'The Special Tribunal for Lebanon: Selective Justice?' (27 February 2009).

([48]) See Annex to Letter Dated 25 September 2006 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2006/760 (2006) [Fifth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005)] paras 88–9; Sixth UNIIIC Report (n11) para 2; Human Rights Watch, 'Why They Died' (September 2007).

([49]) STL Statute (n13) art 1 and art 4(3)(a). The Secretary-General justified this decision by the need to grant 'a jurisdiction reasonably limited so as not to overburden the prosecutor's office and the tribunal as a whole'. See Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, UN Doc S/2006/893 (2006) para 17.

([50]) John Cerone 'The Politics of International Justice—US Policy and the Legitimacy of the Special Tribunal for Lebanon', (2011–2012) 40 Denv J Intl L & Poly 44, 57–8.

([51]) A similar accountability gap arose in respect of cases in which the Commission requested Lebanese authorities to freeze assets belonging to suspects or otherwise linked to the investigation. Security Council Resolution 1636 subsequently provided a system of oversight for such freezing measures, but this was never used. See SC Res 1636 (n10) para 3.

([52]) First UNIIIC Report (n8) para 174 (emphasis added).

([53]) WGAD, Opinion No 37/2007 (Lebanon) in Opinion Adopted by the Working Group on Arbitrary Detention, UN Doc A/HRC/10/21/Add.1 (2009) 72ff. In addition to the four generals, the communication to

WGAD was filed on behalf of two mobile telephone salesmen, arrested for selling telephone cards which could be connected with the Hariri attack without recording the identity of the purchasers, as well as two brothers who purportedly had telephone contacts with persons suspected of complicity in the Hariri assassination. Mr Tarabay and Mr Talal Mesto, the two telephone salesmen, were freed in August 2009. The Abdel Aal brothers were released in February 2009, after over four-and-a-half years in detention. See Amnesty International, 'Annual Report; Human Rights in the Lebanese Republic in 2009' (2009) <http://www.amnesty.org/en/region/lebanon/report-2009> accessed 2 December 2013; Dalila Mahdawi, 'Lebanese Authorities Free Three Suspects in Hariri Killing', *The Daily Star* (Beirut, 26 February 2009).

([54]) New Code of Criminal Procedure (Lebanon), Act No 328 of 7 August 2001, art 108 allows the detention of individuals without indictment for an indeterminate period of time on suspicion of committing specified crimes. Following the amendment to art 108 implemented by Act No 111 of 26 June 2010, terrorism expressly appears among the listed offences. See also Nidal Jurdi, 'Falling Between the Cracks: the Special Tribunal for Lebanon's Jurisdictional Gaps as Obstacles to Achieving Justice Public Legitimacy' (2011) 17 UC Davis J Intl L & Poly 253, 271.

([55]) WGAD Opinion No 37/2007 (n53) 72ff.

([56]) WGAD Opinion No 37/2007 (n53) para 7.

([57]) 'Informal Comments to the Media by the Commissioner of the UN International Independent Investigation Commission into the Assassination of Former Lebanese Prime Minister Rafiq Hariri, Mr Serge Brammertz, on the Situation in the Middle East', *UN Webcast Archives* (19 July 2007) 6m15–6m30) <http://www.un.org/webcast/sc2007.html> accessed 2 December 2013).

([58]) WGAD Opinion No 37/2007 (n53) para 28.

([59]) WGAD Opinion No 37/2007 (n53) paras 36 and 47. The WGAD noted that it was not competent to rule directly on whether investigators acting within the framework of an international investigation commission set up by the Security Council had violated international human rights law.

([60]) STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack Against Prime Minister Rafiq Hariri and Others, Case No CH/PTJ/2009/06, Pre-Trial Judge, 29 April 2009, para 5.

([61]) STL, Order Regarding the Detention of Persons Detained in Lebanon (n60) para 34. The Prosecutor also noted that 'some witnesses had modified their statements and one key witness had expressly retracted his original statement incriminating the persons detained'.

([62]) STL, Order Regarding the Detention of Persons Detained in Lebanon (n60).

([63]) It should be noted that, if the answer to this question is that responsibility lies with UNIIIC, whether the STL Office of the Prosecutor would bear liability for such actions depends on the international rules on succession to international organizations. See eg the ICJ advisory opinion in *International Status of South West Africa,* Advisory Opinion, ICJ Rep 1950 (11 July) 128, 134–7.

([64]) ICTR, Decision, *Prosecutor v Barayagwiza,* Case No ICTR-97-19-AR72, Appeals Chamber, 3 November 1999, paras 55–61.

([65]) *Prosecutor v Barayagwiza* Appeals Decision (n64). See also ICTR, Judgment, *Kajelijeli v Prosecutor,* Case No ICTR-98-44A-A, Appeals Chamber, 23 May 2005, para 226.

([66]) ICTR, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, *Prosecutor v Rwamakuba,* Case No ICTR-98-44-T, Trial Chamber, 12 December 2000, paras 32–3.

([67]) ICC, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to article 19(2)(a) of the Statute of 3 October 2006,

Prosecutor v Lubanga, Case No ICC-01/04-01/06, Appeals Chamber, 14 December 2006.

([68]) ICC, Judgment on the Appeal of Mr Thomas Lubanga Dyilo (n67) para 42.

([69]) ECCC, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias 'Duch', *Prosecutor v Duch*, Case No 001/18-07-2007-ECCC-OCIJ (PTC01), Pre-Trial Chamber, 3 December 2007, para 15.

([70]) First UNIIIC Report (n8) para 174 (emphasis added).

([71]) Second UNIIIC Report (n33) para 54 (emphasis added).

([72]) First UNIIIC Report (n8) para 10. See also para 11 ('From a two-track investigation, one Lebanese, one United Nations, has emerged a complementary and unified investigation carried forward in tandem by the Commission and the Lebanese authorities. The Lebanese authorities have steadily shown the capacity to take increasing responsibility in pursuing the case. This was demonstrated by the fact that they took the initiative of arresting suspects, organizing raids and searches'); para 113 ('on 13 October 2005, on the suggestion of the Commission, the Lebanese Prosecutor General issued an arrest warrant concerning Mr Saddik, which led to his arrest on 16 October').

([73]) First UNIIIC Report (n8) para 13.

([74]) WGAD Opinion No 37/2007 (n53) para 15.

([75]) Gary C. Gambill, 'The Hariri Investigation and the Politics of Perception', *The Middle East Monitor*, 3, 2 (August 2008).

([76]) Erich Follath, George Mascolo, and Holger Stark, '"Bye-Bye, Hariri!" UN Report Links Syrian Officials to Murder of Former Lebanese Leader' *Der Spiegel* (Hamburg, 24 October 2005).

([77]) STL, Order Regarding the Detention of Persons Detained in Lebanon (n60) para 34.

([78]) 'Aoun: Tribunal Must Resolve Issue of False Witnesses' *The Daily Star* (Beirut, 2 August 2010).

([79]) Marten Youssef and Miša Zgonec-Rožej, 'The Special Tribunal For Lebanon (STL)' (Chatham House, International Law Programme Meeting Summary, 14 September 2012) p. 5 <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/140912summary.pdf> accessed 2 December 2013.

([80]) STL, 'Ask the Tribunal: Can the STL Consider the Issue of So-called "False Witnesses"?' <http://www.stl-tsl.org/en/ask-the-tribunal/can-the-stl-consider-the-issue-of-the-so-called-false-witnesses> accessed 2 December 2013.

([81]) Some individuals had already been arrested for false testimony in 2006 under article 408 of the Lebanese Criminal Code. See Annex to Letter Dated 14 March 2006 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2006/161 (2006) [Third Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005) , 1636 (2005) and 1644 (2005)] para 49.

([82]) Decision, Case No 11724/2008, 27 January 2010, First Investigative Judge in Beirut Ghassan Munif Owaidat partially reproduced in STL, Order Assigning Matter to Pre-Trial Judge, *In the Matter of El-Sayed*, Case No CH/PRES/2010/01, President, 15 April 2010, note 11.

([83]) A Ministry of Justice memorandum also confirmed that most such 'false witnesses' were interviewed by UNIIIC only, not by Lebanese authorities. See Ibrahim Najjar, 'The Report of Minister of Justice Ibrahim Najjar to the Lebanese Council of Ministers' (author's tr) *Saida Online* (11 October 2010) <http://www.saidaonline.com/news.php?go=fullnews&newsid=37149> accessed 2 December 2013.

([84]) Jurdi, 'Falling Between the Cracks' (n54). A differing view was taken by the Lebanese Minister of Justice, who indicated that the Lebanese courts had jurisdiction over the cases of false witnesses on the basis that UNIIIC was assisting Lebanese authorities in their investigation and any interviews conducted by them should be considered to have been conducted before the Lebanese judicial authorities. See Najjar, 'Report of Minister of Justice Ibrahim Najjar' (n83).

([85]) STL RPE Amendment of 30 October 2009.

([86]) Such a person may be prosecuted for contempt so long as several conditions are met. See Antonio Cassese, Explanatory Memorandum to the STL's Rules of Procedure and Evidence (10 November 2009) para 29.

([87]) Cassese, 'Explanatory Memorandum' (n86).

([88]) Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions' (n15) 41.

([89]) Serge Brammertz, 'International Criminal Court: Now for Kony and Bashir', *The Guardian* (London, 13 June 2012).

([90]) In its Fifth Report n48, para 91, the Commission noted that 'the recruitment of competent personnel within appropriate timescales remained a significant challenge for the Commission and delays in the recruitment process impacted the Commission's ability to fulfill its mandate in a timely manner'.

([91]) A leaked cable from the US Embassy in Beirut to Washington reveals in fact that 'Surprisingly, [Brammertz] cited administrative issues as his largest obstacle, describing 30 to 40 percent of his time as spent on administrative issues such as hiring more investigators, finding adequate housing for his staff, and dealing with UN budget restrictions.' See Embassy Beirut, 'UNIIIC Investigation "Closing Doors", Making Progress' (18 September 2006) <http://english.al-akhbar.com/node/181> accessed 2 December 2013.

([92]) Letter Dated 13 December 2005 from Fuad Siniora to the UN Secretary-General, UN Doc S/2005/783 (2005). See also SC Res 1644 (n11).

([93]) SC Res 1757 (n13).

([94]) The STL Pre-Trial Judge has accepted the Tribunal's jurisdiction over three such connected cases (the attacks relating to Marwan Hamadeh, George Hawi, and Elias El-Murr) on 19 August 2011. See eg STL, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated Against Mr Elias El-Murr on 12 July 2005 to Defer to the Special Tribunal For Lebanon, Case No STL-11-02/D/PTJ, Pre-Trial Judge, 19 August 2011. It remains to be seen whether the Prosecutor will present evidence that other attacks are 'connected', and the STL Statute requires, the authorization of the Security Council to establish jurisdiction over incidents occurred after 12 December 2005.

([95]) Fifth UNIIIC Report (n48) para 87.

([96]) STL RPE r 66(A) provides that '[w]henever the Prosecutor questions a suspect…the questioning shall be video-recorded or, if that is not practicable, audio-recorded…'

([97]) The Appeals Chamber ruled unanimously that the unrecorded statement should be excluded from the trial record. See ICTY, Judgment, *Prosecutor v Halilović*, Case No IT-01-48-A, Appeals Chamber, 16 October 2007, paras 38–40.

([98]) See eg Sixth UNIIIC Report (n11) para 105: 'The Commission has reviewed the internal procedure that it adopted pursuant to Security Council resolution 1595 (2005) in the light of the draft statute of the special tribunal for Lebanon. It remains aware of the responsibility to ensure that testimonial, forensic or any other evidence that it collects shall be admissible before this jurisdiction and, to this end, to respect all relevant international standards.'

([99]) Secretary-General, Estimates in Respect of Special Political Missions, Good Offices and Other Political Initiatives Authorized by the General Assembly and/or the Security Council, UN Doc A/60/585/Add.2 (15 February 2006); Secretary-General, Estimates in Respect of Special Political Missions, Good Offices and Other Political Initiatives Authorized by the General Assembly and/or the Security Council, UN Doc A/60/585/Add.4 (13 June 2006); Secretary-General, Estimates in Respect of Special Political Missions, Good Offices and Other Political Initiatives Authorized by the General Assembly and/or the Security Council, UN Doc A/61/525 (5 December 2006).

([100]) 'FBI assists Lebanon in probe into Shatah's killing', *The Daily Star* (31 December 2013).

([101]) Daniel Bellemare, Speaker (Canadian Council for International Law Annual Conference, Ottawa, 16–18 October 2008).

([102]) See eg First UNIIIC Report (n8) para 91.

([103]) Fifth UNIIIC Report (n48) para 11.

([104]) See eg International Criminal Court Act 2001 adopted in the UK; Law No 95-1 of 2 January 1995 adopted in France.

([105]) The inadequacy of this framework was emphasized by UNIIIC in its Fifth Report: 'Unlike situations involving mutual legal assistance, where each state can negotiate a framework for cooperation on criminal matters, states are required to cooperate with the Commission and to take any steps necessary under their own law to implement their obligations under the above-mentioned resolutions.' Fifth UNIIIC Report (n48) para 75.

([106]) *The New Yorker* journalist Dexter Filkins reports that, even though investigators identified telephone contacts with Iran, 'they didn't know who in Iran was called, and…they couldn't persuade Western intelligence agencies to help them. As it turned out, the agencies knew quite a bit.' See Dexter Filkins, 'The Shadow Commander' (n1).

([107]) For the position with regards to the fifth person indicted, see text to note 46.

([108]) STL, President's Order Pursuant to Rule 76(E), *Prosecutor v Ayyash et al,* Case No STL-11-01/I/PRES, President, 18 August 2011, para 8.

([109]) Government of Lebanon's Response to the Request for Assistance of 7 October 2011, reproduced partially in STL, Decision to Hold Trial *In Absentia, Prosecutor v Ayyash et al,* Case No STL-11-01/I/TC, Trial Chamber, 1 February 2012, para 116.

([110]) Letter from Lebanese Prosecutor-General to the President of the STL, 7 September 2011 reproduced partially in STL, Decision to Hold Trial *In Absentia* (n109) para 116.

([111]) 'Hezbollah Leader Nasrallah rejects Hariri Indictments', *BBC News*, 3 July 2011.

([112]) D. Filkins, 'The Shadow Commander' (n1).

([113]) Ian Black, 'Syria Refuses to Cooperate with Hariri Tribunal' *The Guardian* (London, 10 May 2007).

([114]) See Dov Jacobs, 'The Unique Rules of Procedure of the STL', Chapter 7.

([115]) Annex to the Letter Dated 18 May 2012 from the Permanent Representative of Portugal to the United Nations Addressed to the President of the Security Council, UN Doc S/2012/373 (2012) [Report of the Workshop on Accountability and Fact-Finding Mechanisms for Violations of International Humanitarian Law and Human Rights Law: 'The Role of the Security Council—Past and Future'] 44.

([116]) David Tolbert and Aleksandar Kontic, 'The ICTY and the Transfer of Cases/Materials to National Judicial Authorities: Lessons in Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The*

International Criminal Court and Complementarity: From Theory to Practice Cambridge: CUP 2011). See also Brammertz, 'International Criminal Court' (n89).

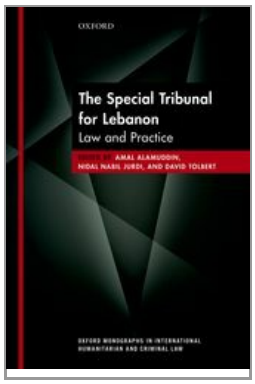
([117]) Similar rosters have been compiled in recent years at the national level (eg the UK Preventing Sexual Violence Initiative) or on an ad hoc multilateral basis (eg Justice Rapid Response). However, no similar initiative has been undertaken within the UN framework.

([118]) Third UNIIIC Report (n81) paras 83–84: '[c]oordination between the investigating judges of the 14 cases is not seamless, especially as they have numerous other cases to investigate. This is compounded by their occasional difficulties in gaining access to information and intelligence products. The Commission has thus suggested to the Lebanese authorities that investigating judges with specific expertise or experience in terrorism investigations be assigned to these cases. The security services use investigative techniques with no analytical capacity and electronic tools, and lack such technical administrative resources as computers and photocopy machines.'

([119]) The ICTY set up programmes for funnelling its expertise in Balkans war crimes prosecutions to national authorities and welcomed many liaison prosecutors from Serbia, Croatia, and Bosnia-Herzegovina to work in its office in The Hague. See Brammertz, 'International Criminal Court' (n89).

([120]) Report of the Fact-Finding Mission to Lebanon (n4) para 62; First UNIIIC Report (n8) para 12 (witnesses told the Commission that they would not have been willing to cooperate with a Lebanese investigation).

([121]) Repertoire of the Practice of the Security Council, 'Subsidiary Organs: Commissions and Investigative Bodies' <http://www.un.org/en/sc/repertoire/subsidiary_organs/commissions_and_investigations.shtml> accessed 2 December 2013.



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The Crime of Terrorism in Lebanese and International Law

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[–] Abstract and Keywords

This chapter examines the *ratione materiae* of the Special Tribunal for Lebanon (STL), as provided for in the STL Statute and Lebanese law, and as developed in the nascent jurisprudence of the Tribunal. It argues that the STL's judges alluded to a 'crystallized' international definition of terrorism that is not really there, under international law. The STL judges also erred in their interpretation of some of the elements of the crime of terrorism under Lebanese law by unnecessarily and inappropriately redefining the Lebanese definition of terrorism in light of international law to include 'means' of committing a terrorist attack — such as with machine guns, pistols, and revolvers — that would not be sufficient to constitute terrorism under Lebanese law. The chapter concludes that STL judges were involved in considerable legal creativity, and in so doing mixed *lex leta* (law as it is) with *lex ferenda* (law as it should be) and caused damage to STL proceedings.

Keywords: international criminal tribunal, Lebanon, Lebanese law, jurisprudence, terrorism

5.1 Introduction

Most commentators agree that the Special Tribunal for Lebanon ('STL' or 'the Tribunal') is a *sui generis* tribunal with a number of innovative features that have no precedent in other international(ized) courts. One of the principal distinctive features of the Tribunal is that it deals with persons suspected of crimes defined under *domestic*, rather than international, law.[1] The STL's subject matter jurisdiction is limited to the crime of terrorism under Lebanese law as well as other ordinary offences against life, or related to personal integrity, or illicit associations. Although there has been understandable criticism of the STL's exclusive reliance on domestic criminal law,[2] the clarity of Lebanese law and jurisprudence related to terrorism does introduce considerable certainty into the process. This is an advantage from the perspective of upholding the 'principle of legality',[3] which requires that no person should be tried or punished for any act or omission that did not constitute a criminal offence under the applicable law at the time it was committed. The other international criminal courts and tribunals have often faced the issue of applying less-than-settled law, so the STL is much better placed in this regard.

However, the STL Appeals Chamber, unlike its predecessors, took the unusual step of 'clarifying' the elements of the crimes prior to the commencement of the proceedings.[4] This was accomplished through a landmark decision, which is more **(p.74)** in the nature of an advisory opinion than a decision on the merits.[5] In doing so, the Appeals Chamber not only 'constructed' a definition of an international customary crime of terrorism but also redefined the parameters of the Lebanese definition of terrorism. The Appeals Chamber has received criticisms for both aspects of its decision,[6] with some justification.

This chapter explores the *ratione materiae* of the Tribunal, not only as provided for in the STL Statute[7] and Lebanese law, but also as developed in the nascent jurisprudence of the Tribunal. It argues that the STL's judges have alluded to a 'crystallized' international definition of terrorism that is not really there—yet—under international law.

It also argues that the STL judges erred in their interpretation of some of the elements of the crime of terrorism under Lebanese law by unnecessarily and inappropriately redefining the Lebanese definition of terrorism in the light of international law to include 'means' of committing a terrorist attack—such as with machine guns, pistols, and revolvers—that would not be sufficient to constitute terrorism under Lebanese law.

Recasting the law in this manner threatens the principle of legality because it expands the acts that constitute the crime. Moreover, such an approach was unnecessary and without a clear judicial benefit. If potential cases before the STL do not come within the ambit of article 314 of the Lebanese Criminal Code that defines terrorism,[8] other crimes enunciated under article 2 of the Statute would still be applicable and can 'fill the gap'.

The chapter concludes that the STL judges have been involved in considerable legal creativity, and in doing so they have mixed *lex leta* (law as it is) with *lex ferenda* (law as it should be). While this may be useful for the future development of international criminal law on terrorism, for the time being the damage done to the STL proceedings outweighs the possible broader benefits.

5.2 The Subject Matter Jurisdiction of the STL in the STL Statute and Lebanese Law

It is clear from article 2 of the STL Statute, that the Tribunal will apply only Lebanese criminal law in prosecuting the crimes that fall under its jurisdiction, **(p.75)** although international criminal law modes of responsibility can be charged under article 3.[9] Article 2 of the Statute stipulates that:

> The following shall be applicable to the prosecution and punishment of the crimes referred to in Article 1, subject to the provisions of this Statute;
>
> (a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".[10]

Subject to the provisions of the STL Statute, the Tribunal will apply the relevant articles in Lebanese criminal law on terrorism, illicit associations, crimes, and offences against life and personal integrity.[11] The drafters of the Statute excluded any reference to international or regional sources for the substantive crimes.[12] Early drafts of the Statute had included a reference to the Arab Convention for the Suppression of Terrorism (Arab Terrorism Convention),[13] to which Lebanon is a state party, but the drafters ultimately deleted that provision.[14]

In terms of the crime of terrorism, article 314 of the Lebanese Criminal Code, promulgated on 1 March 1943, is the cornerstone article for prosecutions by the STL.

For an elaborated understanding of some important elements of the crime of terrorism under Lebanese law, the following section discusses the particular nature of the means of committing this crime, which are at variance with the STL Appeals Chamber's interpretation.

5.3 The Lebanese Definition of Terrorism Requires Commission by 'Means Liable to Create Public Danger' Exclusively

Article 314 states that 'Terrorist acts are all acts intended to cause a state of terror and *committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents*.'[15]

(p.76) While the Lebanese law does include a non-exhaustive list of the means by which the crime of terrorism can be committed, it requires the means used to be of a nature that by itself creates public danger. This has created considerable confusion among parts of the legal community. The English translation may have caused such confusion as to whether the 'creating public danger' is referred to the crime or to the 'means' used. The proper interpretation is that the Lebanese crime of terrorism requires commission by means that by their nature create public danger. The Arabic article is clearer, and it

confirms that the commission of the crime of terrorism takes place only by means which by themselves cause public danger. It is one of the requirements of the material element of the crime. The statutory provision is clear and the domestic jurisprudence is consistent.[16] The probable confusion may have originated from the non-exhaustive list of the means within Article 314. The non-exhaustive list includes means such as 'explosive devices, inflammable materials, poisonous or incendiary products or infectious or microbial agents…'. This list can include other means as long as they are by themselves of the nature to create public danger.

Based on this information, the definition affirmatively excludes attacks that are conducted by weapons that are not likely 'to create a public danger'. For instance, the use of rifles, pistols, revolvers, or guns does not fall under such a category, and thus crimes committed by such devices do not fall under article 314. The Lebanese Council of Justice has been relatively consistent in excluding crimes perpetrated by guns or revolvers from the ambit of the crime of terrorism.[17] The present writer could not identify any—at least published—jurisprudence in which the use of pistols, revolvers, or rifles in terrorizing the public was considered a crime of terrorism. This is a restrictive element in the Lebanese definition, and one can understand the calls for its amendment.[18] However, for the time being, this is the requirement under Lebanese law.

(p.77) The discussion that follows elaborates on the contentious features of the crime of terrorism as interpreted by the STL Appeals Chamber, including its interplay with crimes under international law.

5.4 The Crime(s) of Terrorism as Interpreted by the Appeals Chamber of the STL

The STL Appeals Chamber in its Interlocutory Decision on the Applicable Law made two key findings that are contentious. First, it held that there was a definition of the crime of terrorism under customary international law. Secondly, it held that Lebanese law on terrorism, as codified in article 314 of the Criminal Code, was narrower than this international definition in that it could only be perpetrated using means that are liable by their nature to create a public danger, excluding the use of guns or firearms.[19] The Chamber then went on to 'interpret' Lebanese law so as to include such means, to bring it into line with international law that is binding on Lebanon. In doing so it has threatened the principle of legality.

5.4.1 A customary international law definition of terrorism?

In its Interlocutory Decision on the Applicable Law, the Appeals Chamber went out of its way to provide a definition for a customary international crime of terrorism. Although the move seems surprising to some, it was less so for those who followed the previous writings of the then President of the Tribunal, the late Professor Cassese.[20] The STL Appeals Chamber ruled that:

> At present we can at least state the following about a customary rule defining an international crime of terrorism in a time of peace. We have shown how international conventions, regional treaties, UN Security Council and General Assembly

> resolutions, as well as national legislation and case law have increasingly coalesced around a common definition of the crime of international terrorism. Such definition is the product of a law-making process in the course of which the UN Security Council, through a resolution adopted pursuant to Chapter VII of the UN Charter, has stated that 'terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security'…
>
> In sum, the subjective element of the crime under discussion is twofold, (i) the intent or *dolus* of the underlying crime and (ii) the special intent *(dolus specialis)* to spread fear or coerce an authority. The objective element is the commission of an act that is criminalised by other norms (murder, causing grievous bodily harm, hostage taking, etc.). The crime **(p.78)** of terrorism at international law of course requires as well that the terrorist act be transnational.[21]

The Appeals Chamber adopted an innovative method to detect the existence of state practice in favour of the existence of an international custom proscribing terrorism. It took a flexible approach in order to identify the presence of such a custom, focusing on areas of commonalities instead of areas of divergence, and from that it deduced patterns that can confirm such a practice.[22]

The Appeals Chamber surveyed a wide selection of treaties, UN resolutions, and legislative and judicial practice of states to confirm the formation of a 'general *opinio juris* in the international community, accompanied by a practice consistent with such opinion'.[23] Hence, for the Appeals Chamber, 'a customary rule of international law regarding the international crime of terrorism, at least *in time of peace,* has indeed emerged'.[24]

Before commenting on the approach or the findings of the Appeal Chamber, there is considerable confusion about what constitutes an international crime—even among scholars—which needs some clarification.[25] For Bassiouni, there are five policy criteria for international criminalization:

> 1. The prohibited conduct affects international interests, and this is reflected in a threat to international peace and security;
> 2. The prohibited conduct constitutes egregious conduct that is viewed as an offensive against the commonly shared values of the international community;
> 3. The prohibited conduct has transnational implications;
> 4. The conduct is harmful to international protected persons or interests; and
> 5. The conduct violates an internationally protected interest but it does not rise to the level required by points (1) and (2), but because of its nature it can be prevented and suppressed by criminalization.[26]

In applying these criteria to the findings of the Appeals Chamber, it is not difficult to determine that the policy interests for criminalizing terrorism have evolved rapidly, and most of these criteria have been fulfilled. First, the Security Council, in its numerous resolutions under Chapter VII, has repeatedly indicated that terrorism is a threat to international peace and security.[27] Secondly, the relative consensus in the General

Assembly and the United Nations bodies on combating terrorism reflects that *civitas maxima* do consider terrorism as a global threat. Thirdly, the series of General Assembly and Security Council resolutions against terrorism **(p.79)** before and after 11 September 2001 reflect the transnational implications of some acts of terrorism. Finally, international terrorism is clearly harmful to states, protected individuals, and international interests.

Based on these points, the policy considerations for internationally criminalizing terrorism seem to be fulfilled. Despite that, the challenge is in reaching an internationally acceptable definition of what constitutes the crime of terrorism. The Appeals Chamber's creative efforts in establishing an international definition of terrorism were received with considerable criticism.[28] The Appeals Chamber was viewed by one scholar as being selective in assembling disparate domestic and international patterns and practices to reach the desired conclusion that there exists *opinio juris* and state practice that confirm the existence of a customary definition.[29] The Chamber was also criticized for adopting a customary definition of terrorism that suffers from being over-inclusive and under-inclusive at the same time.[30] So aside from the contentious debate about whether such a definition has in fact crystallized or not, there are number of criticisms regarding the parameters of the elements of the crime which the Appeals Chamber has constructed.

First, the motive or the 'purpose requirement' has not been included in the Appeal Chamber's proposed definition under customary international law. The Appeal Chamber's justification for not including this requirement in the definition is that 'the overwhelming weight of state opinion, reinforced by the international and multilateral instruments, to which these states are party, does not yet contain that element'.[31] On the other hand, the Appeals Chamber confirmed that there are domestic and international law sources that include a political, religious, racial, or ideological purpose. Indeed the Chamber, in its decision, elaborated on various national definitions that include such a requirement,[32] as well as various UN resolutions[33] and the Draft Comprehensive Convention against International Terrorism.[34]

(p.80) The Chamber's conclusion on this point—that although the 'purpose requirement' is present in some national systems it has not ripened into customary international law—appears to be correct. The 1994 UN General Assembly Declaration on Measures against International Terrorism states that

> Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[35]

The Declaration's definition of terrorism requires a political motive. It is terror for a political purpose. But, crucially, the motive requirement was dropped in other subsequent instruments, and thus the better view is that motive is a constitutive element of the evolving international definition of terrorism, but it is not yet an accepted part of

any such definition. According to Ben Saul, the definition of the 1994 Declaration 'at best… reflects nascent political agreement on a shared concept of terrorism'.[36]

Nonetheless, the Appeals Chamber's approach is odd in that it overstretches by finding that there is an international crime of terrorism, but then defines it as excluding this critical motive requirement. It is unclear why the Appeals Chamber considered the available sources on the motive as insufficient to be included in the definition, especially when compared with its conclusion that the other elements had been firmly established. For one writer, it is indeed the 'motivation' that differentiates terrorism from ordinary crimes.[37] So, recognizing a crime that lacks this element does not define the precise nature of the crime of terrorism.

The debates among academic commentators underscore the level of uncertainty regarding what should be included in the definition and what should be excluded. In other words, it seems that the proscription of terrorism is a settled norm in international law but defining its parameters remains law in the making even after the STL Appeals Chamber set out the elements that it considered necessary. This also affects whether such a definition can fulfil the requirements for an international crime described earlier. One of the important requirements is that the crime should constitute a threat to the peace and security of the international community. The current definition proposed by the STL can unfortunately capture conduct that does not constitute a threat to the international community or to any of its protected persons and interests. Some of this conduct does not even constitute egregious conduct that can be viewed as offensive against the commonly shared values of the international community.

(p.81) For example, let us posit that there is a Mexican drug dealer who abducts an American officer and threatens to kill the officer if his partners in a United States prison are not released. According to the proposed definition of the Appeals Chamber, he has committed an international crime of terrorism as his conduct satisfies the elements of the crime. In terms of the *mens rea*, the perpetrator had the will and the knowledge to kidnap the victim (*dolus*) and had the special intent (*dolus specialis*) to coerce the American authorities into releasing some of his partners from prison. In terms of the *actus reus*, the crime is perpetrated through committing the ordinary crime of kidnapping, and it does fulfil the transnational requirement, as the perpetrator is a Mexican who is trying to coerce the American government. However, the primary question here is whether this is an international crime that constitutes a threat to international peace and security or not. The simple answer seems to be 'no'. It is still covering conduct that threatens the interests of particular affected states, but it does not go beyond that. In this scenario, the crime is a transnational crime and not an international one. Nevertheless, if terrorism can occur without such a political, philosophical, ideological, racial, ethnic, religious motive, this conduct would be elevated to an international crime although in reality such conduct should fall short of fulfilling the requirements of international criminalization.[38] It is the political, religious, or ideological motive that makes the crime relevant to the interests of states and international persons.[39]

For some writers, the Appeals Chamber should have given the motive a heavier weight

and included it in the definition of terrorism. This would have significantly strengthened the foundation for the adopted definition of terrorism.[40] Although a strict reading of the state of international law today suggests that the motive requirement is not yet a constitutive element of the crime of terrorism, there are also other elements that are unsettled. Hence, as this crime is still in the making, the motive requirement is crucial in such a definition to make the crime meaningfully correspond to the requirement of international crimes.

Conversely, another objectionable element of the Appeals Chamber's definition of the international crime of terrorism is that it introduces an intent requirement that is overly broad. While the intention to spread terror or fear is well established in many nations' laws across the world, the second alternative prong of the special intention—the intention to coerce the authorities—is potentially far-reaching.[41] The fear is that the definition can be used as a pretext for cracking down on activists who protest against their governments. If they were involved in some riot or road blocking to put pressure on the authorities to meet their demands, they may face the danger of being prosecuted for the international crime of terrorism. That is too broad and may violate international human rights law.[42]

(p.82) The argument presented here confirms that despite the creative efforts of the Appeals Chamber, the disagreements about and discrepancies in the elements of the international crime of terrorism remain. Although the proscription of terrorism in international law is a settled norm, the nations of the world are still in the process of formulating an internationally applicable definition.

5.4.2 The Appeals Chamber's 'reconciliation' of Lebanese and international law on terrorism

Among the fifteen issues considered by the Appeals Chamber, the one most relevant to present purposes is

> [w]hether the Tribunal should apply international law in defining the crime of terrorism; if so, how the international law of terrorism should be reconciled with any differences in the Lebanese domestic crime of terrorism; and in either case, what are the objective and subjective elements of the crime of terrorism to be applied by the Tribunal.[43]

The Appeals Chamber analysed the domestic and international elements of the crime and found that the differences were as follows:

> A comparison between the crime of terrorism as defined under the Lebanese Criminal Code and that envisaged in customary international law shows that the latter notion is broader with regard to the means of carrying out the terrorist act, which are not limited under international law, and narrower in that (i) it only deals with terrorist acts in time of peace, (ii) it requires both an underlying criminal act and an intent to commit that act and (iii) it involves a transnational element.[44]

This means that in some ways, the definition of terrorism under international law is

narrower than Lebanese law. For instance, the Lebanese definition of terrorism does not require the 'acts intended to create a state of terror' to be criminal in and of themselves. The original Arabic text of article 314 does not refer to crimes (*jara'em*) but acts (*af'aal*). Under this article, the underlying conduct (*actus reus*) is therefore 'an act' and not a crime. This approach differs from the proposed customary definition of terrorism as developed by the Appeals Chamber of the STL in its Interlocutory Decision.

But in one key way, the definition of terrorism under international law is *broader* than under Lebanese law. This relates to the *means* by which the crime is perpetrated. Lebanese law accepts certain types of weapons only whereas international law appears to allow for a larger subset, including guns and other firearms. As summarized by the Appeals Chamber, whereas under Lebanese jurisprudence 'these [means] were limited to means with "conspicuous and vast effects (such as bombs)"', the Appeals Chamber held that article 314 also encompasses attacks **(p.83)** with weapons with more 'modest outside effects, such as guns'.[45] It held that attacks with weapons that are not inherently dangerous to the public might qualify as terrorism because of the circumstances and manner in which they are perpetrated. The Appeals Chamber added that 'means that are liable to create a public danger' will also include attacking a prominent political or military leader, even if no other people are present because such attacks may result in other assassinations of leaders or violent reactions.[46]

The Chamber went on to explain how it proposed to reconcile this for the purposes of defining terrorism for the STL:

> international conventional and customary law can provide guidance to the Tribunal's interpretation of the Lebanese Criminal Code…as domestic law those Lebanese provisions may be *construed* in the light and on the basis of the relevant international rules. Thus when applying the law of terrorism, the Tribunal may 'take into account the relevant applicable international law', but only as an aid to *interpreting* the relevant provisions of the Lebanese Criminal Code.
>
> …In interpreting the Lebanese Criminal Code in light of international law binding on Lebanon, we then conclude that one element of the Lebanese domestic crime of terrorism—namely, the objective element of the means used to perpetrate the terrorist act—should be interpreted by this Tribunal in a way that reflects the legal developments in the sixty-eight years since the Lebanese Criminal Code was adopted. As a result of this interpretation, before this Tribunal the means used to perpetrate a terrorist act might include those so far recognised by Lebanese courts. This conclusion does not violate the principle of legality, in particular the non-retroactivity of criminal prohibitions, because it is consistent with the statutory definition of terrorism under Lebanese law and is in accord with the international law that was accessible to the accused at the time of the alleged offending. Thus it is a reasonably foreseeable application of existing law. For all other elements of the crime, the Tribunal will apply Lebanese law as it has been interpreted and applied by the Lebanese courts.[47]

The Appeals Chamber states quite correctly that it should apply the substantive criminal law of Lebanon. Yet the Chamber has also indicated that as the STL is an international tribunal it must abide by the highest international standards of criminal justice.[48] It then indicates that as an international court, 'it may depart from the application and interpretation of national law by national courts under certain conditions: when such interpretation or application appears to be *unreasonable,* or may result in a *manifest injustice,* or is *not consonant with international principles and rules* binding upon Lebanon'.[49]

The Appeals Chamber 'openly acknowledged that its interpretation of Article 314 broadens the scope of that provision as it encompasses conduct that would not have been considered terrorism under the established approach of the Lebanese **(p.84)** courts'.[50] Although it was aware that its decision might lead to criticism that it violated the legality principle, it nonetheless rejected such criticism based on the idea that it would have been reasonably foreseeable to any person that 'any act designed to spread terror would be punishable, regardless of the kind of instrumentalities used as long as such instrumentalities were likely to cause a public danger' due to the international treaties that Lebanon had ratified (and customary international law).[51]

Being bound by the highest standards of international due process in international criminal justice should have compelled the Tribunal to interpret the domestic law in a manner that does not expand the scope of article 314, as this would be inconsistent with the principle of legality. Thus, it can be argued that the Appeals Chamber violated the same standards it had been invoking. For instance, it is a foreseeable scenario that the Tribunal will conduct trials *in absentia* with the possibility of retrial before the STL or subsequently probably before the Lebanese courts when the STL's mandate ends. If Lebanese domestic retrials materialize, the indicted person(s) may be retried for an expanded crime of terrorism that corresponds neither to the wording of article 314 of the Lebanese Criminal Code nor to the jurisprudence of the Lebanese courts that have applied it. It is true that the Lebanese monist legal system recognizes the supremacy of international treaties over domestic law. But equally the principle of legality (*nullum crimen sine lege*) is rigidly adhered to in the Lebanese legal system.[52] Referring to—and being bound by—international treaties does not mean that such treaties can be used as an interpretative guide for obscure or unreasonable domestic laws. Under Lebanese law, reconstructing or mainstreaming domestic laws in the light of treaty obligations can only occur when there is a lacuna or silence in the national law. Moreover this does not include expanding liability in substantive criminal matters, as the principle *nullum crimen sine lege* is rigidly adhered to in the Lebanese legal system.[53] For instance, although Lebanese courts are increasingly invoking the Convention against Torture, there could be no question of amending the ordinary crime of torture to correspond to the definition of torture in article 1 of the Convention if this would have expanded the acts that would be deemed criminal under Lebanese law. In a significant case of torture, the criminal magistrate in Beirut recognized the direct binding effect of the Convention against Torture in Lebanese law, but his substantive ruling was based solely on the basis of article 401 of the Lebanese Criminal Code and not on article 1 of the Convention.[54] The

then Magistrate did not amend the ordinary crime to fit into the crime of torture on the ground of 'foreseeability'. This would have violated the principle of legality in its **(p.85)** simplest form. Despite increasingly invoking the Convention against Torture by Lebanese judiciary, there is not a single case in which the courts have amended the ordinary crime to correspond to the definition of torture in Article 1 of the Convention. This applies to all binding international conventions. For instance, Lebanon never prosecuted the crime of genocide due to the absence of an incorporating legislation despite being a state party since 17 December 1953.[55]

It is also true that the Arab Convention for the Suppression of Terrorism has been invoked by the Tribunal, but this is as a vehicle for cooperation in criminal matters more than for incorporating its definition in domestic criminal codes.[56] The Arab Convention has a limited domestic legal impact as it defines terrorism for the purposes of judicial cooperation. It does not intend to replace the states parties' national laws on terrorism.[57] Therefore, the foreseeability argument the Appeals Chamber has raised, based partially on the Arab Convention, is not accurate. The Appeals Chamber has developed this argument to indicate that the amendments of the objective element of terrorism are not in contradiction to the principle of legality. But the Chamber itself admits that the '[Arab] Convention relates to the separate topic of State cooperation and does not directly conflict with Article 314'.[58] Then how can the public be asked to foresee that the Arab Convention is an integral part of the Lebanese Criminal Code?

Indeed, invoking the Arab Convention under these circumstances becomes even more contentious when one goes back to the drafting history of the Statute, which clearly indicates that the drafters of the Statute have deliberately eliminated any reference to the Arab Convention.[59] Can the Tribunal invoke such a source of law to interpret or reconstitute the Lebanese definition when the STL itself is prevented from prosecuting with reference to this convention? The answer should be in the negative.

Such alleged foreseeability is even more remote when it comes to customary international law on terrorism since its parameters are unclear and its applicability in Lebanon is inconsistent. For example, a perpetrator who used a revolver or a gun to commit the crime of homicide could not have known that he was also committing the crime of terrorism. If article 314 of the Lebanese Criminal Code is deficient, this should be remedied by changing the domestic law, not through international judicial creativity to interpret away the unwanted parts.

To conclude this section, the Interlocutory Decision of the Appeals Chamber to expand the ambit of article 314 to cover situations that are not initially envisaged by the article is incorrect both under the Lebanese law and according to human rights standards.

(p.86) 5.5 Conclusion

The STL is a *sui generis* Tribunal that is facing a number of challenges in law and practice. The Tribunal is different from other international tribunals. It applies substantive domestic law through an international procedural process. This has inherent complications, and respect for the principle of legality is a challenge that remains before

the Tribunal.

However, the attempt of the STL Appeals Chamber to innovate and develop the Lebanese definition was not persuasive. It created undesired complexities that could have been avoided. If the aim was to widen the scope of application of terrorism to prosecute more crimes, this is unnecessary. The ordinary crime of homicide is able to capture the crimes that may not be captured by article 314.

With respect to the declared customary definition of terrorism, the author shares with others the viewpoint that at best international law has not yet developed a fully framed definition of the international crime of terrorism. The situation seems similar to that of the crime of aggression before the International Criminal Court (ICC) review conference in Kampala, Uganda in 2010. Before Kampala, there was an international prohibition of aggression but without an agreed legal definition. The states drafting the Rome Statute of the ICC agreed that aggression *was a crime* but it was not until the ICC Review conference over a decade later that states agreed on the elements of the crime. The situation for terrorism seems no different. There are important consolidated efforts for criminalizing terrorism under international law, and it may be that this long-standing debate will be settled in the near future.

It is too ambitious to claim that the STL's nascent jurisprudence has itself resolved this issue. Even after the Appeals Chambers' seminal 2011 decision, states have still not managed to agree on finalizing the Comprehensive Convention on International Terrorism[60] and one still cannot convincingly claim that a definition of the customary international crime of terrorism has been reached.

It has been said that the only way to change customary international law is to break it. States have to declare the law as they wish it to be and if others follow suit this may eventually become the new reality.[61] Perhaps the same is true for courts and scholars. Indeed it could be said that something similar happened with crimes against humanity post-Nuremburg. Some jurists' writings mixed *lex lata* with *lex ferenda* regarding crimes against humanity, but thanks to these efforts *lex ferenda* has become *lex lata*.[62] Crimes against humanity are now settled as core international **(p.87)** customary crimes enshrined in various international criminal courts' founding instruments, including in article 7 of the ICC Statute.[63]

In the same vein, the STL did not 'find' a crystallized definition for terrorism but likely engaged in a lot of creativity in order to push the law forward. This may be problematic for the upcoming trials at the STL, but it may ultimately be considered a positive step for the future of international criminal law.

Notes:

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those of the organizations the author has worked for [nidaljurdi@yahoo.com].

([1]) See Nidal Nabil Jurdi, 'The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon' (2007) 5 JICJ 1125.

([2]) Jurdi, 'The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon' (n1) 1135.

([3]) See further Philippa Webb, 'Individual Criminal Responsibility', Chapter 6.

([4]) STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No STL-11-01/I/AC/R176bis, Appeals Chamber, 16 February 2011.

([5]) Kai Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?' (2011) 24 LJIL 655.

([6]) See Ben Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 24 LJIL 677.

([7]) Attachment to SC Res 1757, UN Doc S/RES/1757 (2007) [Statute of the Special Tribunal for Lebanon].

([8]) Penal Code (Lebanon), Legislative Decree No 340 of 1 March 1943. Contrary to the term commonly used, the verbatim translation of the Arabic '*Qanun Al'aaqubat Alubnani*' is Lebanese Penal Code, not Lebanese Criminal Code. However, Lebanese Criminal Code will be used throughout this chapter as this is the term used in the translation provided by the STL.

([9]) STL, Prosecutor's Brief Filed Pursuant to the President's Order of 21 January 2011 Responding to the Questions Submitted by the Pre-Trial Judge (Rule 176 bis), Case No STL-11-01/I/AC/R176bis, 31 January 2011; STL, Defence Office's Submissions Pursuant to Rule 176 bis*(B)*, STL-11-01/I/AC/R176bis, 31 January 2011; Interlocutory Decision on Applicable Law (n4).

([10]) STL Statute (n7) art 2.

([11]) Lebanese Criminal Code (n8) arts 200–3, 270–1, 314, 335, 547–9; Law of 11 January 1958 on Increasing the Penalties for Sedition, Civil War and Interfaith Struggle (Lebanon) arts 2, 4–6.

([12]) See further Jurdi, 'The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon' (n1) 1128.

([13]) (Cairo, 22 April 1998).

([14]) Draft STL Statute in *Annahar* (Beirut, 8 September 2006).

([15]) Lebanese Criminal Code (n8) art 314.

([16]) Judgment, Case No 125/1964, Military Court of Cassation, 17 September 1964; Judgment, Case No 79/1959, Military Court of Cassation, 29 December 1959 [in Arabic] cited in Jibran Mansour, *Majmoaat Qararat Mahkamat Al-Tamyeez Al-Aaskariya* [The Decisions of the Military Court of Cassation] (Beirut: Lebanese Maronite Publishers, 1970) 55. See also Samir Aalia, *Al Wajiz fi Shareh Al-Jarayem alwaqiaa aala amen Aldawlah* [The Explanation of Crimes Against State Security in a Nutshell] (Al-Musaa'a Al-Jamiaaya lil Durassat wa al-Nasher wa al-Tawzeaa (University Corporation for Studies and Publishing and Distribution 1999) 147; Ali Jaafar, *Qannon al-Aaqubat wa al-Jarayem* [The Penal Law and Crimes] (Beirut: Halabi Publications) 87; M Zaki, '*Qannon Al-Aaoqubat*' [Penal Code] in A Qahwaji, *Qannon Al-Aaoqubat: Alqusm Al-Aa'm*[Penal Code: the Public Law section] (Beirut: Halabi Publications 2002) 312.

([17]) This was confirmed in Lebanese Republic Judicial Council, Judgment No 1/1975, 23 June 1975 [in Arabic] cited in Samir Aalieh, *Ijtihad Al-Majlis Al-Aadli fi Al-Jarayem Aala Amn Al-Dawla 1949–1977* (Jurisprudence of the Council of Justice on Crimes Against the Security of the State 1949–1977) (University Collection for Studies, Publications and Distribution 1987) [in Arabic]; Lebanese Republic Judicial Council, Judgment, 19 October 1994 reproduced in John Bsaybes, *The Jurisprudence of the Criminal Court 2000–2004* (Beirut: Sadder Publications 2004) 22; Lebanese Republic Judicial Council, Judgment in the Case of the Homicide of Sheikh Nizar al-Halabi, Case No 1/1996, 17 January 1997. In the latter, the Council found that the means used in the crime do not fall under article 314.

([18]) It is difficult for some to understand how the crime of assassination of Lebanese Minister Pierre Gemayel can escape the ambit of article 314 of the Lebanese Criminal Code because of the means used in the assassination. Minister Gemayel was assassinated in the middle of the day in Jdeidah, Lebanon on 21 November 2006.

([19]) Interlocutory Decision on the Applicable Law (n4) para 113.

([20]) See Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 3 JICJ 933. See also Matthew Gillet and Matthias Schuster, 'Fast-Track Justice: The Special Tribunal for Lebanon Defines Terrorism' (2011) 9 JICJ 989.

([21]) Interlocutory Decision on the Applicable Law (n4) paras 110–111.

([22]) Manuel J Ventura, 'Terrorism According to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining? (2011) 9 JICJ 1021, 1031–2.

([23]) Interlocutory Decision on the Applicable Law (n4) para 85.

([24]) Interlocutory Decision on the Applicable Law (n4).

([25]) Mahmoud Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn [Leiden and Chicago: Martinus Nijhoff 2013) 142.

([26]) Bassiouni, *Introduction to International Criminal Law* (n25).

([27]) See eg SC Res 1566, UN Doc S/RES/1566 (2004) para 3.

([28]) See Ben Saul, 'Civilizing the Exception: Universally Defining Terrorism' in Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency* (Dordrecht, Heidelberg, New York, London: Springer 2012) 79, 81; Gillet and Schuster, 'Fast-Track Justice' (n20); Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon' (n5); Saul 'Legislating from a Radical Hague' (n6).

([29]) Saul, 'Civilizing the Exception' (n28) 79.

([30]) Gillet and Schuster, 'Fast-Track Justice' (n20).

([31]) Interlocutory Decision on the Applicable Law (n4) para 98.

([32]) The motive is a requirement in the laws of the United Kingdom, Australia, New Zealand, Pakistan, Canada, South Africa, Argentina, and Ecuador, as cited in Interlocutory Decision on the Applicable Law (n4) note 206.

([33]) Annex to GA Res 49/60, UN Doc A/RES/49/60 (1994) [Declaration on Measures to Eliminate International Terrorism], para 3. See also GA Res 64/118, UN Doc A/RES/64/118 (2009) para 4; GA Res 63/129, UN Doc A/RES/63/129 (2008) para 4; GA Res 62/171, UN Doc A/RES/62/171 (2007) para 4; GA Res 61/140, UN Doc A/RES/61/140 (2006) para 4; GA Res 60/43, UN Doc A/RES/60/43 (2005) para 2; GA Res 159/46, UN Doc A/RES/159/46 (2004) para 2; GA Res 58/8, UN Doc A/RES/58/8 (2003) para 2; GA Res 57/127, UN Doc A/RES/57/127 (2002) para 2; GA Res 56/88, UN Doc A/RES/56/88 (2001) para 2; GA Res 55/158, UN Doc A/RES/55/158 (2000) para 2; GA Res 54/110, UN Doc A/RES/54/110 (1999) para 2; GA Res 53/108, UN Doc A/RES/53/108 (1998) para 2; GA Res 52/165, UN Doc A/RES/52/165 (1997) para 2; GA Res 51/210, UN Doc A/RES/52/210 (1996) para 2; GA Res 50/53, UN Doc A/RES/50/53 (1995) para 2, cited in Interlocutory Decision on the Applicable Law (n4) 52.

([34]) Appendix II to Letter Dated 3 August 2005 from the Chairman of the Sixth Committee Addressed to the President of the General Assembly, UN Doc A/59/894 (2005).

([35]) Annex to GA Res 49/60 (n33) para 12.

([36]) Ben Saul, 'The Special Tribunal for Lebanon and Terrorism as an International Crime: Reflections on the Judicial Function' in William Schabas, Yvonne McDermott, Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (London: Ashgate 2013).

([37]) Daniel Moeckli, 'The Emergence of Terrorism as a Distinct Category of International Law' (2008–2009) 44 Tex Intl L J 157, 181.

([38]) See Bassiouni, Introduction to International Criminal Law (n25).

([39]) Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (Oxford: OUP 2013) 11.

([40]) Gillet and Schuster, 'Fast-Track Justice' (n20), 1009.

([41]) Gillet and Schuster, 'Fast-Track Justice' (n20), 1010.

([42]) This can potentially be in violation of the Universal Declaration of Human Rights (10 December 1948, GA Res 217A (III), UN Doc A/810 (1948) 71) and the International Covenant for Civil and Political Rights (New York, 16 December 1966, 999 UNTS 171). Many of their articles have gained a customary status in international law.

([43]) Interlocutory Decision on Applicable Law (n4) Headnote s I para 1.

([44]) Interlocutory Decision on Applicable Law (n4) Headnote s II(B).

([45]) Interlocutory Decision on Applicable Law (n4) para 125.

([46]) Interlocutory Decision on Applicable Law (n4) para 127.

([47]) Interlocutory Decision on Applicable Law (n4) paras 45–46.

([48]) Interlocutory Decision on Applicable Law (n4) para 16.

([49]) Interlocutory Decision on Applicable Law (n4) para 39.

([50]) Gillet and Schuster, 'Fast-Track Justice' (n20) 1001.

([51]) Interlocutory Decision on Applicable Law (n4) para 138.

([52]) Lebanese Criminal Code (n8) art 1.

([53]) Lebanese Criminal Code (n8).

([54]) Lebanese Criminal Code (n8) art 401 deals with imposing violence on the victim for extracting information but is not a transformation of the crime of torture as stipulated in article 1 of the Convention against Torture. See Criminal Magistrate in Beirut, Judgement, *Alfarouj*, Hani El-Hajjar (8 March 2007).

([55]) Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948, 78 UNTS 277).

([56]) Arab Convention on Terrorism (n13); Interlocutory Decision on Applicable Law (n4) para 75.

([57]) Arab Convention on the Suppression of Terrorism (n2).

([58]) Interlocutory Decision on the Applicable Law (n4) para 75.

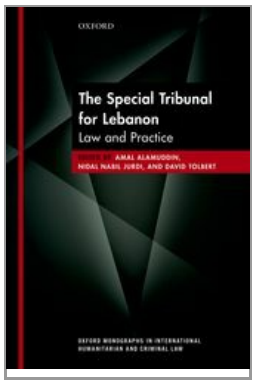
([59]) See Jurdi, 'The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon' (n1).

([60]) See Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, UN GAOR 68th Sess, Supp No 37, UN Doc A/68/37 (2013).

([61]) For a similar argument in relation to humanitarian intervention see Dapo Akande, 'The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect' (EJIL: *Talk!* 28 August 2013) <http://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/> accessed 15 October 2013.

([62]) See eg Mahmoud Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*' (New York: Cambridge University Press 2011). See also Mahmoud Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, The Hague/ London/Boston: Martinus Nijhoff 1999).

([63]) (Rome, 17 July 1998, 2187 UNTS 90).



The Special Tribunal for Lebanon: Law and Practice

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Individual Criminal Responsibility

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[–] Abstract and Keywords

This chapter examines the hybrid approach taken by the Special Tribunal for Lebanon to the application of international and Lebanese approaches to modes of liability. It first considers the statutory context for determining individual criminal responsibility. It then examines the Interlocutory Decision's findings in respect of specific modes of responsibility, drawing comparisons with the approaches taken by other international tribunals, including recent developments on the elements of aiding and abetting. Next, it turns to questions of principle raised by the STL's approach to individual criminal responsibility, including the principle of legality, the obligation to apply the law that will lead to a result more favourable to the accused, and the impact of the STL on the integration or fragmentation of international law in this area.

Keywords: international criminal tribunal, Lebanon, international law, Lebanese law, liability, legality

6.1 Introduction

The hybrid nature of the Special Tribunal for Lebanon ('STL' or 'the Tribunal') holds great promise for dispensing justice that properly takes into account the national context of crimes within its jurisdiction. At the same time, the way in which articles 2 and 3 of the STL Statute[1] combine international modes of responsibility with crimes defined in Lebanese law poses challenges for the conduct of cases and compliance with principles of customary international law.

This chapter first considers the statutory context for determining individual criminal responsibility. The relationship between articles 2 and 3 of the STL Statute has been illuminated to some extent by the Appeals Chamber Interlocutory Decision of 16 February 2011,[2] which directly addresses the question of whether reference should be made to Lebanese law, international criminal law, or both when determining individual criminal responsibility under the Statute. This chapter examines the Interlocutory Decision's findings in respect of specific modes of responsibility, drawing comparisons with the approaches taken by other international tribunals, including recent developments regarding the elements of aiding and abetting. The following section turns to questions of principle raised by the STL's approach to individual criminal responsibility, including the principle of legality, the obligation to apply the law that will lead to a result more favourable to the accused, and the impact of the STL on the integration or fragmentation of international law in this area.

(p.89) 6.2 The Statutory Context: Articles 2 and 3

Unlike many other international criminal tribunals, the applicable law before the STL is domestic law. Article 2 provides that the Tribunal shall apply

> [t]he provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy' and Articles 6 and 7 of the Lebanese law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith struggle'.

Having an international tribunal apply mainly domestic law is already a novel development, making the STL a 'strange animal'.[3] Although the crimes set out in article 2 are drawn from Lebanese law, article 3 deepens the hybrid nature of the STL by providing that individual criminal responsibility will be determined on the basis of modes of responsibility that are used in international criminal law, namely: commission; complicity; organizing or directing others to commit a crime; common purpose; and superior (or command) responsibility.[4]

The inclusion of article 3 is significant because international modes of responsibility may differ from those under Lebanese law, which may impact on the protection of the rights of the accused. In its Interlocutory Decision, the STL Appeals Chamber observed that under Lebanese law one could be convicted of a terrorist act with a mental state of *dolus eventualis*, whereas international criminal **(p.90)** law requires special intent. The mode of responsibility under international law is therefore more protective of the rights of the

accused, which would presumably be reflected in sentencing as well as in the stigma associated with any conviction.[5]

This issue is not theoretical. The indictment in *Ayyash et al* includes nine counts against four accused.[6] In addition to the crimes of committing a terrorist act and conspiring to commit a terrorist act, the charges include the crimes of intentional homicide with premeditation by using explosive materials and attempted intentional homicide. The modes of responsibility are perpetration and co-perpetration, complicity (aiding and abetting), and participating in a group with a common purpose.

The Statute of the Special Court for Sierra Leone (SCSL)[7] makes clear in article 6 that international modes of responsibility apply to international crimes and domestic modes to domestic crimes, but no such rule appears in the STL Statute, leaving the issue open. Not only will the mode of responsibility influence whether or not the accused will ultimately be convicted and the length of any sentence, but it is also important because the principle of legality must be respected to secure any conviction and to ensure the legitimacy of the Tribunal as a whole.

6.3 The Tribunal's Interlocutory Decision on Applicable Law

On 16 February 2011, the Appeals Chamber of the STL issued its Interlocutory Decision. This decision was issued at the request of a pre-trial judge.[8] It has been called the STL's *Tadić* decision:[9] a decision that sets the framework for the future development of the new judicial body's case law and perhaps pushes the boundaries of what was envisaged by the Statute. It is an analogy enriched by the fact that Judge Cassese presided in both cases, sixteen years apart.

An important section of the Interlocutory Decision deals with modes of responsibility in response to the pre-trial judge's question:

> In order to apply modes of criminal responsibility before the Tribunal, should reference be made to Lebanese Law, to international law, or to both Lebanese and International Law? In this last case, how, and on the basis of which principles, should any conflict between these laws be resolved, with specific reference to commission and co-perpetration?[10]

(p.91) The prosecution and defence took 'radically different' positions on the principles that should guide the application of the modes of responsibility.[11] The Prosecutor argued that the 'better interpretation' of the Statute was that the mode of responsibility that 'most accurately captures the conduct of an accused' should be applied, whether it is international or domestic in nature.[12] The Defence Office argued that modes of responsibility must be exclusively regulated by Lebanese criminal law, which was 'the controlling law' of the STL. In its view, this approach would also comply with the principle of legality.[13] The Appeals Chamber agreed with neither the prosecution nor the defence. It noted that the proviso in article 2 of the STL Statute that Lebanese law should apply 'subject to the provisions of this Statute' made it clear that the drafters intended to incorporate through article 3 modes of responsibility recognized in international criminal

law;[14] adopting the Defence Office's approach would require treating article 3 as a mistake when it was in fact 'part and parcel of the Statute'.[15]

It decided that a three-pronged approach should be adopted by the Pre-Trial Chamber and Trial Chamber:

> (i) evaluate on a case-by-case basis whether there is any actual conflict between the application of Lebanese law and that of the international criminal law embodied in article 3;
> (ii) if there is no conflict, Lebanese law should apply; and
> (iii) if there is a conflict, apply the law that would lead to a result more favourable to the rights of the accused.[16]

6.4 Modes of Responsibility

The Interlocutory Decision compared Lebanese law and international criminal law regarding two modes of responsibility: (i) perpetration and co-perpetration; and (ii) complicity (or aiding and abetting). It addressed 'additional concepts of co-perpetration' under a third category of (iii) participating in a group with a common purpose. This covers all the modes charged in the indictment against the four men originally accused of being responsible for the Hariri assassination in the *Ayyash et al* case.

(p.92) At the outset, it should be noted that nearly all domestic and international criminal law systems recognize these forms of responsibility.[17] A large proportion of convictions at the International, Criminal Tribunal for former Yugoslavia (ICTY) have been based on co-perpetration, and Joint Criminal Enterprise (JCE) I has been the main form.[18] The impact on sentencing must not be overlooked. In some systems a co-perpetrator will be given the same sentence as the sole or principal perpetrator, but this is not always the case.[19]

In general, complicity is a lesser mode of responsibility than co-perpetration. As explained in Section 6.4.2, the subjective element or *mens rea* for aiding and abetting consists of knowledge of the principal perpetrator's intent and an intent to *assist* but not to perpetrate the crime.[20] It is therefore applicable to more minor participants in a crime, which is reflected in more lenient sentencing practices. As the STL Appeals Chamber explained, indicating to the perpetrator the house of the victim and ascertaining the victim's schedule to assist in the commission of the crime would amount to complicity.[21] Complicity in terrorism under Lebanese law is illustrated by the decision in the *Bombing of the Church of Our Lady of Deliverance in Zouk Milcayel*. The Lebanese Republic Judicial Council held that a person aided and abetted the perpetrators by 'attending the meetings that were held to plan the operation, by helping to assemble one of the explosive devices, and by providing guidelines for the execution of the bombing operation, in the form of a sketch of the interior and exterior of the church, which enabled the perpetrators to determine the manner in which they should enter the church and the time and place at which they should plant the two explosive devices therein'.[22]

The difference between co-perpetration and complicity will be relevant to determining the

responsibility of the four accused in the indictment before the STL.

Hussein Hassan Oneissi and Assad Hassan Sabra are charged with accomplice liability because, with knowledge of the intent of the alleged co-perpetrators to commit the terrorist act, they allegedly performed acts preparatory to the offence, including 'identifying and then using a 22-year old Palestinian man named Ahmad ABU ADASS in order to create a false claim of responsibility from him on video for the forthcoming offence on behalf of a group called "Victory and Jihad in Greater Syria"'.[23] They are also accused of shielding the co-perpetrators and themselves **(p.93)** from justice by ensuring the video and letter of the false claim of responsibility would be broadcast on Lebanese television. In contrast, Mustafa Amine Badreddine and Salim Jamil Ayyash are charged as co-perpetrators of the assassination of Hariri by using a large explosive device in a public place. They are said to have possessed the specific intent for this terrorist act and to have 'brought about' the detonation of the bomb on Rue Minet el Hos'n, Beirut that killed former Prime Minister Hariri and twenty-two others.[24] All four accused are also charged with conspiracy, which is a substantive (though inchoate) crime, not a mode of allocating responsibility.[25]

6.4.1 Perpetration and co-perpetration

The Appeals Chamber identified two forms of co-perpetration under Lebanese law: (i) 'core' co-perpetration; and (ii) 'direct contribution'.

As regards the first form, under both Lebanese law and international criminal law, the essence of core co-perpetration is performance of the same prohibited conduct with the requisite *mens rea*. A classic example would be a military unit firing on civilians.[26]

The Appeals Chamber held that Lebanese law and international criminal law overlap in terms of this 'core concept of co-perpetration (where all actors engage in the objective, *actus reus*, and subjective, *mens rea*, elements of the crime)'.[27] It decided that both international and Lebanese case law may be considered. Where the two sources of law overlap, applying the three-pronged approach set out by the Chamber,[28] Lebanese law should be applied. This mode of responsibility is invoked in relation to count one in the indictment.

The Appeals Chamber also identified a second form of co-perpetration (as distinguished from the 'core' form). The relevant provision in the Lebanese Criminal Code is article 212: 'The perpetrator of an offence is anyone who brings into being the constituent elements of an offence or *who participates directly* in its commission.'[29] The Appeals Chamber noted that '[u]nder the second form of perpetration…namely a *direct contribution* to the commission of the crime, the agent who plays a principal and direct role in the commission of the crime can also be a co-perpetrator, even though his role does not fulfill all the objective elements **(p.94)** of the crime (for example, in the event of a theft, one person knocks down the door of a house while another steals the money inside)'.[30] This mode of responsibility is invoked in counts two to five in the indictment.[31]

Although the Appeals Chamber only distinguished between two forms of co-perpetration

in article 212, the Lebanese Cassation Court has held that there are four forms of co-perpetration:

> (1) All co-perpetrators execute the same physical act constituting the material element of the crime;
> (2) The co-perpetrators distribute among themselves the execution of the physical act(s) (each of the co-perpetrators executes a part of the material element of the crime);
> (3) The co-perpetrator plays a direct and principal role in the execution of the material element of the crime in support of the physical perpetrator; or
> (4) The co-perpetrator's contribution would not amount to a criminal act taken separately but this contribution is so significant (principal role) to the execution of the crime that he is considered as a co-perpetrator.[32]

It appears that the first form is 'core' co-perpetration while the second, third, and fourth forms are captured by article 212's notion of 'direct contribution to the commission of the crime'.[33]

The Appeals Chamber did not comment on whether it is necessary to identify all the co-perpetrators of a crime in order to prosecute an accused.[34] The practice of the ICTY and other tribunals suggests that it is not.[35] Lebanese practice also indicates that identification of all participants is not required: there have been cases where an individual has been described as 'unknown' in an indictment[36] and in the final judgment of the Lebanese Republic Judicial Council.[37]

The approach of the Appeals Chamber has subsequently been endorsed and applied by the Trial Chamber. In 2013, the defence counsel for three of the accused challenged the Prosecutor's amended indictment on numerous grounds. Counsel for Mr Badreddine alleged 'imprecision in the form of participation', claiming that the amended indictment did not state the applicable source of law (Lebanese or **(p.95)** international) and did not clarify whether the Prosecutor was relying on the first or second form of co-perpetration.[38] The prosecution contended that the Appeals Chamber had decided that Lebanese law applies where there is no conflict with international criminal law; article 212 of the Criminal Code would therefore apply to the modes of responsibility pleaded in counts one to five of the indictment.[39] The STL Trial Chamber saw no conflict between Lebanese and international criminal law on the charging of the crimes and agreed with the prosecution that both forms of co-perpetration under article 212 of the Lebanese Criminal Code may be subsumed under article 3(1)(a) of the STL Statute (which criminalizes someone who 'committed, participated as accomplice, organized or directed others to commit the crime').[40] The Trial Chamber also observed that the prosecution stated in its pleadings that the first form of co-perpetration applied to count one and the second form to counts two to five.[41] Mr Badreddine was thus found to have had sufficient notice of the form of criminal liability alleged against him in order to allow his counsel to prepare his defence.[42]

The Trial Chamber essentially adopted the reasoning of the Appeals Chamber's

Interlocutory Decision and simply stated that it saw 'no conflict between Lebanese and international law here'.[43] This does not give much indication of how the three-pronged approach will be applied in practice. How does 'no conflict' between Lebanese and international criminal law relate to 'overlaps' between the two sources of law? How does the level of precision in one body of law impact on whether that law is 'more favourable to the accused'? This may well be addressed during the course of the trial.

6.4.2 Complicity (aiding and abetting)

The essence of aiding and abetting—or being complicit in—an international crime is participation in that crime by providing assistance to the principal perpetrator in the commission of the crime in the knowledge that the conduct of the principal is **(p.96)** criminal; the accomplice does not possess the same criminal intent as the principal perpetrator.[44]

Counts six to nine of the indictment describe two of the defendants, Oneissi and Sabra, as 'being an accomplice' to various crimes. The indictment refers to both article 219 of the Lebanese Criminal Code and article 3(1)(a) of the STL Statute as being relevant to these counts. As set out later, the Appeals Chamber held that complicity under article 219 is the closest equivalent to 'aiding and abetting' under international criminal law though the two are different, at least as regards the objective element. It concluded that the Lebanese law should apply because it is more favourable to the accused. Recent developments at the ICTY may require this holding to be reconsidered, and attention may also be given to the *Charles Taylor* judgment of the Appeals Chamber of the SCSL that was delivered on 26 September 2013.

6.4.2.1 The Interlocutory Decision's position in 2011

Article 3(1)(a) of the STL Statute provides that 'A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person…participated as accomplice…[in] the crime set forth in article 2 of this Statute.' In order to interpret this provision, the Appeals Chamber engaged in close analysis of the subjective and objective elements of this mode under Lebanese law and international criminal law.

As regards the subjective element, the Appeals Chamber saw similarities between the subjective element of complicity under Lebanese law and that of aiding and abetting under international criminal law. Lebanese law, as found in article 219 of the Criminal Code and developed in case law, has two requirements: (i) *knowledge* of the intent of the perpetrator to commit a crime; and (ii) *intent* to assist the perpetrator in his or her commission of the crime.[45] Under international criminal law, the subjective element also has two aspects: (i) *awareness* (or knowledge) that the principal perpetrator will use the assistance for the purpose of engaging in criminal conduct; and (ii) *intent* to help or encourage the principal perpetrator to commit a crime.[46] The Appeals Chamber noted that under international criminal law it is not required that the accessory be fully aware of the specificities of the crime that will be committed.[47]

As regards the objective element, there are some apparent differences between the two

sources of law. For complicity under Lebanese law, there are three requirements: (i) an understanding (whether immediate or long-standing); (ii) assistance in one or more of the six forms specified in article 219; (iii) conduct by the perpetrator amounting to a crime.[48] Under international criminal law, the Appeals Chamber listed two requirements: (i) practical assistance or support to the **(p.97)** principal perpetrator, which may be in the form of an act or omission and may be physical, moral, or psychological; and (ii) that such assistance must have a 'substantial effect' on the perpetration of the crime.[49]

As a result of this analysis, the Appeals Chamber held that the Lebanese Criminal Code's concept of complicity in article 219 should be applied by the Tribunal instead of the international mode of aiding and abetting because it is more protective of the rights of the accused.[50] Although 'to a large extent the Lebanese notion of complicity and the international notion of aiding and abetting overlap', there are two important ways in which Lebanese law is narrower and therefore more favourable to the accused:

> (1) Lebanese law limits the objective element to the six means of support enumerated in article 219;[51]
> (2) Lebanese law 'generally requires an accomplice to *know* of the crime to be committed, to join with the perpetrator in an *understanding*, whether immediate or long-standing, to commit the crime, and to share in the intent to further that particular crime'.[52]

In fact, the Lebanese law test for the subjective element is, as noted earlier, very similar to the international criminal law test. Both require knowledge of the criminal conduct and an intent to assist. The only difference appears to be the 'understanding' element that is additional under Lebanese law. In any event, the differences between the two bodies of law as regards the objective element still leads to the result that Lebanese law (with its six enumerated means of support) is more favourable to the accused.

This is how the law on aiding and abetting looked to the STL Appeals Chamber in early 2011. However, some recent developments at the ICTY may require this issue to be revisited. In particular, the Appeals Chamber's analysis of complicity under international criminal law[53] may no longer be accurate, and the international law definition of this mode of responsibility may in fact now be more favourable to the accused than the definition under Lebanese law.

(p.98) 6.4.2.2 Specific direction requirement for aiding and abetting in 2013

In *Perišić*, the former Chief of the General Staff of the Yugoslav Army (VJ) had been convicted by the ICTY Trial Chamber of aiding and abetting various international crimes committed by the Army of the *Republika Srpska* (VRS), including persecution.[54] He had, among other things, provided the VRS with weapons and seconded officers involved in the crimes to the VRS. The ICTY Appeals Chamber overturned the conviction, announcing that in order to hold someone individually criminally responsible for aiding and abetting,[55] the prosecution must prove that the perpetrator 'specifically directed' his or her assistance towards a crime and that the assistance had a substantial effect on the commission of that crime. Applying this standard to the facts, it held that the aid facilitated

by Perišić was 'directed towards the VRS's general war effort' rather than the VRS crimes committed in Sarajevo and Srebrenica per se.[56] The specific direction requirement was also applied by an ICTY Trial Chamber to acquit the former Chief and a former employee of the Serbian State Security Service.[57]

The Executive Director of Human Rights Watch, Kenneth Roth, has called the *Perišić* case a 'legal stumble'.[58] For Roth and a number of other commentators, aiding and abetting had long been understood to require proof that the accused knew that the conduct had a substantial likelihood of aiding a crime and that the aid had a substantial effect, but the ICTY had required a third element—'that the accused "specifically directed" the crime'.[59] Such an element is significantly more favourable to the accused and will be difficult to prove in cases without a 'paper trail' linking them to the atrocities. In cases where the accused is based far away from the scene of the crime, it will be difficult to presume the nature and frequency of contact needed to show specific direction to the physical perpetrator. In the *Perišić* case, the ICTY Appeals Chamber observed that Perišić's provision of assistance, in his capacity as Chief of the Yugoslav Army General Staff, to the Army of the *Republika Srpska* was remote from the crimes of principal perpetrators, the two armies being based in separate geographic regions.[60] The Trial Chamber had not referred to any evidence that he was physically present when relevant criminal acts were planned or committed.

Roth suspects that the majority of judges in the *Perišić* case might have feared 'creating a precedent that could lead to unfair accomplice liability for anyone who supports a party to a conflict that then commits human rights crimes'.[61] **(p.99)** Contemporary examples include assistance (such as the supply of weapons) to various parties to the conflict in Syria by Russia, Iran, the US, and the UK.

Both the *Perišić* case and Roth's interpretation of its holding have generated controversy. Heller has claimed that Roth conflates aiding and abetting with the different modes of ordering and instigating. For Heller, there is a fundamental difference between specifically directing a crime (required for ordering and instigating) and specifically directing *assistance toward a crime* without having any direct or indirect communication with the principal perpetrator (which would not be considered aiding and abetting post-*Perišić*). According to this view, the result in *Perišić* is entirely appropriate.[62]

Other academics, notably Stewart, have criticized the 'specific direction' requirement as having no real grounding in customary law, observing that 'the ICTY's new requirement for complicity stands alone in a sea of inconsistent state practice as one of a kind'.[63] Stewart criticizes the notion of specific direction as a component of the objective element of aiding and abetting, pointing out that whether a person specifically directed his or her assistance towards the commission of a crime by an organization as opposed to the organization's activities in general seems relevant to the subjective element. He also notes the unclear definition of 'specific direction', its odd relationship to the 'substantial effect' test, and its variable application, depending on the remoteness of the alleged accomplice from the scene of the crime.[64] Heller, however, argues that the specific direction requirement is a useful aspect of the objective element of aiding and abetting,

given that, in his view, the subjective element is merely knowledge that an organization is committing international crimes.[65]

For the purposes of the STL, what can be drawn from this controversy over aiding and abetting in international criminal law is that the STL Appeals Chamber's 2011 interpretation of the objective element as 'practical assistance + substantial effect' may no longer be entirely accurate in the light of *Perišić*. However, the STL would also have to take account of the September 2013 judgment of the SCSL Appeals Chamber in the *Charles Taylor* case, which declined to adopt the 'specific direction' requirement for aiding and abetting. The SCSL downgraded the holding in **(p.100)** *Perišić* from an interpretation of customary law to a mere expression of 'internally binding precedent':

> Rather than determining whether [specific direction] is an element under customary international law, the Perišić Appeals Chamber specifically and only inquired whether the ICTY Appeals Chamber had previously departed from its prior holding that 'specific direction' is an element of the actus reus of aiding and abetting liability. In the absence of any discussion of customary international law, it is presumed that the ICTY Appeals Chamber in Perišić was only identifying and applying internally binding precedent.[66]

The judgment on this point was unanimous and Judge Fisher, whom Judge Winter joined, delivered a concurring opinion rejecting the standard in even more forceful terms.

If the STL does decide to follow *Perišić*, the critical question will be whether the specific direction requirement makes aiding and abetting under international law more favourable to the accused than complicity in Lebanese law. In particular, this will require a close comparison of specific direction with the six forms of assistance enumerated in article 219 of the Lebanese Criminal Code.

In the abstract, it would seem that article 219 will not always provide a more favourable standard than that under international criminal law. For example, it would appear easier to prove that a person 'harden[ed] the perpetrator's resolve by any means' pursuant to article 219 than to demonstrate that the person's acts were 'specifically directed' to assisting the commission of a crime; the latter standard is more favourable to the accused.

In count six of the indictment, Oneissi and Sabra are alleged to have, inter alia, identified and used a man named Ahmas Abu Adass as the 'fake' suicide bomber who made a false claim of responsibility on video and in a letter. Oneissi and Sabra are said to have ensured that these materials would be broadcast on Lebanese television immediately after the bombing. They are said to have done this knowing the intent of the co-perpetrators (those who were really responsible for the attack) to commit the terrorist act.[67] The objective element is likely to be captured by article 219's reference to a person who 'aids and abets the perpetrator in acts that are preparatory to the offence' and who 'having so agreed with the perpetrator or an accomplice before commission of the offence, helped… to shield one or more of the participants from justice'. Proving the subjective element

under international criminal law would require showing that the creation and dissemination of the false claim was 'specifically directed' towards the bombing and that this had a 'substantial effect' on the commission of that crime. Much will depend on whether the attempt to shield the co-perpetrators through the video could be said to have had a substantial effect on the crime.

The interesting question that arises is which law should apply when the objective element is narrower and therefore more protective of the accused under one system **(p.101)** (here, Lebanese law) but the subjective element may be narrower under the other system in the light of recent jurisprudence. The three-pronged approach established by the Appeals Chamber in its Interlocutory Decision does not address this scenario. It may be that the outcome most favourable to the accused—the touchstone principle—would be to apply the objective element under Lebanese law and the subjective element under international criminal law. This raises a dilemma about which element to prioritize or whether they can be combined.

6.4.3 Participation in a group with a common purpose

6.4.3.1 Joint Criminal Enterprise

In its Interlocutory Decision, the Appeals Chamber treated the 'additional concepts of co-perpetration' under Lebanese law as akin to the notion of JCE in international criminal law.[68] It acknowledged that article 3(1)(b) of the STL Statute is 'broad enough to incorporate all three forms of JCE' and observed that '[t]he reference to "common purpose" hints at the common purpose doctrine, another name for JCE'.[69] Article 3(1)(b) therefore appears to be the provision of the Statute which provides the applicable definition of JCE before the STL.[70] Nonetheless, the ICTY, which had no equivalent article 3(1)(b) in its Statute, based its use of JCE on the word 'committed' in article 7(1) of the ICTY Statute.[71] By analogy, it could be said that JCE also falls under article 3(1)(a) of the STL Statute, which criminalizes 'a person…[who] [c]ommitted…the crime set forth in article 2 of this Statute'.

6.4.3.2 Joint Criminal Enterprise III

JCE III has been applied by the ICTY and ICTR to situations 'involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common plan, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose'.[72] This has been considered controversial in some quarters.[73] The minimum required subjective element is the defendant's awareness of 'the possibility that a crime might be committed as **(p.102)** a consequence of the execution of the criminal act and [he/she] willingly takes the risk'.[74]

The STL Appeals Chamber noted that Lebanese law recognized a mode of responsibility similar to JCE III, but decided that it would not be appropriate for the STL to apply JCE III to the crime of terrorism—one of the crimes charged in the indictment—because it is a special intent crime.[75] In the view of the STL Appeals Chamber, JCE III is predicated on the foreseeability of crimes and on the acceptance of such foreseeable crimes by the 'secondary offender'; this *dolus eventualis* does not correspond to the *dolus specialis*

required of the crime of terrorism.[76] It would be a 'serious legal anomaly' for a person to be convicted as co-perpetrator for a special intent crime without himself possessing that special intent.[77]

The Appeals Chamber's position on JCE III and terrorism is elaborated later in paragraph 262 of the Interlocutory Decision. In discussing the relationship between Lebanese law and international criminal law on collective participation in crimes, the Chamber gives a hypothetical example:

> Should there be a conflict [between Lebanese law and international criminal law]… the Pre-Trial Judge and (in due course) the Trial Chamber will have to consider which source of law leads to the greatest protection for the rights of the accused. One such situation has already presented itself in the course of our theoretical analysis: under JCE III as applied by the Tribunal, the extra foreseeable (but un-concerted) offence may not be a terrorist act (or other criminal offence that requires special intent), but only another offence requiring general intent such as homicide. On the other hand, under Lebanese law, one could be convicted of a terrorist act for which one harbours only *dolus eventualis* (that is, it was foreseeable that the terrorist act would occur, but the person accused did not specifically intend to spread terror). If such a case were to be presented to the Pre-Trial Judge, depending on the circumstances, *the mode of responsibility under international criminal law—CE III—might be applied as it is more protective of the rights of the accused*.[78]

On one view, it appears that the Appeals Chamber is saying that a person could be convicted as an *accomplice* to a terrorist act on the basis of JCE III, whereas the same person could not—and should not—be convicted as a co-perpetrator under JCE III. However, it is possible to reconcile paragraph 262 with paragraph 248 if they are read as addressing different theories of co-perpetration, with the Appeals Chamber opting for the international one as more protective of the rights of the accused.

6.4.3.3 Command/superior responsibility

The mode of responsibility of command or superior responsibility allows a superior to be held responsible for the acts of subordinates if he/she knew or should have **(p.103)** known about their crimes and failed to take actions to prevent or punish them. It appears in the Statutes of the ICTY, ICTR, and ICC,[79] as well as in article 3(2) of the STL Statute. If we apply the reasoning of the STL Appeals Chamber as regards JCE III, command/superior responsibility would also not be appropriate to the special intent required for the crime of terrorism and 'the better approach' would be to treat the superior as an aider and abetter rather than 'pin on him the stigma of full perpetratorship'.[80] If such an approach is followed, it will depart from the practice of the ICTY, which has held persons responsible for special intent crimes on the basis of command responsibility.[81]

6.4.3.4 Perpetration by means

Perpetration by means is not charged in the indictment, but the Appeals Chamber briefly

addressed it. The Chamber distanced itself from the ICC Statute's 'perpetration by means' mode of responsibility, observing that it was not a form of responsibility under customary international law.[82] This is less of a departure from the practice of international criminal courts than it might appear because, as the STL Appeals Chamber observed, the wording of article 25(3)(a) of the ICC Statute expressly provides for perpetration by means ('through another person'), whereas the STL Statute contains no such wording.[83] There is therefore no textual basis for including perpetration by means as one of the modes of responsibility to be applied by the STL.

6.5 Principles

Three points of principle arise from the way in which individual criminal responsibility is treated in the STL Statute: the principle of legality; the interpretation most favourable to the accused; and the STL's role, as one of many tribunals **(p.104)** operating in the international legal system, in integrating or fragmenting international law.

6.5.1 Principle of legality

The mixing of domestic crimes with international modes of responsibility in articles 2 and 3 of the STL Statute raise the possibility of charges being brought against an individual on the basis of a mode of responsibility that did not exist under Lebanese law at the time of the alleged crime. This puts the STL at risk of breaching the principle of legality, *nullum crimen sine lege*.

Nullum crimen sine lege is a general principle of law and appears as a non-derogable norm in major human rights treaties.[84] According to the classic view of this principle, it requires that any criminal conduct must be fixed by law in written form (*scripta*) and that those provisions are applied in a strict (*stricta*), certain (*certa*), and non-retroactive (*praevia*) way.[85] It assumes a 'rational, autonomous legal subject' who will be deterred from crime by 'a known or knowable law'.[86] Article 22 of the ICC Statute codifies the principle: 'A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.'

Prior to the 2011 Interlocutory Decision, various commentators observed that the STL's compliance with the principle of legality was seriously threatened by the modes of JCE and superior responsibility, which generally do not exist (at least in the forms developed and applied in international criminal tribunals) in domestic systems for ordinary crimes.[87] Yet, the 2011 Interlocutory Decision of the STL **(p.105)** Appeals Chamber appears to have crafted a way out of this problem. JCE and superior responsibility will be considered in turn.

As regards JCE, Milanovic pointed out that JCE III is particularly controversial and not recognized by many domestic legal systems.[88] Moreover, the wording of the JCE doctrine in article 3 of the STL Statute is broader than that applicable before other international courts.[89] Article 25(3)(d)(i) of the ICC Statute requires that the defendant act 'with the aim of furthering the criminal activity or criminal purpose of the group,

where such activity or purpose involves the commission of a crime within the jurisdiction of the Court'. The latter requirement is not included in article 3(1)(b) of the STL Statute, which refers to contribution by the defendant to the commission of a crime 'by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime'. Another commentator observes that article 3 applies to national crimes a form of criminal liability that 'is not only alien to national criminal law, but also may even be broader than the already broad form of liability applied by other international tribunals'.[90]

The STL Appeals Chamber has apparently solved the problem of legality with respect to JCE in two ways. First, it found that even though Lebanese law recognized a mode of responsibility similar to the most controversial form of JCE—JCE III—it would not be appropriate for the Tribunal to apply JCE III to the crime of terrorism because it is a special intent crime.[91] This removes the legality concern about this particularly controversial (and recently developed) mode of responsibility being applied to certain crimes under Lebanese law. Secondly—and more generally—the Appeals Chamber indicated that if there is no conflict between Lebanese law and international criminal law as regards modes of responsibility, the Tribunal shall apply Lebanese law.[92] If there is a conflict, it will apply the law leading to a result more favourable to the rights of the accused, which, from the analysis of the Appeals Chamber, generally appears to be Lebanese law, not international criminal law. It therefore appears that the Appeals Chamber has instructed the Trial Chamber to 'read out' JCE to the extent that it is not recognized in Lebanese law.

(p.106) As regards superior responsibility, Milanovic points out that this mode 'simply does not exist in municipal criminal law', subject to incorporated international crimes and domestic military penal law.[93] In his view, an indictment based on superior responsibility would comply with the principle of legality in only two scenarios: (i) where Lebanese criminal law recognized it as a form of vicarious responsibility, which he deemed unlikely; or (ii) if the defendant were a military officer or the applicable Lebanese military penal law extended the responsibility of superiors to domestic crimes committed by their subordinates.[94] Since none of the accused are military officers, it appears that the vicarious responsibility route would be the only one available to justify compliance with the principle of legality; even then it would be a tenuous proposition since the two concepts are not the same.

The Appeals Chamber did not address the issue of superior responsibility, which is not surprising given that it is not alleged by the Prosecutor that any of the accused exercised this mode of responsibility. In any event, it is unlikely the Prosecutor will indict any person for terrorism on the basis of superior responsibility because the Interlocutory Decision has sent a clear message that, for the special intent required by the crime of terrorism, 'the better approach' is to treat a defendant as an aider and abetter rather than 'pin on him the stigma of full perpetratorship'.[95]

6.5.2 Interpretation favourable to the accused

Adopting the interpretation of the law most favourable to the accused (*favor rei*) is a general principle of criminal law that reinforces the protection offered by the principles of fair trial, the presumption of innocence, and the principle of legality.[96] As noted by the STL Appeals Chamber, it is a principle that has been upheld by international criminal tribunals and is codified, in a narrower formulation, in article 22(2) of the ICC Statute ('[i]n case of ambiguity, the definition [of a crime] shall be interpreted in favour of the person being investigated, prosecuted or convicted').[97]

The STL Appeals Chamber has held that the Pre-Trial Chamber and Trial Chamber shall apply Lebanese law both with regard to the definition of crimes (article 2 STL Statute) and, in most cases, to the modes of responsibility (article 3 STL Statute) because Lebanese law is generally more favourable to the accused.[98] **(p.107)** Using the *favor rei* principle as the touchstone for its comparison of Lebanese law and international criminal law has allowed the Appeals Chamber to reach a result that is consistent with the principle of legality, while avoiding ruling that article 3 is a mistake or a nullity.[99]

6.5.3 Integration and fragmentation of international law

As one of the various international criminal tribunals operating around the world, the STL's interpretation and application of the law on individual criminal responsibility will inevitably have an impact on the integration or fragmentation of international law.

In this context, the 'integration' of international law does not equate to total uniformity, which is an unrealistic end-state given the complexity and variety of both international courts and the legal issues that come before them. Integration requires that similar factual scenarios and similar legal issues are treated in a consistent manner, and that any disparity in treatment is recognized, explained, and justified. The desired outcome is harmony and compatibility, which allows for the co-existence of minor variations and for the tailoring of solutions to particular cases.[100] Fragmentation, on the other hand, is when two courts seized of the same issue (legal or factual) render contradictory decisions without acknowledging the difference or explaining the reasons for the divergence. It goes beyond mere variations in reasoning. It is not the same as observing a degree of experimentation among international courts, which can be a positive phenomenon.[101]

In its Interlocutory Decision, the Appeals Chamber noted that since article 3 of the STL Statute draws verbatim from the ICTY and ICTR Statutes,[102] 'it reflects the status of customary international law as articulated in the case law of the ad hoc tribunals'.[103] The Appeals Chamber therefore decided that the STL may apply the modes of responsibility that the ICTY and ICTR had employed over the past two decades, including JCE.[104] This suggested that the STL would align itself with the overall approach of the ICTY and ICTR and would thus promote the integration of international law in this area.

However, in the same decision the STL Appeals Chamber departed from the case law of the ICTY in respect of JCE III. Although the ICTY has convicted persons under JCE III for special intent crimes such as genocide and persecution as **(p.108)** a crime against

humanity,[105] the STL Appeals Chamber decided that 'the better approach under international criminal law is *not* to allow convictions under JCE III for special intent crimes like terrorism'.[106] Any person convicted of committing terrorism must 'specifically intend to cause panic or to coerce a national or international authority'.[107] As noted earlier, the same reasoning could be applied by the STL to superior responsibility, and if such an approach were followed, it would depart from the practice of the ICTY.[108]

Would such a departure be a problem for the coherence of international law? On the one hand, it may only be an instance of 'apparent' rather than 'genuine' fragmentation: this is when judicial decisions appear to be conflicting, but the variations are due to contextual factors, and the underlying legal reasoning can be resolved and rendered compatible through clarification and interpretation.[109] For example, the STL has unique features that may require a different approach from the ICTY to modes of responsibility, such as jurisdiction over the crime of terrorism and the mixing of Lebanese law and international criminal law in articles 2 and 3 of the Statute. If the STL uses the Lebanese law standard because it is more favourable to the accused, and this standard departs from standards employed by the ICTY, it could be seen as legitimate 'tailoring' of the law to the features of the STL and the case in issue, which would not be a cause for concern. On the other hand, one cannot help noticing that the STL Appeals Chamber stated its 'better approach' to special intent crimes and JCE III as a matter of principle, without any authority cited to support it. From this perspective, the departure from the accumulated practice of the ICTY may be an example of genuine fragmentation, analogous to the position taken by the ECCC, which rejected the extended form of JCE by invoking the principle of legality.[110]

The STL will also have to take a position on whether there is a 'specific direction' requirement for aiding and abetting. As discussed under Section 6.4.2, there is now a split between the ICTY and the SCSL on this point. This is a result of the decentralized international legal system. As the SCSL observed:

> In applying the Statute and customary international law, the Appeals Chamber is guided by the decisions of the ICTY and ICTR Appeals Chamber. The Chamber looks as well to the **(p.109)** decisions of the Appeals Chamber of the ECCC and STL and other sources of authority. The Appeals Chamber, however, is the final arbiter of the law for this Court, and the decisions of other courts are only persuasive, not binding, authority. The Appeals Chamber recognises and respects that the ICTY Appeals Chamber is the final arbiter of the law for that Court.[111]

While the STL's approach to modes of responsibility is now fairly clear, it is too early in the life of the Tribunal to assess its tendency towards integration or fragmentation in its jurisprudence as a whole. Much will depend on how the Tribunal sees its role in the world of international courts: as a unique creation that emphasizes the application of Lebanese law, as the 'final arbiter' of the law for itself alone, or as an international tribunal that may contribute to the development of international criminal law, not only in the area of modes of responsibility but also in relation to the definition of terrorism and to the application of international criminal procedure.

6.6 Conclusion

One of the aims of the STL, as articulated by both its Presidents to date, is to 'support the Lebanese people in coming to terms with the serious consequences of the assassinations and, more generally to assist in restoring faith in the rule of law'.[112]

The STL's statutory framework for individual criminal responsibility raises at least two rule of law concerns. First, the mixing of national law and international criminal law will require careful analysis in each case and constant attention to the rights of the accused. The Interlocutory Decision has established a staged approach to such analysis, but there is much that is still unclear about how to harmonize Lebanese law and international criminal law.[113] Identifying the overlaps and conflicts between these two sources of law is not a straightforward exercise, especially when the elements of some complex modes, such as complicity, can be thrown into question by a single judgment.

Secondly, the application of modes of responsibility found in international criminal law to crimes in Lebanese law runs the risk of breaching the principle of legality. The STL Appeals Chamber has mitigated that risk by finding equivalent modes in Lebanese law for many of the modes and using the *favor rei* as a guiding principle in deciding whether to use the international criminal law version of a mode of responsibility. At the same time, however, the Chamber has departed from the body of case law built up by the ICTY and ICTR, which indicates a tendency towards the fragmentation of international law. Such fragmentation could undermine the legitimacy of both the STL and the jurisprudence being accumulated by **(p.110)** the various international criminal tribunals. An early reflection on the STL still holds true today: '[w]hile all international tribunals continuously struggle with the issue of legitimacy, this Tribunal faces particular challenges'.[114]

A former legal advisor at the UN International Independent Investigation Commission observed that the restriction of the subject-matter jurisdiction to crimes defined in Lebanese law 'moulded the activities of the international prosecutor around those of the Lebanese judicial authorities, and by the same token led to an increased need for cooperation between them'.[115] In 2014 and beyond, as the STL puts those accused of the Hariri assassination on trial, the influence of international law and practice may recalibrate the relationship with the domestic system. The mixed national and international nature of the modes of responsibility is no doubt part of that process.

Notes:

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The author is grateful for helpful discussions with the editors and Pascal Chenivesse. The views expressed herein are the author's own.

(1) Attachment to SC Res 1757, UN Doc S/RES/1757 (2007).

(2) STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No STL-11-01/I/AC/R176bis, Appeals Chamber, 16 February 2011.

([3]) Jean d'Aspremont and Annemarieke Vermeer-Kunsli, 'The Special Tribunal for Lebanon: Introductory Note' (2008) 21 LJIL 483, 484. The Cambodia and Sierra Leone tribunals allow domestic crimes to be charged in addition to international ones, but prosecutors have not done so to date.

([4]) STL Statute (n1) art 3, Individual criminal responsibility:

> (1.) A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:
>
> ((a)) Committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or
>
> ((b)) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.
>
> (2.) With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> ((a)) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;
>
> ((b)) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> ((c)) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> (3.) The fact that the person acted pursuant to an order of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Tribunal determines that justice so requires.

([5]) STL, Interlocutory Decision on the Applicable Law (n2) para 262.

([6]) STL, Indictment, *Prosecutor v Ayyash et al*, Case No STL-11-01/I/PTJ, Pre-Trial Judge, 10 June 2011.

([7]) Annex to Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002, 2178 UNTS 138).

([8]) This is a special advisory procedure pursuant to rule 68(G) of the STL Rules of Procedure and Evidence (STL RPE). It is used to guide the pre-trial judge's application of the law for future trial proceedings.

([9]) Marko Milanovic, 'Special Tribunal for Lebanon Delivers Interlocutory Decision on Applicable Law' (EJIL: *Talk!*, 16 February 2011) <http://www.ejiltalk.org/special-tribunal-for-lebanon-delivers-interlocutory-decision-on-applicable-law/> accessed 4 October 2013.

([10]) Interlocutory Decision on the Applicable Law (n2) para 204.

([11]) Interlocutory Decision on the Applicable Law (n2) para 209.

([12]) Interlocutory Decision on the Applicable Law (n2) para 208.

([13]) Interlocutory Decision on the Applicable Law para (n2) 209. The Defence Office referred in particular to arts 3(1)(b) and 3(2).

([14]) These modes are 'recognized' in international criminal law in the sense that they have been developed and applied by the UN War Crimes Commission, the ad hoc international criminal tribunals, and they appear in the Statute of the International Criminal Court.

([15]) Interlocutory Decision on the Applicable Law (n2) para 210.

([16]) Interlocutory Decision on the Applicable Law (n2) para 211.

([17]) Kevin Jon Heller and Markus D Dubber, *The Handbook of Comparative Criminal Law* (Redwood City: Stanford University Press 2010).

([18]) JCE I indicates the first form of JCE. But see Interlocutory Decision on the Applicable Law (n2) para 247 on rarity of convictions based on JCE III (the third form of JCE).

([19]) See Criminal Code (Lebanon), Legislative Decree No 340 of 1 March 1943, arts 213 and 220; cf ICTY, Judgment, *Prosecutor v Brdjanin*, Case No IT-99-36-A, Appeals Chamber, 3 April 2007, para 432 cited in Interlocutory Decision on the Applicable Law (n2) n 358. See also Interlocutory Decision on the Applicable Law (n2) paras 245 and 261.

([20]) The Interlocutory Decision noted that Lebanese law also recognizes cases where a co-perpetrator might provide a 'supporting or instigative role in the crime without himself committing it', see Interlocutory Decision on the Applicable Law (n2) para 215.

([21]) Interlocutory Decision on the Applicable Law (n2) para 220.

([22]) Judgment No 4/1996, 13 July 1996 cited in Interlocutory Decision on the Applicable Law (n2) para 224.

([23]) Indictment, *Prosecutor v Ayyash et al* (n6) 32.

([24]) Indictment, *Prosecutor v Ayyash et al* (n6) 27.

([25]) See the discussion at STL, Interlocutory Decision on the Applicable Law (n2) para 259 on the relationship with JCE I. The ICC Statute does not refer to conspiracy. In the ICTY and ICTR Statutes, it is only provided in relation to the crime of genocide: see Statute of the ICTR (8 November 1994, 33 ILM 1598 (1994)) art 2(3); Statute of the ICTY (25 May 1993, 32 ILM 1159 (1993)) art 4(3). On the way in which conspiracy 'cuts across the substantive-procedural divide in international law', see Jens Meierhenrich, 'Conspiracy in International Law' (2006) 2 Ann Rev L & Soc Sci 341–57.

([26]) STL, Interlocutory Decision on the Applicable Law (n2) para 216.

([27]) STL, Interlocutory Decision on the Applicable Law (n2) para 216.

([28]) STL, Interlocutory Decision on the Applicable Law (n2) para 211.

([29]) Emphasis added. Lebanese Criminal Code (n19) article 213 provides that: '[e]ach of the co-perpetrators of an offence shall be liable to the penalty prescribed by law for the offence. A heavier penalty, in accordance with the provisions of Article 257 of the Criminal Code, shall be applicable to anyone who organizes the participation in the offence or directs the action of the persons taking part in it.'

([30]) STL, Interlocutory Decision on the Applicable Law (n2) para 215 (emphasis added).

([31]) STL, Decision on Alleged Defects in the Form of the Amended Indictment, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Trial Chamber, 12 June 2013, para 52.

([32]) Lebanese Court of Cassation, Judgment No 155/2007, 18 October 2007.

([33]) See STL, Interlocutory Decision on the Applicable Law (n2) para 215, which did not refer to the Court of Cassation judgment.

([34]) It did say that there is no requirement concerning the identification of all the participants in a conspiracy, see STL, Interlocutory Decision on the Applicable Law (n2) para 195.

([35]) See ICTY, *Prosecutor v Krstic*, Case No IT-98-33-A, in which the principal perpetrators were not identified.

([36]) Lebanese Republic Judicial Council, Judgment No 2/97, *Karami*, 25 June 1999, 4 [STL Official Translation].

([37]) *Karami* (n36) 56. The Judicial Council noted that '[i]t appears that the administrative and preliminary investigations and examinations made every endeavour to identify the person who planted the explosive device in the helicopter….Hence, the culprit remained unknown.'

([38]) STL, Preliminary Motion Submitted by the Defence for Mr Mustafa Amine

Badreddine on the Basis of Rule 90(A)(ii) of the Rules of Procedure and Evidence, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC 25 June 2012, paras 39–42 cited in STL, Decision on Alleged Defects in the Form of the Amended Indictment, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, 12 June 2013, paras 39–42; see STL, Consolidated Motion on Form of the Indictment, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Sabra Defence, 2 May 2013; STL, Decision on Alleged Defects in the Form of the Amended Indictment, *Prosecutor v Ayyash et al* (n31), para 51.

([39]) STL, Decision on Alleged Defects in the Form of the Amended Indictment, *Prosecutor v Ayyash et al*, (n31) para 52.

([40]) STL, Decision on Alleged Defects in the Form of the Amended Indictment, *Prosecutor v Ayyash et al*, (n31) para 54.

([41]) STL, Decision on Alleged Defects in the Form of the Amended Indictment, *Prosecutor v Ayyash et al* (n31) pare 54

([42]) STL, Decision on Alleged Defects in the Form of the Amended Indictment, *Prosecutor v Ayyash et al* (n31) para 55.

([43]) STL, Decision on Alleged Defects in the Form of the Amended Indictment, *Prosecutor v Ayyash et al*, (n31) para 53.

([44]) STL, Interlocutory Decision on the Applicable Law (n2) para 225.

([45]) STL, Interlocutory Decision on the Applicable Law (n2) para 220 (emphasis added).

([46]) STL, Interlocutory Decision on the Applicable Law (n2) para 227 (emphasis added).

([47]) STL, Interlocutory Decision on the Applicable Law (n2) para 227.

([48]) STL, Interlocutory Decision on the Applicable Law (n2) para 219.

([49]) STL, Interlocutory Decision on the Applicable Law (n2) para 226 citing ICTY, Judgment, *Prosecutor v Aleksovski,* Case No IT-95-14/1, Trial Chamber, 25 June 1999, para 62; ICTY, Judgment, *Prosecutor v Blaskic*, Case No IT-95-14, Appeals Chamber, 29 July 2004, para 48; ICTY, Judgment, *Prosecutor v Furundzija*, Case No IT-95-17/1, Trial Chamber, 10 December 1998, para 231.

([50]) STL, Interlocutory Decision on the Applicable Law (n2) para 228.

([51]) ‘Anyone who issues instructions [for the] commission [of a felony or misdemeanor], even if such instruction did not facilitate the act; Anyone who hardens the perpetrator’s resolve by any means; Anyone who, for material or moral gain, accepts the perpetrator’s proposal to commit the offence; Anyone who aids or abets the perpetrator in acts that are preparatory to the offence; Anyone who, having so agreed with the perpetrator or 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; 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'.

([52]) STL, Interlocutory Decision on the Applicable Law (n2) para 228.

([53]) STL, Interlocutory Decision on the Applicable Law (n2) paras 225–227.

([54]) ICTY, Judgment, *Prosecutor v Perišić,* Case No IT-04-81, Appeals Chamber, 28 February 2013.

([55]) The Appeals Chamber appeared to limit the specific direction requirement to situations where the alleged accomplice was geographically remote from the scene of the crime, see *Perišić* (n54) paras 39 and 70.

([56]) *Perišić* (n54) para 71.

([57]) ICTY, Judgment, *Prosecutor v Stanišić and Simatović*, Case No IT-03-69, Trial Chamber, 30 May 2013.

([58]) Kenneth Roth, 'A Tribunal's Legal Stumble' *New York Times* (New York, 9 July 2013).

([59]) Roth, 'A Tribunal's Legal Stumble' (n58).

([60]) *Perišić* (n54) para 42.

([61]) *Perišić* (n54) para 42.

([62]) Kevin Jon Heller, 'Ken Roth Conflates Aiding/Abetting with Ordering and Instigation' (Opinio Juris, 10 July 2013) <http://opiniojuris.org/2013/07/10/ken-roth-conflates-aidingabetting-with-ordering-and-instigation/> accessed 4 October 2013.

([63]) James Stewart, 'The ICTY Loses its Way on Complicity—Part 1' (Opinio Juris, 3 April 2013) <http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/> accessed 4 October 2013. His empirical research shows that '[i]n over 98% of aiding and abetting incidents in international criminal law, "specific direction" is either not mentioned at all in relevant decisions, or it is mentioned in only a single casual sentence without later application', see James Stewart,'"Specific Direction" is Unprecedented: Results from Two Empirical Studies' (EJIL *Talk!*, 6 September 2013) <http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/#mo re-9258> accessed 4 October 2013.

([64]) Stewart,'"Specific Direction" is Unprecedented' (n63).

([65]) Kevin Jon Heller, 'Why the ICTY's "Specifically Directed" Requirement is Justified' (Opinio Juris, 2 June 2013) <http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-

directed-requirement-is-justified/>.

([66]) SCSL, Judgment, *Prosecutor v Taylor,* Case No SCSL-03-01-A, Appeals Chamber, 26 September 2013, para 476.

([67]) Indictment, *Prosecutor v Ayyash et al* (n6) para 78.

([68]) STL, Interlocutory Decision on the Applicable Law (n2) para 217.

([69]) STL, Interlocutory Decision on the Applicable Law (n2) para 251.

([70]) Cf Rome Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90) (ICC Statute) art 25(3)(d) (group of persons acting with a common purpose).

([71]) This is because the participant in a JCE contributed to or facilitated the *commission* of a crime, see ICTY, Judgment, *Prosecutor v Tadić,,* Case No IT-94-1-A, Appeals Chamber, 15 July 1999, paras 183ff.

([72]) STL, Interlocutory Decision on the Applicable Law (n2) paras 255–256.

([73]) See eg Allison Marston Danner and Jenny S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 CLR 75. The Extraordinary Chambers of Cambodia (ECCC) have held that JCE III violates the principle of legality, see ECCC, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, *Prosecutor v Ieng, Ieng and Khieu,* Case No 002/19-09-2007-ECCC-OCIJ, Pre-Trial Chamber, 20 May 2010.

([74]) STL, Interlocutory Decision on the Applicable Law (n2) paras 255–256.

([75]) STL, Interlocutory Decision on the Applicable Law (n2) paras 231, 248–249.

([76]) STL, Interlocutory Decision on the Applicable Law (n2) para 248.

([77]) STL, Interlocutory Decision on the Applicable Law (n2) para 248. See further the discussion on JCE III in the context of the fragmentation of international law later.

([78]) Interlocutory Decision, para 262. Emphasis added.

([79]) Under art 28(b)(i) ICC Statute, if the superior is not a military commander (*de jure* or *de facto*) then the *mens rea* is that they 'either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes'.

([80]) Interlocutory Decision (n2) para 249. See Michael Scharf, 'Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation' (ASIL Insights, 4 March 2011) <http://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism> accessed 4 October 2013.

([81]) ICTY, Judgment, *Prosecutor v Orić*, Case No IT-03-68, Trial Chamber, 30 June 2006, paras 294, 353 (for murder and cruel treatment); ICTY, Judgment on Sentence Appeal, *Prosecutor v Mucić, Delić and Landžo*, Case No IT-96-21-A*bis*, 8 April 2003 (for murder, torture, sexual assault). See also ICTR, Judgment and Sentence, *Prosecutor v Ntagerura, Bagambiki and Imanishimwe*, Case No ICTR-99-46-T, Trial Chamber, 25 February 2004. Imanishimwe was convicted on the basis of superior responsibility for genocide and extermination but superior responsibility convictions were overturned on appeal on the basis of 'unfairness of proceedings', see, ICTR, Judgment, *Prosecutor v Ntagerura, Bagambiki and Imanishimwe*, Case No ICTR-99-46-A, Appeals Chamber, 7 July 2006, paras 165, 379, and 444.

([82]) Interlocutory Decision on the Applicable Law (n2) para 253. See further Marko Milanovic, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2011) 9 JICJ 25.

([83]) Interlocutory Decision on the Applicable Law (n2) para 256.

([84]) International Covenant on Civil and Political Rights (New York, 16 December 1966, 999 UNTS 171) art 15; European Convention on Human Rights (Rome, 4 November 1950, 213 UNTS 221) art 7; American Convention on Human Rights (San José, 22 November 1969, 1144 UNTS 123) art 9; Universal Declaration of Human Rights (10 December 1948, GA Res 217A (III), UN Doc A/810 (1948) 71) art 11(2); African Charter on Human and Peoples' Rights (Banjul, 27 June 1981, 1520 UNTS 217) art 7(2); Third Geneva Convention Relative to the Treatment of Prisoners of War (Geneva, 12 August 1949, 75 UNTS 135) art 99; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Geneva, 8 June 1977, 1125 UNTS 3) art 2(c); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Geneva, 8 June 1977, 1125 UNTS 609) art 6(c). This is matched by the principle *nulla poena sine lege*, which is beyond the scope of this chapter but it presents its own difficulties in the context of international criminal law. See Guillaume Endo, '*Nullum Crimen Nulla Poena Sine Lege*: Principle and the ICTY and ICTR' (2002) 15 RQDI 205; Susan Lamb, '*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law' in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (vol I, Oxford: Oxford University Press 2002) 733, 756–66.

([85]) Pierre Hauck, 'The Challenge of Customary International Crimes to the Principle of *Nullum Crimen Sine Lege*' (2008) J Intl L of Peace and Armed Conflict 58, 58; Susan Lamb '*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law' in Cassese, *The Rome Statute of the International Criminal Court* (n84) 734.

([86]) Bruce Broomhall, 'Article 22 *Nullum Crimen Sine Lege*' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2nd edn, Oxford, Beck/Hart 2008) 713, 716.

([87]) Marko Milanovic, 'An Odd Couple: Domestic Crimes and International Responsibility

in the Special Tribunal for Lebanon' (2007) 5 JICJ 1139, 1142.

([88]) Milanovic, 'An Odd Couple' (n87)1144.

([89]) Milanovic, 'An Odd Couple' (n87)1143.

([90]) Bjorn Elberling, 'The Next Step in History-Writing Through Criminal Law: Exactly How Tailor-Made is the Special Tribunal for Lebanon?' (2008) 21 LJIL 529, 534.

([91]) STL, Interlocutory Decision on the Applicable Law (n2) paras 231, 248–249. See discussion earlier. See also Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, UN Doc S/2006/893 (2006) para 26, in which the UN Secretary-General indicated respect for the principle of legality when stating that 'Under article 3, paragraph 1, of the statute, all those who committed, participated as accomplice, organized or directed others to commit the crime, or otherwise contributed to the commission of the crime, shall be individually responsible. This is a reflection of the Lebanese Criminal Code and general criminal law principles, evidenced, inter alia, by article 2, paragraph 3, of the International Convention for the Suppression of Terrorist Bombings of 1997 (General Assembly resolution 52/164, annex).'

([92]) STL, Interlocutory Decision on the Applicable Law (n2) para 211.

([93]) Milanovic, 'An Odd Couple' (n87) 1143. He also observes that the STL Statute in article 3 makes the stricter standard for non-military commanders applicable to both military and civilian superiors, cf ICC Statute art 28(b). See also UN Secretary-General Report (n91) para 26: 'Article 3, paragraph 2, reflects the principle of command responsibility both under international law and national criminal and military codes as more fully articulated in article 28, subparagraph (b) [applying to civilian superiors], of the Statute of the International Criminal Court.'

([94]) Milanovic, 'An Odd Couple' (n87) 1143.

([95]) STL, Interlocutory Decision on the Applicable Law (n2) para 249.

([96]) Variations on the principle include: *in dubio pro reo* (in case of doubt, one should hold for the accused) or *in dubio milius* (in case of doubt, one should apply the more lenient penalty), see STL, Interlocutory Decision on the Applicable Law (n2) para 32. See also *Sweet v Parsley* [1969] 2 WLR 470 (HL) 474.

([97]) STL, Interlocutory Decision on the Applicable Law (n2) para 32.

([98]) Cf the example regarding JCE III given in STL, Interlocutory Decision on the Applicable Law (n2) para 262 discussed earlier.

([99]) Marko Milanovic, 'Special Tribunal for Lebanon Delivers Interlocutory Decision on Applicable Law' (EJIL: *Talk!*, 16 February 2011). http://www.ejiltalk.org/special-tribunal-for-lebanon-delivers-interlocutory-decision-on-applicable-law/

([100]) See generally Philippa Webb, *International Judicial Integration and Fragmentation* (Oxford: Oxford University Press 2013).

([101]) Webb, *International Judicial Integration and Fragmentation* (n100).

([102]) The Appeals Chamber also referred to the ICC Statute and the Charter of the International Military Tribunal (London, 8 August 1945, 82 UNTS 279) and 'the more recent international conventions against terrorism'.

([103]) STL, Interlocutory Decision on the Applicable Law (n2) para 206.

([104]) STL, Interlocutory Decision on the Applicable Law (n2) paras 211–249.

([105]) ICTY, Decision on Interlocutory Appeal, *Prosecutor v Brdjanin*, Case No IT-99-36, Trial Chamber, 19 March 2004, paras 5–10 (Trial Chamber later found insufficient evidence of genocide); ICTY, Judgment, *Prosecutor v Stakić*, Case No IT-97-24-A, Appeals Chamber, para 38; ICTY, Judgment, *Prosecutor v Popović et al,* Case No IT-05-88, Trial Chamber, 10 June 2010, paras 1195, 1332, 1427, 1733–1735.

([106]) STL, Interlocutory Decision on the Applicable Law (n2) para 249 (emphasis added). See also Scharf, 'Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism (n80).

([107]) STL, Interlocutory Decision on the Applicable Law (n2) para 249. A 'secondary offender' without this special intent should only be charged with a form of accomplice liability, namely '*assistance* to the terrorist act' not perpetration of it.

([108]) See *Stanišić and Simatović* (n57).

([109]) See generally Webb, *International Judicial Integration and Fragmentation* (n100).

([110]) ECCC, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, *Prosecutor v Ieng, Ieng and Khieu,* Case No 002/19-09-2007-ECCC-OCIJ, Pre-Trial Chamber, 20 May 2010.

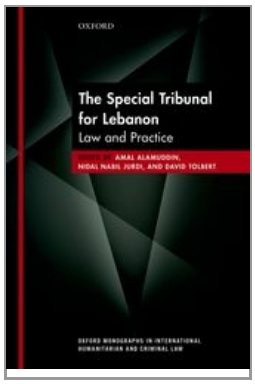
([111]) *Prosecutor v Taylor* (n66) para 472.

([112]) STL, Annual Report (2011–2012) 43.

([113]) Cf the Special Court for Sierra Leone, which prescribes that individual criminal responsibility for domestic crimes shall be determined in accordance with the laws of Sierra Leone while international modes of responsibility are applicable solely to the international crimes, see SCSL Statute (n7) art 6. See also Milanovic, 'An Odd Couple' (n87) 1149.

([114]) Marieke Wierda, Habib Nassar, and Lynn Maalouf, 'Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon' (2007) 5 JICJ 1065, 1066.

([115]) Cecile Aptel, 'Some Innovations in the Statute of the Special Tribunal for Lebanon' (2007) 5 JICJ 1107, 1115.



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The Unique Rules of Procedure of the STL

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[–] Abstract and Keywords

This chapter examines the procedural issues illustrating the balance struck between the various actors in the Special Tribunal for Lebanon (STL), specifically the imbalance in favour of the judges. It shows that this delicate balance can collapse under the weight of the judges' ideological belief that they are also the sole guardians of truth and justice. The chapter is organized as follows. Section 7.2 reflects on the balancing out of the accused through trials *in absentia*. Sections 7.3 and 7.4 discuss the respective roles of the victims and the prosecutor. Section 7.5 addresses the most novel procedural feature of the STL — the advisory function of the Appeals Chamber — which best illustrates how the judges have adopted procedures that put them at the centre of the balancing process. The concluding section highlights the broader consideration that underlies the choice made by the STL and its judges, which should aim at ensuring the lasting relevance of the Tribunal in providing justice for the affected communities.

Keywords: international criminal tribunal, Lebanon, judges, criminal trials, defendants, victoms, Appeals

Chamber

7.1 Introduction: What are the Rules of the Game?

It is rather trite to say that the Special Tribunal for Lebanon ('STL' or 'the Tribunal') is, as an hybrid tribunal,[1] at the crossroads of a number of influences, from the Lebanese legal order and from the international legal order. This reality is most notable in the procedure adopted at the Tribunal, which borrows from the civil law tradition of Lebanon and from the extensive body of procedural rules that have been developed over the years in other international criminal tribunals, themselves the result of a sometimes clumsy and ad hoc mix of common law and civil law traditions.[2]

This chapter could not have the ambition to be a systematic discussion of the different procedural rules of the STL, in such diverse areas as pre-trial proceedings, provisional release, disclosure and admissibility of evidence. Such important studies have been initiated elsewhere[3] and would deserve specific volumes to themselves. Moreover, this chapter does propose a comprehensive study of how the STL procedure compares to the procedure of other international tribunals. Reference to other tribunals is rather used as illustration of general trends in international criminal procedure. Finally, this chapter does not necessarily approach the **(p.112)** procedure in place at the STL through the traditional common law/civil law framework of analysis. While this framework remains a preferred way of discussing international procedure, it is believed that it might be too limited a lens with which to look at things. For one, international criminal procedure, while certainly influenced by the national legal traditions and culture of the staff, and more specifically, the judges of international courts, has arguably developed in ways that are unique to the specific nature of international criminal justice to a point where the relevance of referring back systematically to the common law/civil law dichotomy can be questioned.[4] Secondly, and perhaps more importantly, this dichotomy does not allow for looking at the normative reasons that underlie and explain the procedural choices that are made. In other words, procedural rules are not adopted because they emanate from the common law or civil law systems as such, but rather because they are perceived by their drafters as corresponding better to their normative framework of analysis in relation to how balances should be struck between the various actors in the criminal trial.

This balance is ultimately what should be, and is, at the heart of any discussion of criminal procedure. It articulates how the parties, defence, and prosecution, as well as the newcomer participants in international criminal proceedings, the victims, interact with each other and in relation to the judges. Normally, the accused should be at the heart of the trial process and the judges should be the guarantors of the fairness of the proceedings. What is shown in this chapter is that the balance struck at the STL has two notable features: first, a 'balancing out' of the accused, more specifically through the adoption of trials *in absentia*, and secondly, a reinforced role for judges vis-à-vis the different parties and participants. Both these tendencies, it will emerge, are the result of a civil law bias in the drafting of the Statute and more importantly of the Rules of Procedure and Evidence ('RPE' or 'the Rules'). Ultimately, it will be shown that, this choice of civil law is underscored by a strong and exaggerated normative belief on the part of the judges

that only the inquisitorial system can satisfy the requirements of justice and truth in international trials.

This chapter therefore focuses on a selected number of procedural issues that illustrate the (im)balance that has been struck, not in favour of either party but ultimately in favour of the judges. It should be pointed out and made clear from the outset that the object of this chapter is not to reject the central role of the judges in the conduct of international criminal trials. It is at the heart of their function to regulate and balance the various interests at stake in the criminal process in order to ensure both the fairness and the expediency of the proceedings. What the chapter does illustrate is how this delicate balance can collapse under the weight of the judges' ideological belief that they are also the sole guardians of truth and justice. In other words, the STL is a case when the referee steals the show.

In order to show this, the following sections analyse the procedural role of the parties, the victims, and the judges through discussion of some key particularities of the procedure at the STL. Section 7.2 provides some thoughts on the **(p.113)** balancing out of the accused through trials *in absentia*. Sections 7.3 and 7.4 discuss the respective roles of the victims and the prosecutor. Section 7.5 addresses what is the most novel procedural feature of the STL, the advisory function of the Appeals Chamber, which best illustrates how the judges have adopted procedures that arguably put them at the centre of the balancing process in a way that definitely makes the STL unique in the landscape of international criminal tribunals. The concluding section highlights the broader consideration that underlies the choice made by the STL and its judges, which, beyond the specific procedural points discussed in the chapter, should aim at ensuring the lasting relevance of the Tribunal in providing justice for the affected communities.

7.2 Trials *In Absentia*: Balancing Out the Defendant

A unique provision of the STL Statute[5] is the possibility of holding trials *in absentia,* ie a trial in the absence of the accused. Not since the Nuremberg Tribunal[6] has an international tribunal provided for such a procedure.[7] The question of the legality and fairness of trials *in absentia* at the international level has been dealt with extensively in the literature[8] and will be considered specifically elsewhere in this volume.[9] This section therefore limits itself to discussing the practice in the light of the balancing exercise of international criminal procedure.

7.2.1 What is a trial *in absentia*?

There is a trial *in absentia* at the STL if the defendant: '(a) Has expressly and in writing waived his or her right to be present; (b) Has not been handed over to the Tribunal by the State authorities concerned; (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the pre-trial judge.'[10]

(p.114) These trials therefore need to be distinguished from situations where, although under custody of a court, a defendant chooses not to attend the proceedings or because of his or her conduct has been temporarily removed from the courtroom.[11] Moreover,

according to the Rules, the following situations are not considered to be trials *in absentia*: 'if the accused appears before the Tribunal in person, by video-conference, or by Counsel appointed by him'.[12] According to the Explanatory Memorandum of the RPE, 'in such instances, the accused is not considered "absent" in a legal sense, but only physically not present before the Tribunal'.[13]

7.2.2 The normative bias for trials *in absentia* at the STL

The debate on trials *in absentia* could be seen solely through the lens of the cultural traditions of common law and civil law, which adopt different mechanisms in pursuit of a similar goal (justice, in a broad sense). However, it is interesting to note that the proponents of trials *in absentia* have a noticeably more pronounced normative agenda that it might seem, which fits in a broader normative rejection, and possibly misunderstanding, of how the adversarial system works.

Indeed, the following two pronouncements are particularly striking in this respect. The first one is drawn from the 'Explanatory Memorandum by the Tribunal's President of the Rules of Procedure and Evidence' that was initially drafted by Judge Cassese and subsequently updated by Judge Baragwanath, who replaced him as President of the STL after his passing away. While the memorandum explicitly claims not to be an authoritative or legally binding document,[14] its existence alone, a unique feature among international criminal tribunals, is already a testimony to the intention of the President of the STL to publicly set out his own views 'as to the principal procedural problems likely to arise before the STL and the rationale underpinning their solutions'.[15] When discussing trials *in absentia* and the different reasons these trials are frowned upon in the common law system, the memorandum concludes that the

> grounds militating against trials in absentia do not apply to international criminal trials, particularly when they are not based on full acceptance of the adversarial model. In such trials, proceedings do not boil down to a contest between two parties. *Rather*, the main goal is the pursuit of truth and justice.[16]

This claim finds an echo and is developed in an article published by Judge Riachy, the current Lebanese Vice-President of the STL, where he explains the acceptance of trials *in absentia* in the civil law systems in the following way:

> **(p.115)** This is a distinguishing feature of the criminal justice systems in these countries, inasmuch as the notion of a criminal offence strikes not only at personal interests, but also at stability of society. Consequently, public prosecution does not belong exclusively to the parties to the case (i.e. the Office of the Public Prosecutor and the accused), as is the case in common law systems, where each of the parties pursues its own interests; rather, it belongs to society, and its aim is to arrive at truth and justice. It follows that the defendant's absence from the trial cannot of itself halt the course of justice, which must continue to move forward regardless of his absence in order to achieve its result (the restoration of the 'social peace' that was disturbed by the criminal offence).[17]

These pronouncements illustrate a vision of justice which shifts the focus away from the accused, not just procedurally but also conceptually. 'Justice' is not something that applies to the defendant but is a more general goal that can be 'thwarted' by him.[18]

More specifically, these claims show confusion between the procedural arrangements of certain systems and the objectives of that system. Indeed, both Judges Riachy and Cassese draw from the fact that the proceedings are procedurally centred around the parties in the adversarial system, the conclusion that the process as a whole 'belongs' to the parties and not to society and that the aim is not the establishment of truth and justice. On both counts, this is clearly a misrepresentation of the criminal law process in common law systems.

For one, there is no basis for the claim that criminal law is not aimed at correcting societal wrongs in common law systems. That is the heart of criminal law in any system and what distinguishes it from tort or contract law. More specifically, the prosecutor is the representative of the people and the prosecution is done in the name of the people. He is not a private party as seems to be suggested by the quotes.

Secondly, it illustrates a narrow-minded view of how 'truth' can emerge. It remains to be proven that a more objective 'truth' emerges from the inquisitorial system than from an adversarial system. A more appropriate and subtle way of seeing things is that both systems are different modalities of achieving the 'truth' with different underlying philosophies. In other words,

> the different philosophy behind the two systems can perhaps be summed up as follows: in the inquisitorial system the Court (and the investigating judge before it) aims to discover the truth through an analytical procedure and comprehensive information; in an adversarial system, the truth is conceived as emerging only from a dialectic of opposing views and information presented in accordance with a structured procedure designed to guarantee maximum fairness.[19]

(p.116) 7.2.3 The curious lack of challenge by the defence

In the light of this, it is interesting to point out that the actual legality of the trial *in absentia* mechanism has not been challenged by the appointed defence lawyers of the accused. While they have highlighted the possible consequences of holding such a trial for the full exercise of the rights of the defence,[20] the lawyers have never claimed that holding the trial in the absence of the accused is, in principle, in violation of said rights. This is striking given the propensity of international lawyers, as is arguably required by their function, to challenge anything that might be perceived as detrimental to their client.

The reasons why this challenge was not made are not apparent, nor can they be easily identified in the light of past international defence practice. Indeed, it certainly cannot be linked to the chances of obtaining a positive outcome given that usually, especially in the context of international proceedings, motions are filed irrespective of the likelihood of success.[21] Moreover, the lack of a challenge cannot be explained on the grounds that there is no legal basis for it, as this has not prevented defence lawyers from making such

challenges in the past.[22] Finally, it can hardly be the case **(p.117)** that no challenge came because of the civil law background of some of the defence lawyers as most of them have a common law background; and those who do not have sufficient experience in international criminal proceedings not to be influenced by their own cultural tradition in making strategic choices for their clients.

One possibility would be that the defence teams plan to raise this issue at a later stage of the trial process, but the benefit of such a strategy is obscure as it carries with it the risk that the challenge will be considered not to have been made within a reasonable time.

One remaining possibility is that the current defence teams, which have been chosen, hired, and are remunerated by the STL through the Defence Office, rather than by the accused, have developed a loyalty to the institution that prevents them from challenging the mechanism without which there would likely never be a trial at the STL. This is of course speculative but, if true, would raise the question of whether the institutionalization of the defence *within* international tribunals (as is the case at the ICC to a certain extent), is in fact as positive a development as might have been thought.[23]

7.3 Victim Participation: Balancing in the Victims

The participation of victims in international criminal proceedings is usually portrayed as a positive development. There was none envisioned at the ad hoc tribunals nor at the Special Court for Sierra Leone (SCSL). The recognition of such a participation at the STL is however not surprising, given the dual influence of the Lebanese procedure and the recent evolution at the ICC.[24]

The specific framework for victim participation—its origins, influences, and difficulties—are systematically addressed elsewhere in this volume.[25] This section limits itself to highlighting certain features of the role of victims in the proceedings in light of the general angle of this chapter: the procedural balance that is struck in relation to the defendant. In relation to this, while there are certainly some elements that show a shift of the balance away from the accused (section 7.3.1), some limitations on victim participation and reparation seem to preserve a somewhat central role for the accused in the proceedings (section 7.3.2).

(p.118) 7.3.1 The recognition of victims' 'rights'

It is notable that the recognition of victims in international criminal proceedings has taken a new turn at the STL. The Statute's provision on victim participation is not particularly noteworthy in and of itself. Indeed, it reproduces verbatim the equivalent provision of the ICC Statute,[26] referring to the possibility of victims expressing their views and concerns at appropriate stages of the proceedings, with the caveat that the rights of the defence should not be prejudiced.

What is striking however is that this provision can be found in a section of the Statute entitled 'rights of defendants and victims'. This is both notable and unsurprising. It is notable because it is a new semantic development. Indeed, in the ICC Statute, the relevant article on victims refers to the 'protection of victims and witnesses and their

participation in the proceedings'[27] and does not actually refer to victims' 'rights'. In the STL Statute, the defendant and the victims are now put on a more equal footing, which can be seen de facto as an upgrade for victims and a downgrade for the defendant. It is unsurprising because this development originated in the case law of the ICC, which refers systematically to the language of 'rights', using it to import into the ICC framework the extensive body of human rights law and literature on the issue.[28]

Moreover, the RPE enshrine concrete rights of participation, such as an automatic right, subject to a contrary decision by the pre-trial judge or the Trial Chamber, to obtain non-confidential documents disclosed by the parties,[29] the ability to call witnesses and tender evidence,[30] and the ability to 'examine or cross-examine witnesses and file motions and briefs'.[31] The latter rights can only be exercised with the authorization of the pre-trial judge or the Trial Chamber.[32] Victims were thus given extensive rights in the RPE, rights that mirror the relevant provisions of the Lebanese Code of Criminal Procedure, short of being granted a formal status as parties to the proceedings.[33]

7.3.2 Limitations to victims' participation and reparation

7.3.2.1 Who can participate?

Generally speaking, the Statute provides that the participation of victims should not be 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.[34] This concern is reflected at several points in the Rules.[35]

(p.119) One striking feature of the Rules is rule 86, which provides that 'In deciding whether a victim may participate in the proceedings, the pre-trial judge shall consider in particular:…whether the applicant's proposed participation would be prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.'[36]

In other words, the rights of the defence shall be taken into account as early as the procedure to grant victim status before the Tribunal and the pre-trial judge could find that, in principle, the participation of a given victim would be prejudicial to the accused.[37] This is in theory quite novel,[38] and protective of the interests of the defence, and may allow the exclusion from the outset of victims who, for example, might have specific access to information prejudicial to the accused by way of having a special relationship with him.

In practice, however, the pre-trial judge seemed to give very little weight to this criterion. Indeed, in the decision on victim participation, the pre-trial judge considered that this criteria is satisfied (i) when the other requirements for victim participation in rule 86(B) are met;[39] (ii) because the victims will be represented by common legal representatives who 'by virtue of their professional experience and ethical obligations are required to ensure the integrity and expeditiousness of the proceedings';[40] and (iii) because specific measures can be taken during the proceedings to ensure that the rights of the accused are not prejudiced.[41] These three points are not convincing. Indeed, the first one does not add anything new, given that it is a separate obligation under the RPE anyway, so if the other requirements of rule 86(B) are not met, the question of a possible prejudice to the defence becomes moot. The last two points result from what appears to

be confusion in the timeframe of the procedure. Indeed, the question is not whether the prejudice can be compensated for later on in the proceedings. This is, as recalled earlier, a separate obligation under article 17. What is required from the judge is to evaluate whether applications contain, from the outset, elements that could, per se, cause prejudice to the accused.

In the light of this, it would have been a welcome move had the pre-trial judge specified what particular elements could constitute such prejudice in the application process. Moreover, the existence of these criteria would have justified the defence gaining access to the applications of the victims in order to be able to identify the elements that could in themselves constitute prejudice to the defence. The pre-trial judge, however, did not grant the defence request on this issue.[42]

(p.120) 7.3.2.2 When can the victims start participating?

Another limitation on victims' participation is that victims can only ask to participate after the confirmation of the indictment.[43] This limitation, it should be noted, stems not from the Statute but from the RPE and is therefore a decision by the judges themselves rather than a choice by the drafters of the Statute. As a result, victims are procedurally excluded from the investigative phase. This can be contrasted with the developing case law at the ICC, where victims are granted limited participation rights at the 'situation' phase, before any specific 'case' is initiated.[44] In the light of the criticism that was addressed to the ICC for allowing early participation, one could consider the opposite choice being made at the STL a welcome one.

However, it should be pointed out that there are notable differences between the two tribunals that might have justified a different approach. Indeed, participation of victims at the 'situation phase' at the ICC means that it is theoretically possible to give countless victims of countless alleged crimes committed by a large number of possible perpetrators over a large territory participation rights before the Court, making things unmanageable. Moreover, this state of affairs has also led to the result that once a specific case was initiated, victims of the 'situation' but not of the 'case' were no longer allowed to participate as the case developed.[45]

The context is very different at the STL: the focus on a single event, the assassination of Rafiq Hariri, meant that there is a limited number of potential victims from the start and the investigation itself was unlikely to lead to the result that victims who were not recognized before the confirmation of the indictment would no longer be victims thereafter. It therefore appears, putting aside issues relating to the rights of the accused, that it would make more sense not to allow victims to participate at an early stage at the ICC, while their participation at the STL at the investigation phase would be less problematic.

In fact, the reasons given for this limitation of victims' participation rights are not really convincing. The Explanatory Memorandum of the RPE puts forward two reasons: '(i) avoiding confusion that might somehow hamper the actions of the Prosecutor and (ii) preventing possible delay in the proceedings'.[46] While these are valid points, couldn't

they be equally considered reasons not to have victims participate at all? Other reasons put forward include the risk that the Prosecutor will be pressurized by victims to initiate proceedings against particular individuals or that particularly sensitive information received by the Prosecutor might be made **(p.121)** available to victims.[47] These reasons are also unconvincing. Indeed, the assumption should be that the Prosecutor is competent in exercising his distinct investigative function, ie that he will not be prone to influence by victims at any stage of the proceedings and will make sure that any sensitive information received is not disclosed to the victims, who do not have access to confidential information. In addition, these risks might well exist equally at all stages of the proceedings and would therefore justify not allowing victims' participation at all.

7.3.2.3 No right to reparation

Finally, it should be noted that, contrary to what has been implemented at the ICC,[48] victims cannot obtain reparations at the STL. In that respect, the STL adopts the more traditional approach chosen in previous international tribunals, which did not provide for a reparations scheme for victims from the tribunals themselves.[49]

The Statute does provide that victims 'pursuant to the relevant national legislation…may bring an action in a national court or other competent body to obtain reparation'[50] and that 'the judgment of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person'.[51] These provisions mirror the equivalent provisions of the Rules of Procedure and Evidence of the ICTY.[52] This procedure raises a certain number of questions about the relationship between the STL and national courts.

First of all, does it apply to the national courts of all states or just the courts of Lebanon? A plain reading of article 25 would indicate that this claim could be brought before any national court. This interpretation would seem to be reinforced by the fact that when provisions of the Statute are directed only at the national courts of Lebanon, this is explicitly indicated.[53] If this is the correct interpretation, one wonders if the Security Council can make judgments of the STL directly binding on states and their national courts, even if the broad scope of Chapter VII powers might indicate that this would not be impossible. Another possible interpretation is, however, likely. The Statute was initially negotiated as a treaty between Lebanon and the UN and it was envisaged that it would enter into force as a treaty. Had it done so, it would not have benefited from Chapter VII backing and could therefore not have been binding on third states. In the light of this, one can suppose that the negotiators of the treaty, acting in full cognizance of the rules of international law, would not have wanted to include in it a provision that would be **(p.122)** contrary to international law and could therefore only have meant its provisions to be applicable to the only courts that could be bound by the treaty, that is, the national courts of Lebanon.

Secondly, does the Statute actually create a right for victims to bring a claim before national courts or does it merely state that if that right exists 'pursuant to national legislation', the victims can exercise it? The latter interpretation would make the provision redundant. The former interpretation would raise a number of new difficulties. For one, it

deviates from the logic of the Statute, which as a criminal law statute is aimed at regulating the procedure before the court that it creates, namely the STL. If it creates a right to be exercised before national courts, it would be more akin to a human rights treaty. Secondly, if this provision creates a new right for victims, does it create a corresponding obligation for states to amend their national legislation to make sure that any obstacles that might exist for victims in the national procedure be removed to give full effect to the right to make a claim? This would seem like the logical consequence of creating a right to bring a claim but is a far-reaching effect of the creation of an international criminal tribunal by the Security Council, assuming that article 25 is interpreted as being aimed at all States, not just the courts of Lebanon.

This might appear to be a very theoretical point, but the globalization of international law today means that requests for compensation are likely to occur not only in the country of origin where the crimes were committed (in this case Lebanon), but in front of the courts of other jurisdictions. The debates surrounding the use of the Alien Torts Statute in the United States illustrate this point.[54] Another example is the fact that Karadžić, currently on trial at the ICTY, has been the object of reparations proceedings both in New York and in Paris.[55] In this context, while it is likely that article 25 is in fact only directed at Lebanon, one cannot entirely exclude the possibility that it will be used as a basis for obtaining reparations before other jurisdictions.

7.4 The Prosecutor

The organ of the STL that seems to show least difference compared to other international tribunals seems to be the Office of the Prosecutor. The Statute of the Tribunal provides that '[t]he Prosecutor shall be responsible for the investigation and prosecution of persons responsible for the crimes falling within the jurisdiction of the Special Tribunal'.[56] Moreover, he 'shall act independently as a **(p.123)** separate organ of the Special Tribunal'.[57] In terms of his role in the procedure, the Prosecutor is therefore in charge of the investigation, up until the moment where he presents an indictment to be confirmed by the pre-trial judge,[58] as is the case in any other international tribunal.[59]

Despite the recognition of this apparently traditional role of the Prosecutor in the proceedings, there are a certain number elements that seem to indicate a perhaps more limited role for him.

7.4.1 The unclear status of the findings of UNIIIC

First of all, it is important to recall the general context in which the Prosecutor is conducting his investigation. Indeed, the STL takes over from the UN International Independent Investigation Commission of Inquiry ('UNIIIC' or 'the Commission') which, over a period of years, produced eleven reports on both the killing of Rafiq Hariri and other related acts. The question can therefore be raised as to the relationship between the UNIIIC and the STL and, more specifically, of the actual margin of investigation of the Prosecutor in the light of these reports and the evidence gathered by UNIIIC.

Neither the Statute nor the RPE are unfortunately very explicit on the relationship

between the two institutions. The Statute provides that 'Evidence collected with regard to cases subject to the consideration of the Special Tribunal, prior to the establishment of the Tribunal, by the national authorities of Lebanon or by the International Independent Investigation Commission in accordance with its mandate as set out in Security Council resolution 1595 (2005) and subsequent resolutions, shall be received by the Tribunal'.[60]

While this provision shows a symbolic recognition of the link between the UNIIIC and the STL, the remainder of the article raises more procedural questions than it answers. Indeed, according to the Statute, the evidence's 'admissibility shall be decided by the Chambers pursuant to international standards on collection of evidence. The weight to be given to any such evidence shall be determined by the Chambers.' There are a certain number of ambiguities in this provision.

(p.124) First of all, what does it mean that the evidence 'shall be received *by the Tribunal*'? Does it mean it will be received by the Prosecutor, who will then include it in his case, or does it mean that the evidence is directly available to the Trial Chamber, to be used at its convenience? The latter option would then effectively bypass the Prosecutor and limit his investigative role and his role in designing the case.

Moreover, what is the purpose of the specific part of the article on admissibility and credibility? Isn't all evidence evaluated pursuant to 'international standards on the collection of evidence'? If it means that this evidence should be assessed in the same way as any other evidence, then there seems to be no point in having article 19 at all. If, on the other hand, it alludes to different rules of admissibility, then these should have been specified in the Rules, which are silent on this matter.

Overall, it appears that article 19 is at best redundant and at worst confusing. More clarification on the actual impact of the UNIIIC findings on the work of the Prosecutor would have been welcome, especially given the fact that the final commissioner of the UNIIIC became the first Prosecutor of the Tribunal, which could create a perception of bias. Indeed, to what extent can the Office of the Prosecutor (OTP) be seen as truly independent in its investigative choices and strategies in that context? If the approach adopted by UNIIIC were to be imported wholesale, wouldn't that make the Office of the Prosecutor less accountable and the findings less challengeable? This is all the more true as the Commission's lack of accountability and the allegations of impropriety in terms of false testimony and violations of the confidentiality of documents have raised doubts as to its credibility and legitimacy that could spill over to the STL, tainting more particularly the perceptions of the OTP's independence should the relationship between the two institutions not be clarified.[61]

7.4.2 The limitations on the role of the Prosecutor in the RPE

More specifically in relation to the rules adopted in the RPE, there are some indications that the procedural balance has been shifted from the Prosecutor to the judges. Two examples can be given of this.

First, at the pre-trial phase, the RPE provides for a unique procedure to increase the

involvement of the pre-trial judge. Before the confirmation of the indictment, and to 'ensure the efficient and speedy preparation of cases',[62] the Prosecutor is required to forward items necessary for the confirmation.[63] Moreover, the RPE provides for monthly confidential *ex parte* meetings between the pre-trial judge and the Prosecutor.[64] This is an extraordinary provision that brings the pre-trial judge to what is traditionally the Prosecutor's exclusive turf: the investigation. Essentially, **(p.125)** while not explicitly laid out, this is meant to ensure that the Prosecutor's investigation is going in the right direction so that there is no risk of the indictment not being confirmed. As a consequence, while the confirmation process at the ad hoc tribunals was superficial rubber-stamping,[65] this provision arguably makes it completely redundant at the STL by involving the pre-trial judge, even indirectly, in the Prosecutor's investigation.

The second example is at the same time more symbolic and more telling. As previously recalled, the Statute of the Tribunal describes the role of the Prosecutor in a fairly traditional way, as essentially being in charge of the investigation and prosecution of the case. The corresponding provision in the RPE on the functions of the Prosecutor clarifies this role in the following way: 'In performing his functions, the Prosecutor shall assist the Tribunal in establishing the truth and protect the interests of the victims and witnesses. He shall also respect the fundamental rights of suspects and accused.'[66] While one should be cautious about reading too much into these couple of sentences, they are striking on a number of levels. In general, this provision seems slightly pointless in relation to other provisions of the Statute and the RPE. It seems obvious that the Prosecutor, through the presentation of the case, will contribute to the establishment of the 'truth'. Moreover, to the extent that the interests of victims and witnesses are recognized in the Statute, it seems obvious that the Prosecutor, as an organ of the Tribunal, should be involved in their protection. The same is even more true for the accused. Indeed, respect for his rights is both technically recognized in the Statute and is at the heart of the fairness of the proceedings.[67]

Beyond the possible futility of the rule, its phrasing also deserves some attention. The Prosecutor is considered to be an assistant of the Tribunal in the establishment of the truth. This might seem like an innocuous and possibly uncontroversial statement, but it does illustrate the shift of the procedural balance to the judges, as already illustrated in relation to trials *in absentia*. Furthermore, the order of the 'obligations' of the Prosecutor, with the respect of the rights of the accused coming last, illustrates further the tendency of a balancing out of the defendant.

In conclusion, while the Prosecutor seems, on a superficial reading of the procedural framework of the STL, to have a similar role as in other international tribunals, there are a number of examples that seem to limit his scope of actions, with the balance shifting—once again—to the judges.

(p.126) 7.5 The 'Advisory' Function of the Appeals Chamber: An Illustration of the Central Role of Judges at the STL

The most innovative provision of the procedural framework of the STL is arguably rule 68(G) of the RPE. This rule provides that 'The Pre-Trial Judge may submit to the Appeals

Chamber any preliminary question, on the interpretation of the Agreement, Statute and Rules regarding the applicable law, that he deems necessary in order to examine and rule on the indictment.'[68]

It is the use of this provision which allowed the Appeals Chamber, in February 2011, to issue the much debated decision on the applicable law at the STL wherein it found, among other things, that there existed a definition of terrorism under customary international law that could be used to interpret the Lebanese provisions relating to terrorism.[69] While this decision was extensively commented upon,[70] few commentators actually took interest in the way it was made procedurally possible.[71] Yet, it is a unique legal provision that deserves further consideration.

7.5.1 A truly unique provision

First, this is a unique legal provision in international criminal law: no similar procedure can be found in the Statutes or RPE of any other international or hybrid court.[72] In some cases, there are even pronouncements that such a procedure would not be permissible.[73] Possibly the only example involving an international court is the *renvoi préjudiciel* (preliminary ruling) within the European Union system, which allows a national court to suspend proceedings and send a question on the correct interpretation of European law to the Court of Justice of the European **(p.127)** Union.[74] This procedure is, however, not comparable to the procedure adopted in rule 68(G) as it involves courts from different jurisdictions with the European Court having jurisdiction to decide on only one very specific area of law, that is European law.

Moreover, it also appears to find no equivalent in any national legal system, despite the Appeals Chamber's claim that 'this procedure, sometimes encountered in civil proceedings of some countries, is less common in the context of criminal proceedings'.[75] This statement is not accompanied by any reference to even one national legal system that might have such a procedure, which is rather strange given the extensive, if sometimes contested, references included in support of the remainder of the decision. While a number of systems will allow for interlocutory constitutionality challenges,[76] grant judiciary bodies advisory functions on request of the legislator,[77] or have a system of certified questions,[78] none of these procedures actually correspond to the procedure adopted before the STL, ie a lower jurisdiction directly requesting from its immediate appellate body to pronounce itself on the applicable law.

While the uniqueness of this provision is not necessarily a difficulty as such, or an obstacle to its adoption at the STL, it does mean at least that its inclusion deserves careful reflection and justification, which do not appear convincingly in the case law of the Tribunal, as will be seen later. Moreover, whatever the diversity of 'advisory procedures' set up in various systems, they all have one thing in common: they were set up by legislators rather than by the judges. Therefore, while rule 68(G) may appear to be a minor procedural issue, it is illustrative of how international criminal judges perceive themselves.

7.5.2 The justification for the Rule

The explanatory memorandum of the RPE has very little to say about rule 68(G). Calling it a 'unique ability' of the pre-trial judge, it defines it as a 'procedure aiming at ensuring consistency in applicable law throughout the legal proceedings and at speeding up pre-trial deliberations'.[79]

The Appeals Chamber, in its February 2011 Interlocutory Decision gave more specific reasons for the adoption of this rule.

The first is expediency to avoid a situation in which the Trial Chamber 'adopt[s] an interpretation of the law with which [the] Appeals Chamber ultimately disagrees, unnecessarily delaying the resolution of cases and thereby causing an **(p.128)** injustice to the parties and to the people of Lebanon'.[80] This is an unconvincing argument because it is too far-reaching. Indeed, it negates the whole idea of having several degrees of jurisdiction, something that is recognized by most international human rights instruments.[81] Following the argument of the Appeals Chamber, why not also apply this reasoning to all aspects of the procedure and dispense with both the pre-trial judge and the trial judge? In other words, 'the Appeals Chamber might as well decide all legal and factual issues in any given case itself lest there be delay',[82] thereby avoiding the lower degrees of jurisdiction taking positions that the Appeals Chamber might disagree with.

The second reason put forward is that 'the questions asked by the Pre-Trial Judge have been the subject of careful written submissions and oral arguments of counsel at a reasonable level of specificity'.[83] This is equally unconvincing. Indeed, it ignores several realities of normal adjudication. It first ignores the fact that the development and interpretation of law is not only a dialogue between the parties and the judges, but also a dialogue between different benches and jurisdictions. Arguably the most famous judge in England was Lord Denning, who influenced the development of the common law as Master of the Rolls (the Presiding Judge of the Appeals Chamber) through constant disagreement with the House of Lords.[84] At the ad hoc tribunals, a number of notable developments in the case law were the result of careful discussion by the Appeals Chamber of trial judgments or were directly adopted in important trial judgments.[85] Secondly, and probably more fundamentally, this argument rests on the problematic assumption that the law can be permanently settled without facts. No matter how specific the submissions of the parties are, the reality of adjudication is the complex interaction between law and facts. Not only can the law not cover all factual circumstances, often a different fact pattern can reveal the absurdity of an agreed interpretation of the law, which therefore cannot be interpreted in the abstract.[86]

The third reason put forward is that 'no prejudice will arise against any further accused'[87] because he will have the opportunity, 'in light of specific evidence'[88] to **(p.129)** make a request for reconsideration under the Rules.[89] This line of reasoning is equally unpersuasive. At the outset it should be clarified that it is not really a justification for the rule *stricto sensu*. Had the judges found that rule 68(G) was prejudicial to the defence, it would have been a justification not to adopt it, but it cannot be deemed a reason to positively adopt it. But even if one takes the argument at face value, the

reconsideration procedure is especially inappropriate for this kind of decision, particularly with the limited timeframe for submitting the request imposed by the RPE.[90] This is so for several reasons. First, it is unclear how evidence disclosed by the Prosecutor would affect the legal definition of crimes, without at least being tested in court.[91] Secondly, the rule on reconsideration requires that the decision should be 'necessary to avoid injustice'.[92] However, how is the accused expected to prove actual injustice when no trial judgment has been rendered? It is only if convicted on an erroneous interpretation of a crime that the defendant might have reasons to contest that interpretation. The absurdity of applying the rules of reconsideration to this kind of advisory opinion was made apparent when the defence did indeed make such a request, which was rejected by the Appeals Chamber based on the fact that the defendants had not been able to show a prejudice arising from the decision at this stage,[93] a prejudice which can arguably only appear once the trial has actually started.

An extra line of reasoning was adopted by the Appeals Chamber in its later reconsideration decision, where it stated that

> It will still be for the Trial Chamber to apply and shape the relevant legal principles in the light of the charges contained in the indictment and the evidence adduced by the parties. This judgment will be subject to an appeal and the Appeals Chamber will revisit any legal issue that might be raised by such an appeal under Article 26 of the Statute.[94]

In other words, the Trial Chamber can allegedly still develop its own interpretation of the law,[95] which will then be considered by the Appeals Chamber in any subsequent appeal. This pronouncement seems, on the face of it, to alleviate certain fears, such as that the Trial Chamber will be 'relegated to merely trying the facts'.[96] However, it is not entirely satisfactory. It ignores the possible psychological effect **(p.130)** for trial judges of already having a decision by the Appeals Chamber when exercising their functions. More importantly, it seems to negate the only point behind the adoption of rule 68(G) in the first place—to avoid the Trial Chamber adopting interpretations that the Appeals Chamber would disagree with. Whatever one thinks of rule 68(G), if it is to have any purpose once in operation, it cannot have no effect whatsoever on the 'normal' operation of the proceedings. If this were so, the judges might as well not have adopted the rule in the first place.

Taken together, these elements do not therefore amount to strong reasons to have adopted the rule in the first place. The last point even seems to negate the purpose of the rule as initially justified in the February 2011 decision. However, what ultimately matters is whether, irrespective of the justifications for the rule, the judges actually had the power to adopt it.

7.5.3 The *ultra vires* adoption of the Rule

One question that can therefore be raised is whether, in the absence of a statutory provision extending the function of the Appeals Chamber in this way, the adoption of rules 68(G) and 176bis was *ultra vires*.[97]

The issue was not dealt with in the original Interlocutory Decision, but arose in the context of the defence requests for reconsideration in June 2012. In its decision on the defence requests, the Appeals Chamber found that the rules were not *ultra vires* and that their adoption was in conformity with the Statute.[98]

For the judges, these rules fall perfectly within the scope of the RPE, which are aimed at regulating 'pre-trial, trial and appellate proceedings' as well as 'other appropriate matters'.[99] Accordingly, the Appeals Chamber found that there was 'no harm in the plenary of Judges assigning further, clearly delineated powers to the Appeals Chamber, in addition to the competence to hear appeals against judgments of the Trial Chamber, if this is in furtherance of the aims of the Statute and not to the detriment of either party'.[100]

The judges consider that if such flexibility were not possible, it would, for example, prevent the Appeals Chamber from hearing interlocutory appeals because it is not provided for in the Statute, despite the fact that this procedure is widely accepted in international criminal practice.[101] This comparison is not necessarily that relevant. Indeed, the practice of interlocutory appeals in international criminal procedure is a common and uncontroversial feature of all recent international or **(p.131)** hybrid tribunals[102] that has received state approval in the form of the ICC Statute.[103] Moreover, the interlocutory procedure does not fundamentally change the interaction between chambers, as rule 68(G) does. There is still an actual decision by a lower chamber that is being appealed, albeit sooner rather than later.

More importantly, the key question is not wide recognition or not, nor is it an acceptable line of reasoning for the Appeals Chamber to say that it sees 'no harm' in granting itself more powers even if there were, contrary to the present situation, good policy reasons to do so. The only relevant question is, who has the power to decide these policy considerations? The presumption in this matter should always be that the 'legislator', ie the drafters of the Statute, gave each organ of the Tribunal the functions that it deemed necessary. These functions cannot thereafter be expanded by the organs of the Tribunal themselves, whatever the valid reasons they think they might have to do so. In this sense, rule 68(G) cannot be considered as falling within the normal scope of the Rules of Procedure and Evidence because it does more than just specify the details for the operation of procedures provided for by the Statute—it creates a new function for the Appeals Chamber. Moreover, not only is the adoption of rule 68(G) an *ultra vires* use of the legislative function of the judges, it arguably also grants a new legislative function to the Appeals Chamber. Indeed, the only body that can decide the definition of the law in the abstract is the legislator. A court, when it does this, therefore de facto loses its judicial function, and ultimately, cannot any longer be regarded as a court.

7.6 Conclusion: Keeping the Eye on the Ball

When the findings of the previous sections are considered together, a clear double trend appears: a procedural balancing out of the accused, notably due to the practice of trials *in absentia,* and the corresponding shift of that balance to the judges.

Of course, the STL is not the only international tribunal where judges might be seen to use the Rules to increase their control over the proceedings beyond what could be considered legitimate. Other tribunals have shown similar tendencies. A seminal example at the ICTY was the controversial adoption in the Rules of Procedures relating to contempt of court.[104] Even at the ICC, where the judges did not draft their own Rules, controversy arose in relation to the adoption, in the Regulations of the Court, of a regulation allowing the Trial Chamber to legally re-characterize the facts in their judgment, despite the absence of such a power in the Statute or in the RPE.[105]

(p.132) However, the compound effect of the various procedural rules that have been considered here, most notably in relation to trials *in absentia* and the advisory function of the Appeals Chamber, leads to the conclusion that STL judges arguably control the process far more than in other international tribunals, whether it be in relation to the (absent) accused, the victims, or the Prosecutor.

There are good and different reasons for all parties concerned—the accused and their defence counsel, the Prosecutor, and the victims—to contest this state of affairs; reasons which have been touched upon in the previous discussion. There are also professional communities outside the Tribunal, which might arguably also feel some discomfort at, for example, seeing judicial decisions being used as a 'vehicle to publish [an] expansive academic treatise'[106] and to push forward normative agendas, as the Tribunal did in unnecessarily defining an international crime of terrorism or affirming the customary law nature of the contested mode of liability of joint criminal enterprise,[107] and, more generally, at seeing the international judicial process monopolized by a small group of referees stealing the show, as this chapter suggests.

However, what ultimately matters is not satisfying a small group of academics or specialists in international criminal law. What matters is keeping in mind what game is being played and if anybody is watching. In that respect, the pace and nature of political change in the middle East, more broadly in the Arab world, and more specifically in Lebanon, raises questions as to the continued relevance of a Tribunal set up half a world away to investigate one event that took place nearly ten years ago. If the STL is going to overcome this legitimate concern, it must address the issues raised in this chapter, not only for the sake of legal coherence but for the sake of the impact that these issues have on its overall credibility.

This changes the whole perspective in a number of ways.

Trials *in absentia* should not be used, not because they violate the rights of the defence or highlight a normative bias on the part of the judges. They should not be used because the absence of the accused is an illustration of the incapacity of the international community and Lebanon to live up to their own promises when creating the Tribunal. The STL should therefore be putting the international community at the forefront of its responsibilities, and shaming its members, daily and publicly, for the fact that a tribunal was created with no ensuing political will behind it. That is the message that could be sent, rather than pretending that everything is going well in The Hague because the cases are

proceeding as planned.

The STL should allow all victims who want to participate to come to the Tribunal but not to satisfy some legal or human rights requirement. Rather, the victims should be shown that the justice they were promised cannot be delivered, not because of the STL, but once again because of the lack of political will of their own leaders, whom they should hold accountable for this denial of justice.

The judges should remove the advisory function of the Appeals Chamber, not because it violates some theoretical rule on the separation of powers between the **(p.133)** legislative and the judicial function but because the affected communities do not care that there exists a customary international law crime of terrorism or what Hersch Lauterpacht wrote in 1933 on the role of the judge.[108] He is a 'great international authority' to a small group of international scholars, not to the victims of terrorism in Lebanon.

It is only if the STL refocuses on the game that is actually being played in the territory where the crimes were committed rather than focusing on the procedural niceties being played in The Hague that it will have any chance of actually delivering on its promise of justice. If not—beyond all the technical discussions on the procedural framework of the STL—what is the point of setting up rules for a game, which nobody is in fact playing, and more importantly, which nobody may be watching anymore? The ultimate risk is therefore not really that the referee could be stealing the show but rather that there might not actually be a show anymore to steal, just an empty pitch and the echoes of the now departed spectators dying out as the last floodlights are inexorably being switched off, one by one.

Notes:

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([1]) Technically the STL is an international tribunal created by UN SC Res 1757, UN Doc S/RES/1757 (2007), as confirmed by the Appeals Chamber of the STL, see STL, Decision on the Defence Appeals Against the Trial Chamber's 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/AC/AR90.1, Appeals Chamber, 24 October 2012, para 27. However, the term 'hybrid' is used here as a descriptive rather than normative term to illustrate the reality of a tribunal that systematically combines elements of both the national and the international in a unique way that is not adequately reflected in the term 'international'.

([2]) See eg Kai Ambos, 'The Structure of International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' in Michael Bohlander (ed), *The Globalization of Criminal Justice* (Burlington: Ashgate 2010) 461–535. For a recent comprehensive assessment of the various aspects and sources of international criminal procedure, see Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press 2013).

([3]) See Matthew Gillet and Matthias Schuster, 'The Special Tribunal for Lebanon Swiftly Adopts Its Rules of Procedure and Evidence' (2009) 7 JICJ 885. See also Sluiter, *International Criminal Procedure* (n2).

([4]) John Jackson and Sarah J Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (New York : Cambridge University Press 2012).

([5]) Attachment to SC Res 1757, UN Doc S/RES/1757 (2007).

([6]) Charter of the International Military Tribunal (London, 8 August 1945, 82 UNTS 279) art 12: 'The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.'

([7]) The ICC Statute does provide that the confirmation of charges can be held in the absence of the defendant if the person has waived their right to be present, or is not available, see Rome Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90) art 61(2). No such provision exists in relation to the actual trial for which the accused 'shall be present', see Rome Statute of the International Criminal Court art 63(1).

([8]) See eg Paola Gaeta, 'To Be (Present) or Not To Be (Present)' (2007) 5 JICS 1165; Niccolò Pons, 'Some Remarks on *In Absentia* Proceedings Before the Special Tribunal for Lebanon in Case of a State's Failure or Refusal to Hand Over the Accused' (2010) 8 JICJ (2010) 1307; Wayne Jordash and Tim Parker, 'Trials *In Absentia* at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law' (2010) 8 JICJ 487.

([9]) See Paola Gaeta, 'Trial *In* Absentia Before the Special Tribunal for Lebanon: Between Myth and Reality', Chapter 12.

([10]) STL Statute (n5) art 22.

([11]) See eg ICC Statute (n7) art 63(2).

([12]) RPE r 104.

([13]) Explanatory Memorandum to the STL's Rules of Procedure and Evidence (12 April 2012) para 42. The consequence of this is that the accused 'cannot subsequently enjoy a right to a retrial that in absentia proceedings would allow', see Explanatory Memorandum to the STL's Rules of Procedure and Evidence, para 42.

([14]) Cassese, Explanatory Memorandum to the STL's Rules of Procedure and Evidence (n13) para 7.

([15]) Cassese, Explanatory Memorandum to the STL's Rules of Procedure and Evidence

(n13) para 7.

([16]) Cassese, Explanatory Memorandum to the STL's Rules of Procedure and Evidence (n13) para 39 (emphasis added).

([17]) Ralph Riachy, 'Trials In Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon: Challenge or Evolution?' (2010) 8 JICJ 1295, 1297.

([18]) Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford: Oxford University Press 2013) 358.

([19]) Cassese, *International Criminal Law*, 3rd edn (n18) 336. It should be pointed out that this formulation is not attributable to Cassese himself but rather to Christopher Gosnell, who revised the text on this issue for the third edition of the textbook after Cassese's passing away. Indeed, the passage does not appear in the second edition of the textbook. Interestingly, the revision of Cassese's text by a common lawyer leads to the inclusion of certain notable changes. For example, in relation to the discussion on the adversarial and inquisitorial systems, consider the following passage from the second edition of the textbook: 'the essence of the inquisitorial model lies in the strong emphasis on the *public interest* in prosecuting and punishing all those who offend against societal values enshrined in criminal rules. Consequently, public institutions such as the prosecutors and investigating judges play a significant role in administering justice, whilst lesser emphasis is placed on the role and the rights of the defense', see Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 365. This becomes 'The inquisitorial model is conceived as a controlled process in which both the investigation and the trial is (sic), in large measure, within the control of judicial officials purportedly acting in the *public interest*', see Cassese, *International Criminal Law,* 3rd edn (n19) 340. One can note the removal of the opening statement suggesting that the adversarial system does not consider the societal dimension of prosecutions as important and the inclusion of the word 'purportedly' in defining the role of public officials. In the light of this, one can wonder whether selling this new edition of the textbook as representing Cassese's viewpoints is not in fact misleading.

([20]) For example, the defence rightly points out that in not being able to discuss the case with the accused, they are deprived of the opportunity of being directed to possible exculpatory evidence that the accused might have access to, see, STL, Public Redacted Version of the Joint Defence Motion to Vacate Tentative Date for Start of Trial Filed on 23 January 2013, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Defence Counsel, 24 January 2013.

([21]) A case in point is the challenges to the legality of the establishment of the Tribunal. Despite the fact that no such challenge has ever succeeded before an international tribunal, defence counsel in *Ayyash et al* challenged the Tribunal's legality (see STL, Motion on Behalf of Salim Ayyash Challenging the Legality of the Special Tribunal for Lebanon, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Ayyash Defence, 4 May 2012; STL, Sabra's Preliminary Motion Challenging the Jurisdiction of the Special Tribunal

for Lebanon, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Sabra Defence, 9 May 2012; STL, The Defence for Mr Hussein Hassan Oneissi's Motion Challenging the Legality of the Tribunal, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Oneissi Defence, 10 May 2012; STL, Exception Préjudicielle d'Incompétence du Tribunal Spécial pour le Liban Déposée par la Défense de M Badreddine, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Badreddine Defence, 10 May 2012). See also the unsuccessful claim by the defence that r 68(G) of the STL RPE is contrary to the STL Statute (n5) (see s 7.5).

([22]) See eg Oneissi's Motion Challenging the Legality of the Tribunal, *Prosecutor v Ayyash* (n21) and the STL decision On Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011, *El Sayed*, Case No CH/AC/2011/01, Appeals Chamber, 19 July 2011. For an example from the ICC, see the abuse of process challenge by Lubanga, which was deemed admissible despite the absence of a specific statutory provision on the issue (ICC, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Appeals Chamber, 14 December 2006.

([23]) See eg Maria Stefania Cataleta, *Le Tribunal Spécial pour le Liban et le Respect des Droits de l'Homme* (Torino: L'Harmattan 2012) 93–9, arguing that including the Defence Office as a formal organ of the Tribunal has increased respect for the rights of the defence.

([24]) For an overview of provisions on victim participation in the various international tribunals, see Anne-Marie de Brouwer and Marikka Heikkilä, 'Victim Issues: Participation, Protection, Reparation, and Assistance' in Sluiter, *International Criminal Procedure* (n2) 1299.

([25]) See Howard Morrison and Emma Pountney, 'Victim Participation at the Special Tribunal for Lebanon', Chapter 9.

([26]) ICC Statute (n7) art 68(3).

([27]) ICC Statute (n7) art 68(3).

([28]) See eg ICC, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Prosecutor v Katanga and Ngudjolo Chui*, Case No ICC-01/04-01/07, Pre-Trial Chamber, 13 May 2008.

([29]) RPE r 87(A).

([30]) RPE r 87(B).

([31]) RPE r 87(B).

([32]) RPE r 87(B).

([33]) Cassese, Explanatory Memorandum to the STL's Rules of Procedure and Evidence (n13) para 16.

([34]) STL Statute (n5) art 17.

([35]) See eg RPE r 86(B)(iv).

([36]) RPE r 86(B)(iv).

([37]) Such a requirement is not present in the ICC framework, see ICC RPE rr 85 and 89.

([38]) At the ICC, the main relevant criteria is whether the victim has 'suffered harm as a result of the commission of any crime within the jurisdiction of the Court', see ICC RPE r 85.

([39]) ie they are victims within the meaning of r 2 of the RPE (see RPE r 86(B)(i)), their personal interests are affected (RPE r 86(B)(ii)), and their views and concerns relate to legitimate objectives (RPE r 86(B)(iii)).

([40]) STL, Decision on Victims' Participation in the Proceedings, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 8 May 2012, para 100.

([41]) STL, Decision on Victims' Participation in the Proceedings, *Prosecutor v Ayyash* (n40).

([42]) STL, Decision on Defence Motion of 17 February 2012 for an Order to the Victims' Participation Unit to Refile its Submission *Inter Partes* and Inviting Submissions on Legal Issues Related to Applications for the Status of Victim Participating in the Proceedings, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 5 April 2012.

([43]) RPE r 86(A).

([44]) See eg ICC, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Pre-Trial Chamber, 17 January 2006.

([45]) See ICC, Judgment on the Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Appeals Chamber, 11 July 2008.

([46]) Cassese, Explanatory Memorandum to the STL's Rules of Procedure and Evidence (n13) para 20.

([47]) Jerôme de Hemptinne, 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon' (2010) JICJ 8 165, 173.

([48]) ICC Statute (n7) art 75.

([49]) The ICTY does provide for a very specific case of compensation: the return of

property acquired by criminal conduct (Statute of the ICTY (25 May 1993, 32 ILM 1159 (1993)) art 24(3); ICTY RPE r 105). This limited provision was, however, never utilized.

([50]) STL Statute (n5) art 25(3).

([51]) STL Statute (n5) art 25(4).

([52]) ICTY RPE r 106.

([53]) See eg STL Statute (n5) art 4(1) on concurrent jurisdiction or art 19 on the transfer of information to the Tribunal.

([54]) See eg John B. Bellinger, 'Enforcing Human Rights in US Courts and Abroad: The Alien Tort Statute and Other Approaches' (2009) 42 Vand J Transn'l L 1.

([55]) See Dov Jacobs, 'French Civil Court Orders Karadzic to Compensate Bosnia Family' (Spreading the Jam, 14 March 2011) <http://dovjacobs.com/2011/03/14/french-civil-court-orders-karadzic-to-compensate-bosnian-family.html> accessed 13 October 2013.

([56]) STL Statute (n5) art 11(1). Cf ICC Statute (n7) art 54(1)(a), which explicitly provides that the Prosecutor should 'investigate incriminating and exonerating circumstances equally'. The ICC is the only international court to place such an obligation on the Prosecutor. In practice, however, despite a number of challenges by defence teams about the alleged violation of this obligation (see eg ICC, Public Redacted Version of the Defence Reply to the 'Confidential Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defence Applications Under Article 64 of the Statute to Refer the Confirmation Decision Back to the Pre-Trial Chamber', *Prosecutor v Muthaura and Kenyatta,* Case No ICC-01/09-02/11, Defence Counsel, 8 March 2013), ICC chambers have been reluctant to specify the content of this obligation or give effect to it (see eg ICC, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, *Prosecutor v Muthaura and Kenyatta,* Case No ICC-01/09-02/11, Trial Chamber, 26 April 2013).

([57]) STL Statute (n5) art 11(2).

([58]) STL Statute (n5) art 18.

([59]) With the unique and notable exception of the Extraordinary Chambers in the Courts of Cambodia, which adopted the Cambodian civil law tradition of having an investigative judge, see Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea as promulgated on 27 October 2004 (Phnom Penh, 6 June 2003) art 23.

([60]) STL Statute (n5) art 19.

([61]) Nidal Jurdi, 'Falling Between The Cracks: The Special Tribunal For Lebanon's Jurisdictional Gaps As Obstacles To Achieving Justice And Public Legitimacy' (2010–2011)

17 UC Davis J Int'l L & Pol'y 253. See also, Amal Alamuddin and Anna Bonini, 'The UN Investigation of the Hariri Assassination', Chapter 4.

([62]) RPE r 88(C).

([63]) RPE r 88(D).

([64]) RPE r 88(E) and (F).

([65]) See Dov Jacobs, 'The Burden and Standard of Proof' in Sluiter, *International Criminal Procedure* (n2) 1128.

([66]) RPE r 55(C).

([67]) One can wonder what the drafters of the RPE meant by 'fundamental rights' of suspects and accused. The Statute does not distinguish between types of rights afforded to these categories of people (see STL Statute (n5) arts 15–16); it just recognizes a set of rights, irrespective of whether they are fundamental or not. In the light of this, is Rule 55 suggesting that the Prosecutor only needs to respect certain rights and not others?

([68]) RPE r 68(G).

([69]) STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *Prosecutor v Ayyash et al,* Case No STL-11-01/I/AC, Appeals Chamber, 16 February 2011.

([70]) See Nidal Jurdi, 'The Court's Subject Matter Jurisdiction: The Crime of Terrorism in Lebanese and International Law', Chapter 5.

([71]) Cf Dov Jacobs, 'A Comment on Why the STL Appeals Chamber Should Not Have Rendered its Decision on Applicable Law' (*Spreading the Jam*, 17 February 2011) <http://dovjacobs.com/2011/02/17/a-comment-on-why-the-stl-appeals-chamber-should-not-have-rendered-its-decision-on-applicable-law> accessed 13 October 2013; Matthew Gillet and Matthias Schuster, 'Fast-Track Justice' (2011) 9 JICJ 989, 991–7.

([72]) Gillet and Schuster 'Fast-Track Justice' (n71) 996. It should, however, be pointed out that a somewhat similar direct referral to the Appeals Chamber exists at the Special Court for Sierra Leone in relation to certain preliminary motions on jurisdiction or on issues that could affect the fairness of the proceedings, see SCSL RPE rr 72(E) and 72(F). This referral mechanism was found to be in conformity with the Statute by the SCSL Appeals Chamber, see SCSL, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, *Prosecutor v Norman, Kallon and Gbao,* Case No SCSL-03-07-PT-127, Appeals Chamber, 4 November 2003.

([73]) SCSL, Decision on the Applications for a Stay of Proceedings etc, *Prosecutor v Norman et al* (n72).

([74]) See Ami Barav, *Études sur le Renvoi Préjudiciel dans le Droit de l'Union Européenne* (Bruxelles: Bruylant 2011).

([75]) STL, Interlocutory Decision on the Applicable Law (n69) para 8.

([76]) See eg Constitution de la Cinquième République (France) (Paris, 4 October 1958) art 61–1.

([77]) For the US example, see Mel A. Topf, *A Doubtful and Perilous Experiment: Advisory Opinions, State Constitutions, and Judicial Supremacy* (Oxford: Oxford University Press 2011).

([78]) This, however, usually involves a court referring to another court from a different jurisdiction for clarification of the law in that jurisdiction. For a US example, see Thomas R Newman and Steven J Ahmuty Jr, 'Court of Appeals Review of Certified Questions from Other Courts' (2004) 231 NYLJ 23.

([79]) Cassese, Explanatory Memorandum to the STL's Rules of Procedure and Evidence (n13) para 11.

([80]) STL, Interlocutory Decision on the Applicable Law (n69) para 9.

([81]) International Covenant on Civil and Political Rights (New York, 16 December 1966, 999 UNTS 171) art 14(5); Protocol 7 to the European Convention on Human Rights (Rome, 4 November 1950, 213 UNTS 221) art Z.

([82]) Gillet and Schuster, 'Fast-Track Justice' (n71) 994.

([83]) STL, Interlocutory Decision on the Applicable Law (n69) para 10.

([84]) Charles Stephens, *The Jurisprudence of Lord Denning. A Study in Legal History,* vol III (Newcastle-upon-Tyne, Cambridge Scholars Publishing 2009).

([85]) Gillet and Schuster, 'Fast-Track Justice' (n71) 995.

([86]) This can be illustrated by what is arguably the most famous hypothetical scenario of legal theory, that of Hart's discussion of what constitutes a 'vehicle' in a law prohibiting vehicles in a park, see HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv L Rev 593, 607. It is only by 'testing' the prohibition through different fact patterns (ambulances, prams, skateboards…) that generations of legal theorists have tried to uncover the true interpretation of the law. For an entertaining take on these debates, see Pierre Schlag, 'No Vehicles in the Park' (1999) 23 Seattle U L Rev 381.

([87]) STL, Interlocutory Decision on the Applicable Law (n69) 10.

([88]) STL, Interlocutory Decision on the Applicable Law (n69) 10.

([89]) RPE r 176bis(C).

([90]) 30 days after full disclosure from the Prosecutor, see RPE r 176bis(C).

([91]) For a similar argument see, Gillet and Schuster, 'Fast-Track Justice' (n71) 996. The authors are, however, too hasty in claiming that the facts of the case 'should not alter the core definition of crimes within the Tribunal's jurisdiction'. Facts might not change 'definitions' but they certainly affect 'interpretations' of these definitions, and what the Appeals Chamber did was not to technically define the crimes, despite what the authors claim, but rather interpret their definition.

([92]) RPE r 140.

([93]) STL, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/AC/R176*bis*, Appeals Chamber, 18 July 2012, paras 45–51.

([94]) STL, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, *Prosecutor v Ayyash et al* (n93) para 37.

([95]) As implicitly recognized by the Appeals Chamber, see STL, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, *Prosecutor v Ayyash et al* (n93) note 85.

([96]) Gillet and Schuster, 'Fast-Track Justice' (n71) 993.

([97]) See Jacobs, 'Why the STL Appeals Chamber Should Not Have Rendered its Decision on Applicable Law (n71); Gillet and Schuster 'Fast-Track Justice' (n71) 992.

([98]) STL, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, *Prosecutor v Ayyash et al* (n93) para 39.

([99]) STL, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, *Prosecutor v Ayyash et al* (n93) paras 33–34 (referring to article 28 of the STL Statute).

([100]) STL, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, *Prosecutor v Ayyash et al* (n93) para 34.

([101]) STL, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, *Prosecutor v Ayyash et al* (n93) para 34.

([102]) Sluiter, *International Criminal Procedure* (n2) 962–80.

([103]) ICC Statute (n7) art 82.

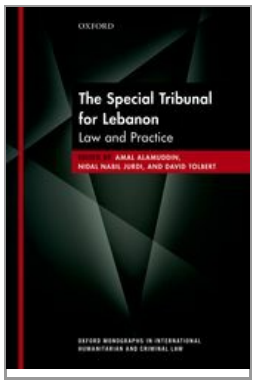
([104]) On this, see Commentary on 'Judgment on Allegations of Contempt, *Prosecutor v Blaskic* (Contempt), Case No IT-95-14-R77.6, 7 February 2007' in André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals*, Vol 33 (Antwerp: Intersentia 2013) 304–13.

([105]) Dov Jacobs, 'A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court?' in William Schabas, Yvonne McDermott, and Niamh Hayes (eds), *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Farnham: Ashgate 2013) 205–22.

([106]) Gillet and Schuster, 'Fast-Track Justice' (n71) 992.

([107]) STL, Interlocutory Decision on the Applicable Law (n69).

([108]) STL, Interlocutory Decision on the Applicable Law (n69) para 11.



The Special Tribunal for Lebanon: Law and Practice

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Responding to Cooperation Problems at the STL

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[–] Abstract and Keywords

Under the Special Tribunal for Lebanon's (STL) legal framework only one state — Lebanon — is obligated to cooperate with the STL. Suspects have not been arrested, and it remains uncertain whether other cooperation obligations will be fulfilled when the first trial begins. This chapter examines possible solutions to cooperation difficulties. It considers whether two alternative routes bypassing the defective STL cooperation regime can 'repair' cooperation problems, in particular whether other sources of international law, especially those related to combating terrorism, could be used as additional sources of law, obliging states other than Lebanon to cooperate with the STL. It explores whether the STL could itself perform investigative acts in the territory of states. Finally, it examines whether the STL may encounter a situation where a lack of cooperation impedes its functioning to the extent that measures such as staying proceedings or even withdrawing the indictment may become necessary.

Keywords: international criminal tribunal, Lebanon, cooperation obligations, terrorism, international law

8.1 Introduction

All international criminal tribunals are in need of cooperation. Since they do not have their own police force to enforce arrest warrants, subpoenas, or other orders, they rely on cooperation provided by states and, to a lesser extent, by international organizations, non-state entities, and even individuals. State cooperation can be essential to secure the presence of the suspect at his or her trial, the attendance of witnesses, and the collection of key evidence.

The experience of international criminal courts over the past two decades demonstrates that there have always been problems in receiving the necessary cooperation. In some instances, an arguably effective legal framework has been developed, containing strong obligations to assist international criminal tribunals in the fulfilment of their mandates. However, in practice this is no guarantee of success—in spite of legal obligations on paper, states have on some occasions simply not provided cooperation, making it impossible to arrest suspects or to collect relevant evidence.

The Special Tribunal for Lebanon ('STL' or 'the Tribunal') is confronted with these problems as well. In contrast to some other international criminal courts, the STL's legal framework is not worded very strongly: only one state—Lebanon—has an obligation to cooperate with the STL. Suspects have not been arrested, and it remains to be seen whether other cooperation obligations will be fulfilled when the first trial begins. Under these circumstances one may be tempted to criticize the cooperation law applicable to the STL and develop the argument that more comprehensive and generally stronger cooperation obligations should have been put in place. There is indeed much to say in favour of that view. However, this chapter will focus on the situation that arises within the existing legal framework.

First, within the significant limitations of the cooperation law directly applicable to the STL, the chapter explores whether there are solutions to remedy the **(p.135)** cooperation difficulties. It examines whether two alternative routes bypassing the defective STL cooperation regime could suffice to 'repair' cooperation problems, in particular whether other sources of international law, especially those related to combatting terrorism, could be used as additional sources of law, obliging states other than Lebanon to cooperate with the STL. Secondly, the particular circumstances under which the STL has to function may call for a significantly larger amount of 'self-help'; instead of having to rely on acts of cooperation by states, the chapter explores whether the STL could itself perform investigative acts in the territory of states. Finally, the chapter examines whether, at some point in the proceedings, the STL may be faced with a situation where a lack of cooperation impedes its functioning to such a degree that measures such as staying proceedings or even withdrawing the indictment may ultimately become necessary.

8.2 Scope and Content of the Law Governing Cooperation with the STL: Some Preliminary Observations

As with other international(ized) criminal tribunals, a distinction can be made in the framework of the STL between the different forms of cooperation that are needed for its effective functioning. The most important forms of cooperation are those related to the

arrest and transfer of indicted persons and the collection of evidence. For these forms of assistance, the STL will fully depend on one particular state or entity, namely the one which is in possession of relevant evidence or which is capable of arresting an indicted person. In comparison, assistance in the enforcement of sentences and in the relocation of witnesses can be done by any state and is therefore organized on a voluntary basis. This chapter's particular focus is on forms of assistance concerning the collection of evidence and arrest of persons.

When it comes to cooperation in criminal matters, one must distinguish between the 'demand' and the 'supply' sides. In international criminal justice, cooperation tends to be regarded as a 'one-way street', with the international criminal court requesting cooperation and states supplying the requested assistance.[1] Indeed, under the statutes governing some international courts (such as the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)) states have far-reaching obligations to provide legal assistance, with very limited recognized grounds for refusing cooperation.[2] If a dispute arises over the scope and content of cooperation obligations, the international criminal court that has requested the cooperation is also endowed with the power to settle such a dispute.[3] As a result of these features, the **(p.136)** cooperation law governing international criminal courts tends to be carefully distinguished from the traditional inter-state cooperation in criminal matters, which is governed by mutual legal assistance and extradition treaties. Whereas the latter is referred to as 'horizontal', with states on an equal footing, an overall vertical cooperation regime has been put in place in international criminal justice.[4]

This is certainly the case at international courts such as the ICTY, ICTR, and—to a slightly lesser degree—the International Criminal Court (ICC). The ICC's relationship with its state parties is slightly less vertical (or slightly more horizontal) as its cooperation law incorporates a number of grounds for refusing cooperation that are not available to states in the ICTY and ICTR context.[5] In addition, contrary to the law and practice of the ICTY, the law of the ICC does not provide for the power to subpoena witnesses and generally only uses the term 'request' for cooperation and not 'order'.[6]

When it comes to the family of *internationalized* courts, such as those that have been created in Sierra Leone, Cambodia, and East Timor, cooperation obligations are less robust. Internationalized courts are generally strongly embedded within—or closely related to—one state or justice system. It is that state—often also the seat of the court (whether in Sierra Leone, East Timor, or Cambodia)—which alone is subject to cooperation obligations. Other states may be encouraged to cooperate but have no duty to do so. This is a result of both the way these courts were established and the applicable source of law. When the court is created by a treaty between a single state and the UN (such as the courts for Sierra Leone and Cambodia) or where a court is part of a temporary UN administration (as in East Timor), this does not lend itself to the imposition of obligations on third states.

Despite this difference in cooperation regimes, it does not appear that the work of either the Extraordinary Chambers in the Courts of Cambodia (ECCC) or the Special Court for

Sierra Leone (SCSL) has been seriously hampered by the restriction of cooperation obligations to one state. The arrest of Charles Taylor by Nigeria, a state that did not have an obligation to cooperate with the SCSL, illustrates that important cooperation can be obtained in the absence of legal obligations.[7] The Special Panels for Serious Crimes in East Timor (SPSC) suffered more serious constraints. For the arrest of important suspects, such as former Indonesian Presidential candidate Wiranto, the SPSC was dependent on Indonesia.[8] **(p.137)** Although a basic legal framework was in place—a Memorandum of Understanding (MoU) between UN Transitional Administration in East Timor (UNTAET) and Indonesia[9]—to serve as the legal basis for such assistance, Indonesia simply refused to cooperate with the SPSC in a number of important areas.[10] The political climate was such that there was no significant pressure on Indonesia to be more cooperative and, as a result, Wiranto and others were never brought to justice. In addition, the applicable MoU did not impose strong obligations on the parties.[11] The refusal by Indonesia to cooperate thus seems be the combination of a weak applicable legal framework and the absence of any relevant political pressure.

The STL by and large follows the precedent set by other internationalized criminal justice models. Only one state—Lebanon—is obliged under international law to cooperate with the STL, as is provided for in Article 15 of the 'Agreement' between Lebanon and the UN that is annexed to Security Council resolution 1757.[12] It must be noted that this Agreement was in fact never ratified in Lebanon; instead, the terms of the Agreement were 'activated'—entered into force—when the Security Council adopted Resolution 1757 on 30 May 2007. This has generated the peculiar situation that formally the source of obligations to cooperate is the Security Council's resolution and all UN Members are required to carry out and accept this resolution pursuant to Article 25 of the UN Charter. In substance, however, the resolution—by only referring to the Annex and endowing the text of that Annex with legal effect—does in no way alter the content of the Annex, including the fact that according to its terms only Lebanon is obliged to cooperate with the STL.

The cooperation regime created by resolution 1757 was a step back from the regime that was in place during the investigation phase. Before the Security Council **(p.138)** created the STL to prosecute those who assassinated Hariri, it created—in Security Council Resolution 1595, adopted on 7 April 2005—the UN International Independent Investigation Commission ('UNIIIC' or 'the Commission') to investigate the attack. UNIIIC was given a fact-finding mandate 'to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices'.[13] In its resolution, the Security Council decided that UNIIIC shall enjoy the full cooperation of the Lebanese authorities and in that respect also obliged the said authorities to ensure freedom of movement for the UNIIIC in Lebanon and to provide the Commission with the required privileges and immunities to do its work.[14] When it came to third states, Resolution 1595 called upon them 'to cooperate fully with the Commission, and in particular to provide it with any relevant information they may possess pertaining to the above-mentioned terrorist act'.[15]

These cooperation obligations were accentuated by subsequent Security Council resolutions regarding the work of UNIIIC. In Resolution 1636, adopted on 31 October 2005, the Security Council obliged all states to cooperate with the UNIIIC by, among other things, not allowing entry to their territory to individuals identified by UNIIIC as suspects and by freezing the assets of these individuals.[16] Moreover, in this same resolution, the Security Council explicitly obliged Syria to arrest individuals identified as suspects by UNIIIC and to cooperate fully with UNIIIC.[17] Security Council Resolution 1644, adopted on 15 December 2005, underscored Syria's obligation and commitment to cooperate fully and unconditionally with the Commission.[18]

It can be concluded from the foregoing that the Security Council had imposed at the investigation stage the following obligations:

- Lebanon and Syria must fully and unconditionally cooperate with UNIIIC.
- Other states are called upon to cooperate with UNIIIC.
- Other states must fully cooperate in respect of certain specific areas, such as not allowing suspects to enter their territory and by freezing assets.

It is puzzling that this appeal made to all states to cooperate with the UNIIIC vanished when the STL was created by Resolution 1757. It is a step back, whereas in the light of the nature of the institution being created—a court rather than an investigation body—one would at the very least have expected repetition of this appeal to all states.

It is, however, not clear whether inclusion of similar obligations in Resolution 1757—ie full obligations incumbent on Lebanon and Syria and more limited obligations on all states—would have made much difference from a practical perspective to **(p.139)** the functioning of the STL. The UNIIIC, while benefiting from the fact that the Security Council had imposed firm obligations to cooperate with it has, in its eleven reports, alluded to the many cooperation problems it encountered.[19]

Conversely, it may be that, although the STL's cooperation regime imposes obligations on Lebanon alone, it will not face problems in practice. The STL's cooperation regime is by and large identical to those at the SCSL and ECCC, and this model appeared to work at those courts. However, it is doubtful whether this will actually be the case for the STL. There are a number of factors that make the cooperation situation of the STL significantly more complex. First of all, it is generally acknowledged that, in addition to Lebanon, the cooperation of other important states in the region, such as Syria, may be indispensable to the arrest of suspects and the collection of evidence.[20] Secondly, the suspects cannot be found or arrested, which has resulted in trials being conducted in their absence.[21] The reason for the failure to execute STL arrest warrants has to do with the fact that national law enforcement officials are not able to fully carry out their functions in all parts of Lebanon.

The cooperation problems the STL has encountered, principally the non-execution of arrest warrants, inevitably raise the question about the appropriate role of the Security Council. The Council has formally created the STL, acting under Chapter VII of the UN

Charter. As a result, the argument could be made that any threat to the effective functioning of the STL—whether they are problems in funding the court or problems in obtaining the required cooperation—also constitute a threat to international peace and security. In principle, this should make the Security Council spring into action, if necessary by adopting resolutions in which the cooperation obligations can be extended. Yet, the unfortunate reality is that this does not appear to be the position of the Security Council. Resolution 1757 was an unusual step, triggered by the problems in the Lebanese ratification process but, in the light of its wording and the overall approach in setting up the STL, it is unlikely that the Security Council will intervene again to fully support the STL in the future fulfilment of its mandate.

Bert Swart, a former judge at the STL, has suggested that one solution for filling the gap in cooperation obligations for third states is ad hoc agreements between the **(p.140)** STL and third states.[22] In 2009, the Prosecutor of the STL concluded an MoU with the Government of Lebanon, aimed at further regulating the modalities of cooperation.[23] Likewise, in 2010 the Defence Office of the STL concluded an MoU regulating the modalities of cooperation between Lebanon and defence teams.[24] These MoUs are aimed at streamlining the cooperation process but do not contain new substantive obligations. More importantly, these MoUs are restricted in scope to the one state, Lebanon, which already has a duty to cooperate. Apart from that, there is just a Cooperation Agreement with Interpol, which allows the STL to make use of the Interpol notice system and provides for the exchange of information.[25] No other cooperation agreements with third parties or states have been concluded.

The other alternative is to have the Security Council, acting under Chapter VII, oblige a third state to cooperate on an ad hoc basis. This was contemplated in the Secretary-General's report on the STL at the time of its establishment but such a resolution has so far never materialized and it is unlikely that this will ever happen.[26] In the light of the shortcomings in the legal framework governing cooperation with the STL, there is thus every reason to consider other alternatives and to discuss what should happen if, as a result of a lack of cooperation, arrests could not be effected and investigations could not be properly conducted.

8.3 Other Sources of Law Capable of Extending Cooperation Obligations Towards the STL

The fact that under the law of the STL only Lebanon is explicitly obliged to cooperate does not necessarily mean that other states would have no obligations to suppress or address crimes within the jurisdiction of the STL. A question arises as to whether, on the basis of other sources of law, states other than Lebanon may be obliged to cooperate with the STL as well.

Former STL Judge Swart has already drawn attention to the fact that the duty of states to cooperate in the investigation of terrorist crimes is determined by international treaties, in particular those relating to terrorism, as well as resolutions of the Security Council, including resolutions adopted under Chapter VII.[27] It has been established that the acts over which the STL has jurisdiction amount to terrorism, a crime under

international law. This has been confirmed by the Security **(p.141)** Council.[28] Moreover, the STL Appeals Chamber has ruled that the STL will apply the crime of terrorism in accordance with its definition under international law.[29] There are a number of multilateral conventions that aim to combat terrorism, such as the 1994 UN Convention on the Safety of United Nations and Associated Personnel,[30] the 1997 UN Convention for the Suppression of Terrorist Bombings,[31] and the 1999 International Convention for the Suppression of the Financing of Terrorism.[32] Lebanon is only a party to the first convention. The issue that arises is whether these conventions could be used as a legal basis to obtain cooperation from third states.

A preliminary question is whether the crimes being prosecuted by the STL would fall within the material scope of these conventions. The indictments currently in place accuse the suspects of either committing the terrorist attack that killed Rafiq Hariri and twenty-two others, or assisting with covering it up. As a result, the UN Financing of Terrorism Convention is not applicable. Nor is the UN Personnel Convention. But it can be argued that the crimes would fall within at least the material scope of the UN Terrorist Bombing Convention. This Convention contains several useful provisions obliging states to cooperate in the investigation and prosecution of terrorism.[33] These include provisions obliging states to arrest and extradite a suspect in case they do not themselves bring that suspect to justice (*aut dedere aut iudicare*),[34] provisions labelling terrorism as an extraditable offence and referring to the Convention as a possible treaty basis for extradition,[35] and provisions obliging states to cooperate in the collection of evidence.[36] However, no provision can be found empowering law enforcement officials to conduct investigations directly on a state party's territory.[37] Moreover, it must be acknowledged that these treaty provisions dealing with cooperation do not contain unconditional obligations. The purpose of the cooperation provisions in the UN Terrorist Bombing Convention appears to be to oblige states to make use in the first place of existing extradition treaties and mutual legal assistance treaties to cooperate with one another in the suppression of terrorism; in case such treaties are not available, states parties are encouraged or obliged to cooperate on the basis of **(p.142)** the UN Terrorist Bombing Convention and/or domestic law instead.[38] The obligations are not particularly strongly worded but could nevertheless be used by a state as a legal basis for soliciting various forms of cooperation from another state party.

The central question is how, from a legal point of view, the STL could benefit in terms of cooperation from the UN Terrorist Bombing Convention. The Convention is designed to create rights and obligations *inter partes*. The STL cannot be a party to this and other terrorism conventions as they are only open to ratification by states. Unlike article VI of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[39] none of the terrorism conventions makes reference to an international criminal tribunal that should benefit from legal assistance provided by the states parties.[40] In the light of this omission, it is difficult to argue that the STL can benefit from the cooperation obligations in the UN Terrorist Bombing Convention or similar treaties. Articles 34 and 36 of the 1969 Vienna Convention on the Law of Treaties[41] contain the vital rules of treaty law that a treaty cannot, in principle, affect a non-state party (either in a positive or

negative sense). Applying these provisions to a third party that is an 'organization', such as the STL, is even more of a stretch.[42]

But this is not the end of the analysis. A question arises as to whether the STL could request the cooperation of third states via Lebanon. The idea would be that the STL requests Lebanon to make use of its network of cooperation relationships with other states—regulated in multilateral or bilateral treaties—with a view to 'forwarding' the assistance received from third states to the STL. This idea appears reasonable. It would assist to a certain degree in resolving the paradox that, in the absence of such obligations being applicable, an internationalized tribunal established by the Security Council would have fewer means of obtaining the assistance of UN Members than the State of Lebanon would ordinarily have pursuant to cooperation treaties.[43] This argument, however, is not straightforward.

First, it is not clear how strong the 'cooperation network' of Lebanon is, both in quantity (number of states) and quality (strength of the obligations). Lebanon is not a party to the multilateral convention that is most clearly applicable to the mandate of **(p.143)** the STL: the UN Terrorist Bombing Convention. Another potentially useful convention, however, is the Riyadh Arab Agreement for Judicial Cooperation, which was endorsed by the Council of Arab Ministers of Justice on 6 April 1983.[44] The Agreement contains several potentially useful provisions on legal assistance in criminal matters, which could serve as the basis for legal assistance between all Arab States. But even under this treaty, the wording of the relevant obligations leaves significant room for states to refuse to comply with a request for legal assistance.

Second, and more importantly, it is not evident that the STL can request Lebanon to use its cooperation network with third states to the benefit of the STL or whether Lebanon would be obliged to provide that particular type of assistance. Here a distinction has to be made between the STL, on the one hand, and internationalized courts which are part of the domestic court structure (such as the ECCC) on the other. The latter may be better placed to make use of the capacity of the state to obtain cooperation from third states.[45] The STL is regarded as a court outside the Lebanese court structure, a separate organization. Arguably, therefore, it cannot make direct use of channels of legal assistance available to the Lebanese government. Moreover, it follows from the cooperation obligations set out in the Annex to Resolution 1757 that Lebanon is only under an obligation to provide direct forms of cooperation when it is requested to perform investigative acts or other acts that directly benefit the STL.[46] There is nothing to suggest that it can be obliged to assist the STL in obtaining cooperation from third states.

Third, and finally, even if Lebanon were willing to seek cooperation from other states on the STL's behalf, it is not clear that it would be effective in doing so. Typically, legal assistance treaties impose obligations that are confined to (on-going) criminal proceedings in the requesting state. There is no duty to cooperate in respect of criminal proceedings elsewhere. Indeed, in the extradition context, the rule of specialty can be an explicit bar to requesting a state's cooperation to advance criminal proceedings elsewhere.[47] To put

it simply, even if Lebanon were prepared to make use of its cooperation network with third states to the benefit of STL proceedings, there will be in all likelihood no obligation for the third state to provide such cooperation. Rather, if it comes down to voluntary assistance, it is probably more efficient for the STL itself to approach such third states directly to seek their cooperation.

It follows that there are no obvious creative legal solutions that would bring third states within the 'cooperation reach' of the STL. This means that, compared to Lebanese courts, the opportunities for international cooperation have been reduced **(p.144)** rather than enlarged by the creation of the STL.[48] On the other hand, Lebanese authorities can be expected to feel a stronger obligation to cooperate with the STL than if the proceedings had been conducted before a national court. Moreover, it is uncertain how strong Lebanon's cooperation network with third states is. Outside the Arab region, Lebanon does not appear to have extensive cooperation networks with strong mutual obligations.[49] This could mean that a strong appeal by the STL to a third state to cooperate voluntarily with the STL is likely to be more successful than having to rely on Lebanon's cooperation network, especially if a state's non-cooperation is publicized. This has not happened to date, despite speculation that the accused who have 'disappeared' are in fact being sheltered by foreign authorities.[50]

That being said, there were several ways in which the Security Council could have—and probably should have—involved third states in the functioning of the STL. This does not necessarily have to come down to imposing the same obligations on third states as those applicable to Lebanon. A separate regime could apply. One solution could have been for the Security Council to have declared cooperation obligations in terrorism conventions applicable *mutatis mutandis* to the STL. Taking as an example the content of article 10(2) of the UN Terrorist Bombing Convention, this would have meant that states parties would be required to afford the STL assistance in accordance with their domestic law. In the light of the establishment of the STL in the interests of international peace and security and the fact that for over three years, while the UNIIIC was in operation, *all states* were called upon to cooperate with the *same investigation* that the STL then continued, such an imposition of relatively modest cooperation obligations on third states does not appear unreasonable. Although one cannot expect miracles from such modest obligations on paper, at the very minimum it would have put the STL in a formal relationship of legal assistance with a considerable number of states and would have facilitated access to evidence or suspects that might be located on their territory.

8.4 Autonomous Investigations

Autonomous investigations, or on-site investigations, can remedy to a certain degree a defective cooperation regime, at least in practice. Conducting on-site **(p.145)** investigations offers a number of advantages for the trial forum compared to requesting a state's legal assistance. International investigators collecting evidence themselves can ensure that evidence is collected according to international standards and in line with their court's procedures, helping to avoid arguments about admissibility of evidence when it comes to trial. From the perspective of the requested states, on-site

investigations on their territory also save resources because the state need not execute requests for assistance but can instead simply allow international investigators onto its territory to do it themselves.

However, there are also serious limitations to autonomous investigations. First, these forms of self-help, executed by the STL Prosecutor or defence teams, cannot be a substitute for acts of procedure which require coercive measures, such as the arrest of indicted persons or a search and seizure operation in someone's home. In these situations, it will have to be a state—or an international organization with enforcement powers—that executes coercive measures. Secondly, it would be wrong to assume that autonomous investigations would not require assistance from states, and could be regarded as a complete solution in the context of an uncooperative state. Cooperation is still required, but is of a passive nature. The state is essentially asked to allow investigators to enter the country and be permitted to do their work without interference. Thirdly, the security situation may be too volatile in a certain state to allow for the conduct of autonomous investigations, irrespective of the applicable legal framework.

The law of the STL has recognized the need for, and the importance of, on-site investigations but—again—only for Lebanon. Pursuant to article 15(1) of the Agreement between Lebanon and the UN, Lebanon is obliged to facilitate access by prosecutors and defence counsel to sites, persons, and relevant documents required for the investigation. This obligation is further defined in the STL's Rules, especially rule 61(i). The obligation to allow on-site investigations has also been elaborated in the MoUs concluded between Lebanon and the Prosecutor and between Lebanon and the Defence Office.[51] It is safe to say that on the basis of this body of law—the Resolution, the Rules, and the MoUs—parties to STL proceedings have the most solid legal basis to conduct on-site investigations. This is even an improvement on the law of the ICTY, ICTR, and ICC because the obligations relating to on-site investigations extend to defence counsel.[52]

But this is not to say that all functions well in practice. There have been filings at the STL in which the Defence has complained about a lack of cooperation on the part of Lebanon, as discussed further later. In addition, what matters for the effective functioning of the STL is not only the situation in Lebanon but also whether it is possible to conduct autonomous investigations in third states. Neither of the parties is explicitly empowered under the law of the STL to conduct on-site investigations in third states, but one may wonder whether investigators for the prosecution or the defence could not simply travel to certain states, if they feel this **(p.146)** is needed, for example, to locate and talk to a potential witness. Would any rule of law be violated by doing that and if so, would it have consequences for the trial?

In an inter-state legal assistance relationship, the general rule in international law is that a state cannot take measures on the territory of another state by way of enforcement of its own national laws without the consent of the territorial state.[53] The violation of sovereignty would therefore also arise when an international organization attempted to do the same. Action by the Prosecutor's office to further investigations would amount to

public action attributable to the STL, which cannot therefore lawfully take place on a state's territory without its consent. But where defence counsel is concerned, investigative actions may not have the same status. It is true that the defence has been upgraded in the context of the STL—it is now an organ of the STL, in the form of a Defence Office.[54] But investigative activities by *individual* defence counsel are not attributable as such to the Defence Office or by extension to the STL, and therefore are not an exercise of public authority. As a result, in respect of the defence, it does not appear that unauthorized investigations in a third state would violate national sovereignty or any other rule of international law.[55] This asymmetry is one of the advantages that the defence has, from a legal perspective, over the Prosecutor.

At the same time, it is not the case that on-site investigations by the defence would always be lawful. The law of the relevant state applies fully and may prohibit any investigative activity related to a non-national criminal case; this may well be the position in criminal justice systems in the civil law legal family.[56] Furthermore, when defence counsel—or his or her investigators—travel on a tourist visa to a third state, they do not benefit from privileges and immunities in that country. This means that although there are a priori no legal obstacles for STL defence teams to conduct investigations (not requiring coercive measures) in any third state, there may be risks involved in doing so. Moreover, in practice the STL Prosecutor may well be a more powerful player than individual defence teams and therefore able to attract more voluntary support from states that support their mandate more readily than that of defence counsel.

Another question that must be addressed in the context of on-site investigations is what consequences any unlawful investigation should have for the purpose of the trial. If the legality of autonomous investigations conducted in third states is questioned at trial, would that mean that any evidence gathered as a result of such investigation would not be admissible? The matter of remedies in international criminal justice for unlawful conduct is highly complex; it has been addressed in respect of both the collection of evidence and other acts of criminal procedure in a recent study on principles and rules of international criminal procedure.[57] One conclusion of this study is that in international criminal justice **(p.147)** (more so than is often the case at the national level) evidence is relatively easily admitted.[58] A violation of state sovereignty—or of a rule of domestic law—is not automatically an obstacle to admissibility. Even human rights violations committed in the course of gathering evidence do not always result in exclusion of the evidence, according to ICTY and ICC case law.[59] A threshold for the seriousness of a human rights violation applies, meaning that the exclusion of evidence is only warranted when the violation 'casts substantial doubt' on its reliability or when its admission 'is antithetical to, and would seriously damage, the integrity of the proceedings'.[60] In cases involving violations below this threshold, there seems to be no risk of running into any adverse consequences triggered by unauthorized on-site investigations, at least when it comes to the admissibility of any evidence that is gathered. Knowingly violating rules of international law by defence or prosecution staff conducting unauthorized on-site investigations may, however, be in violation of ethical and professional obligations that can result in sanctions for the individuals involved.[61]

It follows from this that only defence counsel can conduct investigations in third states without prior consent, as long as he or she is not explicitly prohibited in law or in fact from doing so. Yet, one can imagine that the situation on the ground calls for caution and that defence investigators might well be reluctant to run significant risks in these unregulated situations. It is therefore necessary to examine the scenario in which it is deemed legally and/or factually impossible to conduct investigations.

8.5 Remedies in Cases of Inability to Conduct Investigations

The matter of remedies in response to an inability to conduct investigations has been raised in criminal proceedings at both the ad hoc tribunals and the ICC. It may not come as a surprise that it has principally been the defence that has complained in the course of criminal proceedings about the impossibility of—or serious problems in—conducting investigations. Of course, the Prosecutor also has difficulties in obtaining cooperation but always has a remedy available: where there is no prospect of sufficient evidence being presented at trial, the Prosecutor can simply withdraw certain charges or decline to file charges at all.

(p.148) The *Tadic* case, the first case at the ICTY, represents the first time a defendant complained to an international criminal court about an inability to conduct investigations.[62] Defence counsel argued on appeal that Tadic's right to a fair trial and the principle of 'equality of arms' had been violated. Specifically, the defence alleged that due to obstruction and lack of cooperation by the Government of the *Republika Srpska* and the civic authorities in Prijedor, the defence was prevented from accessing witnesses, the majority of whom were Serbs residing in *Republika Srpska*.[63] The Appeals Chamber dismissed the defence argument, highlighting successive efforts by the ICTY judges to assist the defence in the collection of evidence.[64] However, the Appeals Chamber ruled that it could conceive of a situation where a fair trial would not be possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a state.[65] Although this statement has not been further elaborated, this obiter dictum also seems applicable to the impossibility of conducting investigations.

The appropriate remedy in a case where a fair trial is not possible is a permanent stay of proceedings. This has been confirmed in the proceedings at the ICC in the *Lubanga* case. In that case, it was decided that the Prosecutor had violated his obligation to disclose evidence to the defence to such a degree that the accused could no longer be guaranteed a fair trial and, as a consequence, the Chamber ordered a stay of proceedings.[66] This reinforced the conclusion reached by the Appeals Chamber in an earlier decision in the *Lubanga* case that 'if no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped'.[67]

Drawing on this case law, the defence in one of the 'Darfur' cases at the ICC argued that the judges should order a stay of proceedings. It is common knowledge that investigations in Sudan, especially the Darfur region, are practically impossible because of the lack of cooperation on the part of the Government of Sudan. The defence in the *Banda and Jerbo* cases contended that, as a result, severe restrictions **(p.149)** have made an effective defence impossible.[68] The defence argued that the Government of Sudan had

denied access to its territory and had even criminalized cooperation with the court by any state authority.[69] The defence reached the conclusion that the proceedings against their clients should be stayed because the accused persons' rights had been violated to such an extent that a fair trial would be rendered impossible.[70]

In its analysis of the matter, the Trial Chamber set out the required standard of proof for a stay of proceedings as a result of the unavailability of evidence:

> [T]he Defence will not have 'properly substantiated' its Request if the unavailable evidence is not identified with sufficient specificity by the defence in light of the information available to it at this stage'[71] …The evidence must both possess an apparent exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means. Mere speculation for which there is no evidential support falls short of that mark.[72]

The cautious approach by the Chamber then becomes apparent:

> [T]he Chamber should not automatically conclude that a trial is unfair, and stay proceedings as a matter of law, in circumstances where States would not allow defence (or prosecution) investigations in the field even if, as a result, *some potentially relevant evidence* were to become unavailable.[73]

However the judges went on to explain that 'the Chamber needs to be satisfied that the accused persons have been provided with adequate facilities for the preparation of their defence and the opportunity to obtain the attendance of witnesses on their behalf by means other than on-site investigations'.[74]

The Chamber ultimately concluded that the best approach is for the case to go to trial and that at that stage a determination can be made about possible fair-trial violations.[75] This means that, at the ICC at least, the jurisprudence to date suggests that there are only limited remedies available to a party that is unable to conduct full investigations prior to trial. On the one hand, this is an understandable approach because a practice of staying the proceedings prior to trial may too easily trigger defence motions to that end, at a time when it is difficult for the court to **(p.150)** judge the impact of potential missing evidence to the trial. On the other hand, the defence is left without any mechanism to seek redress and is also in the difficult position of deciding whether or not it should develop initiatives that are not envisaged in the legal framework of the ICC. To give an example, in the *Banda and Jerbo* cases, the defence may feel compelled to take risks in nevertheless securing access to witnesses in Darfur. In case they fail to do so, they may be reproached for not having used sufficient initiative to obtain evidence for their client, even though it is not clear whether this would come within the legal framework regulating on-site investigations. It is legitimate to argue that the Chamber should not have provided more clarity on this matter. Moreover, even if it would be premature to stay the proceedings at the pre-trial stage, it would be consistent with the rights of the accused and in the interests of justice for the Chamber to have provided some reassurance that there can be no conviction in a case where the defendant has been precluded from properly

investigating and presenting exculpatory evidence at his trial.

The absence of procedural remedies due to a lack of state cooperation in investigations is also a matter that may trouble the functioning of the STL. The defence for Sabra has filed four motions seeking the cooperation of Lebanon with the pre-trial judge.[76] These motions request certain information and documents from Lebanon. The pre-trial judge has—for now—only ruled on the first motion, in which he tried to solve the issue by giving the Lebanese authorities longer deadlines.[77] Outstanding requests for cooperation to the Lebanese authorities have also repeatedly delayed the commencement of trial proceedings.[78] But the situation at the STL should be distinguished from the *Banda and Jerbo* cases—an impossibility to collect evidence does not arise, at least not yet.

At present, the position of the court is that Lebanon is cooperative, though it may need more time to organize and provide its cooperation. As the STL is fully dependent upon the cooperation of one key state, Lebanon, this more amicable approach may appear understandable. But if matters deteriorate, a more confrontational approach towards Lebanon and/or procedural remedies, such as a stay of proceedings, may need to be seriously discussed. When doing so, the STL may be tempted—as the ICC Trial Chamber was in the *Banda and Jerbo* cases—to postpone such serious discussion to the trial stage, with a view to avoiding any **(p.151)** stay of proceedings prior to trial. Yet, one should remember that, at the STL, the perception of a fair trial being conducted—and as a result the legitimacy of the entire STL proceedings—will be seriously damaged if not only the defendants are unavailable (proceedings *in absentia*), but in addition important (potentially) exonerating evidence is equally unavailable. If that scenario does indeed arise, it may be wiser to stay the proceedings rather than conduct a trial on shaky foundations.

8.6 Conclusion

The STL is not to be envied when it comes to the legal framework on paper, which governs cooperation. Like other internationalized criminal tribunals, the STL suffers from the shortcoming that only the state directly concerned, Lebanon, is obliged to cooperate with it. It is true that UNIIIC (which benefited from more robust cooperation arrangements) had already collected a significant amount of evidence, which is available for use at the STL. But a criminal court should always have sufficient powers and means to gather evidence and conduct trial proceedings.

The question whether or not this legal framework will impede the STL in its functioning *in practice*—and if so to what degree—remains to be seen as the first trial proceeds. At the ECCC, a similar structure did not unduly hamper the court's work. Yet, as far as the STL is concerned, the expansion of cooperation obligations beyond Lebanon would have seemed necessary and reasonable, among other things because the establishment was triggered by a Security Council resolution adopted pursuant to Chapter VII and since previous resolutions called for the cooperation of all states, and Syria in particular, in the investigation process.

In this chapter, alternatives to a defective cooperation law have been explored, for

instance, making use of alternative legal bases underlying the duty to cooperate in terrorism cases and through the conduct of autonomous investigations by the parties. However, none of these alternatives can fully remedy a defective cooperation regime.

This leaves us with the paradoxical situation that a tribunal set up under the auspices of the UN Security Council, acting under Chapter VII, may be on a more shaky legal foundation when seeking to obtain cooperation than a national Lebanese court or any other national court trying terrorist offences. One of the important lessons of the STL—and other internationalized criminal tribunals—should therefore be that in the future they should at least be endowed with the benefit of the legal assistance network available to the immediately concerned state, and they should at least also benefit, as much as possible, from relevant treaty provisions obliging states to cooperate with each other in the suppression of international crimes.

Given the shortcomings in the cooperation law of the STL, it is also imperative to consider the question of remedies in case of failure to cooperate. As a matter of fairness, this especially concerns the accused, who may be faced with the situation in which relevant evidence may be unavailable to him. These remedies may be especially important if the inability to collect evidence jeopardizes the right of the **(p.152)** accused to a fair trial. Recent case law from the ICC reveals that chambers are generally reluctant to respond with firm remedies, such as ordering a stay of proceedings, before the impact of the missing evidence becomes clear at the trial stage. This may also in due course become the practice at the STL, if it is confronted with a situation in which no (exculpatory) evidence can be presented by the defence. The STL has not yet reached the stage in which insurmountable cooperation problems prejudice the defence. (If anything, they have so far prejudiced the prosecution, which has not been able to secure arrests of the four accused.)

We are thus still very far from any situation in which STL judges have to consider the appropriate remedy if this problem were to occur. But if the defence teams, in presenting a defence case for their clients *in absentia*, raise a credible argument at trial that they were not able to prepare a proper case, the STL judges—when formulating a response—should take into account that its proceedings already lack a good deal of credibility as a result of being conducted in the absence of the accused. If, in addition to the unavailability of the defendants at trial, their counsel cannot gather critical evidence, one may question whether a trial should be held—or be allowed to proceed.

Notes:

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([1]) Both the law (eg art 93(10) Rome Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90)) and the practice (eg referral of cases at the ICTY and ICTR pursuant to r 11bis ICTY RPE and ICTR RPE) allow for the inverse, ie provision of legal assistance from international criminal tribunals to states, but such assistance is provided only on a voluntary basis.

([2]) For more detail, see Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Antwerp, Oxford and New York: Intersentia 2002) 83–4.

([3]) Sluiter, *International Criminal Adjudication* (n2) 86–7.

([4]) Sluiter, *International Criminal Adjudication* (n2) 82–9.

([5]) In this regard, see ICC Statute (n1) arts 90, 93(3) and 93(4) as direct grounds justifying non-cooperation. In addition, Part 9 of the ICC Statute contains grounds justifying postponing cooperation (arts 94–95). Finally, it must be mentioned that there are elements in Part 9 containing obligations for the ICC in the issuance of cooperation requests, which may—in case of non-compliance—be used in practice as grounds justifying non-cooperation (see arts 98, 99(4), and 91(2)(c)).

([6]) cf ICC Statute (n1) arts 54(3)(b) and (f), 57(3)(d), 59(1), 70(4)(b), 73, 87, 89–99; Statute of the ICTY (25 May 1993, 32 ILM 1159 (1993)) arts 18(2), 29.

([7]) Taylor was arrested and transferred by Nigeria to Liberia, which then transferred him to Freetown to stand trial at the SCSL.

([8]) The arrest warrant related to Wiranto was issued on 10 May 2004 and has never been executed. See SPSC, Warrant of Arrest for Wiranto, *Deputy General Prosecutor v Wiranto and Others*, Criminal Case No 5/2003, Judge Rapoza, 10 May 2004.

([9]) Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters (Jakarta, 5 April 2000).

([10]) See Göran Sluiter, 'Legal Assistance to Internationalized Criminal Courts and Tribunals' in Cesare PR Romano, André Nollkaemper, and Jann K Kleffner (eds), *Internationalized Criminal Courts—Sierra Leone, East Timor, Kosovo, and Cambodia* (New York: Oxford University Press 2004) 391–3.

([11]) The MoU between Indonesia and the UN Transitional Administration in East Timor (n9) s 9.3 contains the following ground for refusal related to the transfer of suspects, which can easily be abused: 'Each Party shall have the right to refuse a request for such transfer if the carrying out of legal proceedings of the requesting Party would not be in the interests of justice.'

([12]) Annex to SC Res. 1757, UN Doc S/RES/1757 (2007) [Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon], art 15:

> ((1)) The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall facilitate access of the Prosecutor and defence counsel to

sites, persons and relevant documents required for the investigation.
((2)) The Government shall comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to:
((a)) Identification and location of persons;
((b)) Service of documents;
((c)) Arrest or detention of persons;
((d)) Transfer of an indictee to the Tribunal.

([13]) SC Res 1595, UN Doc S/RES/1595 (2005), operative para 1.

([14]) SC Res 1595 (n13) operative para 3.

([15]) SC Res 1595 (n13) operative para 7.

([16]) SC Res 1636, UN Doc. S/RES/1636 (2005) operative para 3.

([17]) SC Res 1636 (n16) operative para 11.

([18]) SC Res 1644, UN Doc S/RES/1644 (2005) operative para 4.

([19]) The eleven reports can be found at <www.stl-tsl.org/en/documents/un-documents/reports-of-the-uniiic> accessed 1 October 2013.

([20]) The position of Syria, including the importance of it cooperating with the fact-finding process, has been repeatedly emphasized in UNIIIC Reports. It is also because of the non-cooperative position of Syria during the fact-finding process leading to the establishment of the STL that the UN Secretary-General has indicated in his Report on the establishment of the STL that the success of the STL may rely considerably on the cooperation of third States; moreover, the Secretary-General suggested that the obligation incumbent upon UN Members to cooperate with the UNIIIC in the investigations into the Hariri assassination (SC Res 1595 (n13); SC Res 1636 (n16); SC Res 1644 (n18)) should be extended by analogy to the STL (Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, UN Doc S/2006/893 (2006), paras 7 and 53). However, the Security Council did not follow that suggestion.

([21]) On the issue of trials *in absentia*, see, eg Paolo Gaeta, 'To Be (Present) or Not To Be (Present): Trials in Absentia before the Special Tribunal for Lebanon', (2007) 5 JICJ 1165.

([22]) Bert Swart, 'Cooperation Challenges for the Special Tribunal for Lebanon', (2007) 5 JICJ 1153.

([23]) Memorandum of Understanding between the Government of the Republic of Lebanon and the Office of the Prosecutor of the Special Tribunal for Lebanon Regarding the Modalities of Cooperation Between Them (Beirut, 5 June 2009).

([24]) Memorandum of Understanding between the Government of the Lebanese Republic

and the Defence Office on the Modalities of their Cooperation (28 July 2010).

([25]) Cooperation Agreement between the Special Tribunal for Lebanon and the International Criminal Police Organization-Interpol (Singapore, 11 October 2009).

([26]) Swart, 'Cooperation Challenges for the STL' (n22) 1159–60.

([27]) Swart, 'Cooperation Challenges for the STL' (n22) 1157.

([28]) SC Res 1595 (n13); SC Res 1636 (n16); SC Res 1644 (n18); SC Res 1664, UN Doc S/RES/1664 (2006); SC Res 1686, UN Doc S/RES/1686 (2006); SC Res 1748, UN Doc S/RES/1748 (2007); SC Res 1757, UN Doc S/RES/1757 (2007).

([29]) STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No STL-11-01/I/AC/R176bis, Appeals Chamber, 16 February 2011.

([30]) (UN Personnel Convention) (New York, 9 December 1994, 2051 UNTS 363).

([31]) (UN Terrorist Bombing Convention) (New York, 15 December 1997, 2149 UNTS 256).

([32]) (UN Financing of Terrorism Convention) (New York, 9 December 1999, 2178 UNTS 197).

([33]) UN Terrorist Bombing Convention (n31) arts 8–18.

([34]) UN Terrorist Bombing Convention (n31) art 8.

([35]) UN Terrorist Bombing Convention (n31) art 9.

([36]) UN Terrorist Bombing Convention (n31) art 10.

([37]) This is even explicitly prohibited. See UN Terrorist Bombing Convention (n31) art 18: 'Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.'

([38]) UN Terrorist Bombing Convention (n31) arts 9(2) and 10(2).

([39]) (Genocide Convention) (Paris, 9 December 1948, 78 UNTS 277).

([40]) Genocide Convention (n39) art VI: 'Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'

([41]) (VCLT) (Vienna, 23 May 1969, 1155 UNTS 331).

([42]) (VCLT) (n41) art 34: 'A treaty does not create either obligations or rights for a third State without its consent.' See also (VCLT) (n41) art 36:

> ((1)) A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
> ((2)) A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

([43]) Swart, 'Cooperation Challenges for the STL' (n22) 1159.

([44]) (Riyadh Agreement) (Riyadh, 6 April 1983).

([45]) Sluiter, 'Legal Assistance to Internationalized Criminal Courts and Tribunals' (n10) 404.

([46]) Agreement between Lebanon and the UN (n12) art 15.

([47]) cf Riyadh Agreement (n44) art 53: 'No contracting party may extradite a person to a third state following the extradition of such person to the said contracting party—except in the case prescribed in paragraph (a) of Article 52 of this Agreement—unless it obtains the consent of the extraditing party, and even then, the contracting party requested to extradite shall submit an application to the contracting party from which it had received such person to that effect, accompanied by the documents presented by the said third state.'

([48]) Swart, 'Cooperation Challenges for the STL' (n22) 1159.

([49]) In addition to the Riyadh Agreement, Lebanon is a signatory to, but has not ratified, the Arab League Extradition Agreement. Mutual legal assistance for Lebanon more commonly takes the form of bilateral agreements concluded with several Arab and European states, including Syria, Jordan, Tunisia, Egypt, United Kingdom, Belgium, and Italy. For a more comprehensive overview of the mutual legal assistance regime of Lebanon, see Middle East and North Africa Financial Action Task Force, 'Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism' (10 November 2009), paras 657–684 <http://www.menafatf.org/MER/MutualEvaluationReportoftheLebaneseRepublic-English.pdf> accessed 1 October 2013.

([50]) See eg Dexter Filkins, 'The Shadow Commander' (*The New Yorker*, 30 September 2013) <http://www.newyorker.com/reporting/2013/09/30/130930fa_fact_filkins> accessed 2 October 2013 (suggesting that one of the accused is in Syria fighting for President

Assad).

([51]) Prosecution MoU (n23); Defence MoU (n24).

([52]) cf Defence MoU (n24) art 3.

([53]) Sluiter, *International Criminal Adjudication* (n2) 295.

([54]) Agreement between Lebanon and the UN (n12) art 7(d).

([55]) cf Sluiter, *International Criminal Adjudication* (n2) 295–7.

([56]) Sluiter, *International Criminal Adjudication* (n2) 297.

([57]) Karel de Meester and others, 'Investigation, Coercive Measures, Arrest, and Surrender' in Göran Sluiter and others (eds), *International Criminal Procedure—Principles and Rules* (Oxford: Oxford University Press 2013) 351–80; Fergal Gaynor and others, 'Law of Evidence', also in Sluiter, *International Criminal Procedure* 1032–43.

([58]) Gaynor, 'Law of Evidence' (n57) 1016–43.

([59]) Gaynor, 'Law of Evidence' (n57) 1032–4. See also, ICC, Decision on the Confirmation of Charges, *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Pre-Trial Chamber I, 29 January 2007, para 84; ICTY, Decision on the Defence Objection to Intercept Evidence, *Prosecutor v Brdjanin and Talić*, Case No, IT-99-36-T, Trial Chamber, 3 October 2003, para 54.

([60]) ICTY, Judgment, *Prosecutor v Naletilic and Martinovic*, Case No IT-98-34-A, Appeals Chamber, 3 May 2006, para 238. Cf ICC Statute (n1) art 69(7)(b).

([61]) See Pascal Chenivesse and Daryl Mundis, 'Ethics Before the Special Tribunal for Lebanon', Chapter 13.

([62]) ICTY, Judgment, *Prosecutor v Tadić*, Case No IT-94-1-A, Appeals Chamber, 15 July 1999.

([63]) ICTY, Judgment, *Prosecutor v Tadić* (n62) para 29.

([64]) ICTY, Judgment, *Prosecutor v Tadić* (n62) paras 53–54.

([65]) ICTY, Judgment, *Prosecutor v Tadić* (n62) para 55.

([66]) ICC, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Trial Chamber, 13 June 2008, para 91: 'If, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial

process, it is necessary—indeed, inevitable—that the proceedings should be stayed. It would be wholly wrong for a criminal court to begin, or to continue, a trial once it has become clear that the inevitable conclusion in the final judgment will be that the proceedings are vitiated because of unfairness which will not be rectified.'

([67]) ICC, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, *Prosecutor v Lubanga,* Case No ICC-01/04-01/06, Appeals Chamber, 14 December 2006, para 37. See in detail on stay of proceedings, de Meester, 'Investigation, Coercive Measures, Arrest, and Surrender' (n57) 362–6.

([68]) ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v Banda and Saleh Jerbo*, Case No ICC-02/05-03/09, Trial Chamber, 26 October 2012, para 3.

([69]) ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v Banda et al* (n68) para 3.

([70]) ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v Banda et al* (n68) para 12.

([71]) ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v Banda et al* (n68) para 93.

([72]) ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v Banda et al* (n68) para 95.

([73]) ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v Banda et al* (n68) para 100 (emphasis added).

([74]) ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v Banda et al* (n68) para 100.

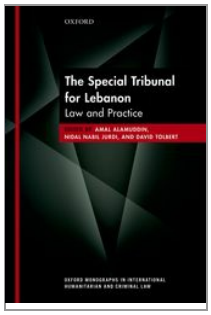
([75]) ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, *Prosecutor v Banda et al* (n68) para 159.

([76]) STL, Motion Seeking the Cooperation of Lebanon, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Sabra Defence, 27 September 2012; STL, Second Motion Seeking the Cooperation of Lebanon—Telecommunications Information, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Sabra Defence, 4 February 2013; STL, Third Motion Seeking the Cooperation of Lebanon—Terrorist Groups, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Sabra Defence, 4 April 2013; STL, Fourth Motion Seeking the Cooperation of Lebanon—Information on Mr Sabra, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Sabra Defence, 4 April 2013.

([77]) STL, Decision on the Defence Request Seeking to Obtain Cooperation of Lebanon, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 11 February

2013, para 21.

([78]) STL, Decision relating to the Defence Motion to Vacate the Date for the Start of Trial, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 21 February 2013; STL, Order Setting a New Tentative Date for the Start of Trial Proceedings, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Pre-Trial Judge, 2 August 2013, para 48.



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Victim Participation at the Special Tribunal for Lebanon

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[–] Abstract and Keywords

This chapter first examines the rationale for victim participation. The goals of victim participation include the reparative effect on victims, the contribution to 'truth', and balancing the fair trial rights of the accused. The chapter then outlines the key features of the Special Tribunal for Lebanon's (STL) victim regime; evaluates the STL regime against the goals of victim participation; and considers options for addressing the continuing tension between victim participation in theory and in practice.

Keywords: international criminal tribunal, victim participation regime, STL regime

9.1 Introduction

Following in the footsteps of the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon ('STL' or 'the Tribunal') has established a regime of victim participation. Where their personal interests are affected, victims of crimes falling within the jurisdiction of the court may be allowed to present their views and concerns at any appropriate stage of the proceedings.[1]

A decade ago, victim participation was heralded as a revolutionary change to international criminal practice, one that would make the adjudication of the most heinous violations of universal values more 'meaningful and fair' for those who have suffered the most.[2] By 2013, the initiative that had been the 'overriding interest' for the drafters of the ICC Statute[3] was rejected outright by the group of high-profile lawyers who drafted a 'blueprint statute' for a future Syrian tribunal, on the basis that victim participation reflects 'a myriad of logistical and legal challenges'.[4] **(p.154)** Victim participation is subject to increasing criticism from a variety of fronts, and appears to have lost its initial momentum. But what has caused this precipitate fall from grace? Can it be redressed, or will victim participation in international courts prove to be misconceived, a proverbial flash

in the pan? Drawing on the case study of the STL, this chapter argues that, as the courts have increasingly sought to take account of the guarantee of a fair trial for the accused, a gap has emerged between the aspirations of victim participation and its potentialities in practice. This must be resolved if victim participation is to retain any credibility.

In the first part of this chapter, the rationale for victim participation is explored. Advocates for participation focus on two primary goals: a reparative effect on victims and a contribution to 'truth'. Alongside these goals is a secondary goal: balancing the fair trial rights of the accused—an essential element of the trial process. The chapter then outlines the key features of the STL victim regime. The *Ayyash et al* case is still in its pre-trial phase,[5] and the system is thus untested. However, drawing on the experience of the ICC and the ECCC, the broad contours of the determination of victim status and the modalities of participation and compensation are discernible. In the third part of the chapter, the STL regime is critically evaluated against the goals of victim participation. The STL is moving further away from attaining the primary goals of victim participation, whilst simultaneously moving towards a regime more compatible with fair trial rights. The chapter concludes by considering options for addressing the continuing tension between victim participation in theory and in practice.

9.2 The Goals of Victim Participation

The seminal normative statement of victims' rights is set out in the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Declaration).[6] The UN Declaration primarily concerned states' obligations to provide remedies and reparation to victims of violations of human rights and humanitarian law, rather than establishing a specific regime or approach to the right of victim participation in judicial proceedings. However, it also enshrined the basic principle that '[v]ictims should be treated with compassion and respect for their dignity'.[7] It defined victimhood[8] and made the recommendation **(p.155)** that the 'responsiveness' of judicial systems to victims' needs should be facilitated by victim participation.[9]

The UN Declaration was to become the foundation of victim participation in international criminal law.[10] However, this did not occur immediately. When the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established in the mid-1990s, victims featured primarily as witnesses, as 'suppliers of evidence'.[11] The needs of victims were not disregarded: the ad hoc tribunals took affirmative steps to assess and provide protection from threats to victim-witnesses as a particular priority,[12] and established a comprehensive regime of witness protection.[13] Provisions were also adopted concerning the restitution of property to victims,[14] and the suffering of victims was in a number of cases considered when determining the gravity of the crime and as an aggravating factor in sentencing. However, a victim had no standing to participate in proceedings before the tribunals.

By the early 2000s, victim participation rights were firmly on the agenda. Non-governmental organizations acting on behalf of victims asserted that effective prosecution of human rights violations required the active participation of victims;[15] adopting the notion that victims had rights in the criminal proceedings when they had suffered injuries.[16] At the national level, Anglo-American systems saw an increased use of restorative justice techniques, with objectives 'intrinsically **(p.156)** linked to that of fulfilling victim needs'.[17] By the time of the Rome Conference in 1998 (just over five years after the ad hoc tribunals had been established), the need to establish a regime of victim participation had become an 'overriding interest' for the participants.[18] The ICC Statute and ICC Rules of Procedure and Evidence ('RPE' or 'the Rules') established, for the first time in international criminal law, a regime of victim participation.

Subsequent courts followed suit. The ECCC, building on the civil law concept of '*partie civile*', established a form of victim participation in its founding documents in 2004,[19] and the STL also provided for victim participation when it was created in 2007.[20] In this climate, the notion of victimhood adopted by the ICTY and ICTR was increasingly criticized for its perceived shortcomings.[21] The ad hoc tribunals themselves fell on their own swords: in 2009, the ICTY President himself spoke of his 'fear that failure by the international community to address the needs of victims of the conflicts that occurred in the former Yugoslavia will undermine the Tribunal's efforts to contribute to long-term peace and stability in the region'.[22]

As the twenty-first century began, therefore, there was an overwhelming sense of consensus as to the

existence of a 'will to attend to victims' concerns and to recognize the importance of their involvement'.[23] But what set of common understandings underpinned this consensus? What are the intended goals of victim participation?

The first goal, stemming from the influence of the restorative justice paradigm, rests on the assumption that involvement in criminal proceedings has important reparative value for the victims. An important element in this paradigm is the opportunity for financial compensation, serving as a quantification of damage, loss, and injury suffered.[24] It has been said that this is of particular importance at the ECCC, where 'Civil Parties have an interest in the result of the public action since they have a clear and direct interest in seeing the accused convicted of the specific **(p.157)** crimes that caused their own suffering in order to found their exercise of civil action for damages'.[25]

Of perhaps greater import in international criminal law, however, is the assumption that participation itself is a form of reparation.[26] Through the opportunity 'to obtain recognition of the harm they have allegedly suffered',[27] victims avoid 'be[ing] a victim twice'.[28] This renewed sense of empowerment contributes to 'rehabilitation and the restoration of [victim] dignity'.[29] The contours of this renewed sense of agency are not empirically clear-cut. However, it is clear that a broader notion of involvement is implied than in the alternative role as a victim-witness, where 'victims did not have an independent voice; they were called to serve an interest that did not always coincide with their own. In other words, victims were usually a means to an end in the prosecution's case.'[30] Unlike victim-witnesses, 'who lack control over the scope and use of their testimony, victims who participate in proceedings in a capacity other than witness are believed to be more likely to feel a sense of recognition and empowerment'.[31]

The second assumed benefit of victim participation is a contribution to 'truth'. The idea that international criminal trials should or could seek to establish some form of factual truth for the historical record has retained consistent resonance in international criminal law.[32] The notion that victim-witnesses might serve as important sources of such a truth gained ground under the ad hoc international tribunals, with the indictments in several landmark cases being amended following **(p.158)** the elucidation of further information through victim-witness testimony.[33] Victim-participants, at least in theory, have greater importance, because they 'may bring up relevant facts or evidences that are not provided by the prosecutor or the defence, thereby helping the judges to develop a more nuanced view of the case'.[34] At the ICC, this contribution has been described as '(i) bring[ing] clarity about what indeed happened; and (ii) clos[ing] possible gaps between the factual findings resulting from the criminal proceedings and the actual truth'.[35]

The idea that international criminal trials can contribute to the establishment of a factually accurate and consistent narrative should be treated with caution. A court is not a truth commission;[36] the truth that emerges will only ever be a judicial truth, within the confines of what is presented by counsel.[37] The tribunals, through the operation of the adjudicated fact regime may, at the behest of either party, admit certain 'factual' truths from other cases. However, the tribunals are not bound by the factual findings of other trial chambers, nor are they even under a duty to reconcile factual findings.[38] Ultimately, a trial chamber must make its own final assessment of the evidence on the basis of the totality of the evidence presented in the case before it,[39] and even adjudicated facts may be rebutted by evidence at trial.[40] 'Truth', for the purposes of international criminal law, seems best understood as a normative aspiration with factual pretensions. However, especially when combined with other transitional justice processes—such as truth commissions, reparation programs, and institutional reforms—it seems arguable that criminal justice processes can play a role in establishing the historical record. Within these confines, victim participation can be understood as offering a possible contribution to a greater factual matrix before the court.

Alongside the benefits of victim participation is another factor to be considered: the fair trial rights of the accused. This is a secondary goal for victim participation regimes. For victim participation to occur, it must be 'in a manner which is not **(p.159)** prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[41] This standard assumes that there is a—reconcilable—tension between victim participation and fair trial rights.[42]

It is unclear from the provisions governing the STL and the ICC 'how, in concrete terms, the participation of the victim can be reconciled with the essentially accusatorial procedure',[43] or 'how the intervention of the

victim in the proceedings can be accommodated with the right of the accused to be tried fairly, impartially and expeditiously'.[44] This has left much to judicial discretion and evolution.[45] The very ambiguity of the regime has led to claims that the process is unsatisfactory from the perspective of legal certainty.[46] However, the practice of victim participation at the ICC and ECCC to date has indicated that two particular fair trial rights may be in jeopardy.

The first relates to the accused's right to be tried within a reasonable time period. Excessive delay has a negative impact on both victim and accused,[47] but it is only the accused whose 'right' to a speedy trial may be violated by such delays. It has been said at the ICC that 'the delays caused by the current system of victim certification are so significant that they preclude the Court from effectively dealing with other parts of the proceedings. For each victim, certification by the [Pre-Trial **(p.160)** Chamber] concludes approximately one year after their application is submitted.'[48] The early stages of the ECCC proceedings were also 'overwhelmed' by Civil Party lawyers' interventions, requiring the Chamber to restrict the time that they were permitted to intervene.[49] The significant delay that may be caused by victim participation was also one of the reasons why the Group of Experts recommended that any future international court for Syria should not include a victim participation regime.[50]

The second fair trial right that is threatened by a system of victim participation is the right of the defence to 'equality of arms' with the prosecution. Because victims may be called as witnesses by the prosecution, there is a fear that their participation may in practice amount to a second, shadow prosecution—the so-called 'Prosecutor *bis*' phenomenon.[51] This may be particularly detrimental. Whereas a prosecutor is considered to be a 'minister of justice' who acts fairly rather than pursuing a conviction at all costs, it has been said that victims may have an interest in securing convictions so that they can seek compensation at national courts or at the ICC.

The concern of 'double-prosecution' seems prima facie particularly pronounced before the ECCC, where the provision of support to the prosecutor is an enumerated rationale for victim participation.[52] Defence counsel at the ECCC have frequently complained that Civil Party lawyers were acting as 'prosecutors', challenging the principle of equality of arms.[53] This led the Trial Chamber to determine in a 2009 decision that 'the accused's right to a fair trial in criminal proceedings includes the right to face one prosecuting authority only. Accordingly, and while the Civil Parties have the right to support or assist the Prosecution, their role within the trial must not, in effect, transform them into additional prosecutors.'[54] The possible additional burden that a defendant faces when victims participate in the court process and the consequent threat to equality of arms was also one of the issues that militated against victim participation for the prosecutors producing the draft Syrian Statute.[55]

(p.161) The primary rationale for victim participation, then, might be understood as a combination of restorative healing for the individual victim and a contribution to a broader notion of 'truth'. A secondary goal —in the sense of being parasitic on the first—is to balance the fair trial rights of the accused, considering, in particular, the impact on the length of proceedings and the possibility of victims becoming a de facto second prosecution.

9.3 Key Aspects of the STL Regime

The key operative provisions of the STL victim participation regime are found in article 17 of the Statute, which states that:

> Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The tenets of the victim participation regime are given substance through a range of other statutory provisions and rules.[56] Litigation has taken place mainly in the *Ayyash et al* case, which remains at pre-trial.

9.3.1 Determining victim status

9.3.1.1 Determining qualification as a victim

The Victim Protection Unit (VPU) is the body responsible for the receipt of applications from victims seeking to participate in the proceedings before the STL, the verification of these applications, and their transmission to the pre-trial judge.[57]

The pre-trial judge will decide a request for the determination of the status of victims participating in the proceedings after seeking submissions from the parties and the VPU on relevant legal issues.[58] There have been four key decisions by the pre-trial judge on the question of the application for victim status, granting a total of sixty-eight people the status of victim participant.[59] The applications that have **(p.162)** been made so far were made confidentially and *ex parte* to both prosecution and defence.[60]

A person can only apply for victim status once the indictment has been confirmed by the pre-trial judge.[61] Accordingly, victims of the attacks that are linked to the Hariri attack[62] cannot apply for victim status until someone is indicted for those crimes.

Three cumulative requirements must be satisfied for an individual to qualify as a victim as defined in rule 2: (i) the applicant must be a natural person; (ii) he/she must have suffered physical, material, or mental harm; and (iii) such harm must have been a direct result of an attack within the Tribunal's jurisdiction.[63]

The requirement that a victim be a 'natural person' is narrower than the approach adopted by the ICC, which also permits organizations and institutions to be considered as potential victims.[64]

Harm is defined as 'injury, loss, damage, material or tangible detriment'.[65] As the three forms of harm mentioned in rule 2 of the Rules—namely, physical, material, and mental—are listed in the alternative, prima facie evidence of one form of harm suffices.[66] Physical harm is equated with bodily injury,[67] which is consistent with the position adopted by the ICC and ECCC in their respective RPE.[68] Physical harm does not have to be permanent, but must be of 'such nature and gravity as to **(p.163)** interfere with the health, well-being or comfort of the victim'.[69] As regards mental harm, this is defined as '[o]f or pertaining to the mind',[70] and must be serious.[71]

The third element of the definition of 'victim'—that harm suffered must have been the 'direct result' of the attack—has been subject to some debate. As at the ICC, a 'direct result' does not preclude 'indirect' victims. The pre-trial judge also concluded that the term 'attack' lacked sufficient precision[72] and confirmed that the required causal link was between the harm alleged and a crime specifically charged in the indictment.[73] On the basis of this aspect of the test, the applications for victim status underlying the Fourth Victim Status Decision were rejected.[74]

The STL's approach to defining who is a 'victim' is broadly consistent with international practice.[75] Rule 85(a) of the ICC RPE defines victims as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court'. Pre-Trial Chamber I has held that the events described in an application for participation must establish a crime that is within the jurisdiction of the court and the harm suffered must seem to have arisen 'as a result' of the crime charged.[76] The ECCC's Pre-Trial Chamber has also found that the Court's Rules[77] require a causal link between harm suffered by victim applicants and an alleged 'crime'.[78]

(p.164) 9.3.1.2 Determining that a victim has a right to participate in proceedings

At the STL, victims cannot participate at the investigative stage of proceedings but can apply to participate in the pre-trial, trial, and appeal stages. Victims' inability to participate at the investigation stage differs from the position at both the ECCC and the ICC. At the ICC, victims may participate before the court at any stage, including the investigation stage, if the judge deems it appropriate, provided there are judicial proceedings at which their personal interests are affected.[79] At the ECCC, victims also have a right to participate at the investigative stage, including by requesting hearings, interviews, confrontations, site investigations, and expert reports.[80]

The four mandatory requirements that will be considered by the pre-trial judge when determining whether someone is a victim entitled to participate in proceedings are whether: (i) the applicant has provided prima

facie evidence that he is a victim as defined in rule 2; (ii) the applicant's personal interests are affected; (iii) the applicant's proposed participation is intended to express his views and concerns; and (iv) the applicant's proposed participation would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[81]

(p.165) The first of the four requirements—*prima facie* evidence of victim status—is the determinative factor.[82] This has been discussed earlier.

When assessing the second requirement—that the victim's 'personal interests' are affected—the STL has adopted a similar approach to the ICC.[83] A 'personal interest' means 'the legitimate interest which a [victim participating in the proceedings] must demonstrate in order to justify participating in the proceedings in a specific manner, for example, by calling witnesses or tendering evidence'.[84] However, this does not add an onerous burden for the victim to discharge.[85] Indeed, its existence can be 'presumed' once the first element —demonstration that a person has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal's jurisdiction—has been demonstrated.[86]

The third requirement is that the applicant's proposed participation is intended to express his views and concerns. The concept of 'views and concerns' has its origins in the UN Declaration and also appears in the ICC Statute.[87] At the ICC, this requires that applicants be driven to contribute to the pursuit of justice, which may include by seeking to establish the truth or to obtain recognition of the harm they have allegedly suffered.[88] The STL pre-trial judge has held that this means that the objective 'cannot be to undermine the integrity or the fair and efficient conduct of the proceedings'.[89] Where an applicant has not stated any specific reason for participating in the proceedings, the pre-trial judge has considered whether 'taking into account the entirety of his application, his willingness to do so was demonstrated'.[90]

Finally, there is a requirement that the proposed participation be compatible with the defendant's fair trial rights. The question of fair trial rights has been considered only briefly at the stage of applications for victim participation. The pre-trial judge has indicated that there are no reasons at the 'application' stage to conclude that granting victim participation status to the applicants would prejudice the rights of the accused to a fair and impartial trial[91] but that this issue would **(p.166)** be considered further at the trial stage.[92] A similar position has been adopted by the ICC.[93]

The pre-trial judge may also consider other factors in determining victim status.[94] One important factor relates to the question of whether a person who acts in the capacity of a witness during trial would still have the right to participate in proceedings as a victim.[95] Rule 150(D) of the RPE provides that victims who participate in proceedings are not permitted to give evidence unless a chamber decides that it is in the interests of justice to do so.[96] In contrast, the ICC has found that witnesses would *not* generally be banned from also participating as victims, as this would 'be contrary to the aim and purpose of Article 68(3) of the Statute and the Chamber's obligation to establish the truth'.[97]

9.3.2 Modalities of participation

Victims may only participate in the proceedings through legal representatives, unless otherwise authorized by the pre-trial judge.[98] A victim is not entitled to **(p.167)** choose his or her legal representative; the VPU maintains a list of qualified counsel from which the Registrar selects a legal representative.[99] This is in contrast to the ICC, where a victim is generally able to choose his/her own legal representative provided that the person in question has the requisite amount of professional experience.[100] The judges there still have the option, however, to request the victims to choose a common legal representative or representatives.[101] Where the victims are unable to do so within the time limit decided by the chamber, the chamber may request the Registrar to choose.[102]

The STL regime assumes that victims will be represented by one lawyer. Under rule 86(D) of the RPE, unless there are valid reasons to justify *not* doing so, victims will be treated as a single group.[103] In the applications so far, a common legal representative has been appointed for all of the victims in question, as the applicants have been deemed to be affected by the same alleged facts and criminal conduct.[104] At the ECCC, common representation at the trial stage for civil parties was also established by amendment of the Internal Rules after the end of the *Duch* trial.[105]

At the STL, granting a victim the status of a participant does not mean that they then enjoy the same rights as a fully fledged party to the proceedings. Indeed, if a victim's personal interests are not affected by the particular issue at the specific stage in the proceedings in which they seek to intervene, their participation will either be limited or prevented accordingly.[106] This is consistent with the practice of the ICC.[107] The ICC has held that the question of personal interest will be **(p.168)** fact-dependent, but that a 'general interest in the outcome of the case or in the issues or evidence the Chamber will be considering at that stage is likely to be insufficient'.[108]

With regard to motivation at this stage, the pre-trial judge held that the term refers to the 'general motivation of persons seeking to participate in the proceedings as victims, as well as to the modalities of their participation at specific stages thereof'.[109] No further elucidation has been given so far on the question of what type of motivation might be required at the stage of modalities. The pre-trial judge also confirmed that the accused's fair trial rights should be considered throughout the proceedings when assessing the manner in which a victim-participant may intervene.[110]

The Rules confirm that at the pre-trial stage, victims may receive documents filed by the parties, unless the pre-trial judge determines otherwise in the interests of justice.[111] In the Decision on Victim Modalities, the pre-trial judge also elaborated on the full range of rights of victim participants at this stage. Broadly speaking, subject to the pre-trial judge's discretion and consideration of the victim's personal interests and the defendant's fair trial rights, the legal representative may (i) attend and participate in meetings, status conferences and hearings;[112] (ii) have full access to public transcripts, as well as transcripts any of meetings that the legal representative attends;[113] (iii) file motions or briefs on any issue that affects victims' personal interests;[114] and (iv) have access to all documents filed confidentially in the *Ayyash et al* case,[115] as well as to disclosure materials.[116] This is without prejudice to the Trial Chamber's determination of the modalities of victim participation at a later stage.[117]

There have been limited submissions made by the legal representative so far. The legal representative submitted in one instance that it would be in the 'personal interests' of all victims for the trial to start on a particular date, in response to a request for a variation of pre-trial brief filing deadlines.[118] In another filing, the **(p.169)** legal representative suggested that it might be 'opportune' to appoint *amicus curiae* to investigate allegations of contempt.[119] In December 2012, the pre-trial judge rejected a request for total anonymity as a protective measure[120] and in 2013 he authorized confidentiality as a protective measure for eight victim-participants.[121]

When it comes to trial at the STL, victims participating in the proceedings may be granted significant powers. This may include being allowed (i) to make opening[122] and closing[123] statements; (ii) to call witnesses[124] and tender evidence;[125] (iii) to examine or cross-examine witnesses;[126] (iv) to pose questions to the accused;[127] and (v) to file motions and briefs.[128] At the sentencing stage, rule 87(C) of the STL RPE permits victims to voice their views and concerns on the 'personal impact of the crimes upon them'. This returns to the practice of the ICTY, where the Appeals Chamber has stated that factors to be considered when assessing the gravity of the offence include, *inter alia*, 'the vulnerability of the victims and the consequences, effect or impact of the crime upon the victims and their relatives'.[129]

At the appeals stage, rule 87(D) of the STL RPE states that they 'may participate in a manner deemed appropriate by the Appeals Chamber'. The exact role of the victims' participation in the proceedings therefore remains to be determined.

9.3.3 Compensation

The UN Declaration introduced the concept of an individual right to compensation into international law.[130] The relevant STL provision for the purposes of **(p.170)** compensation is article 25, entitled 'Compensation for Victims'.[131] Under this article, the STL may identify the victims who have suffered harm and the Registrar will then transmit any judgments establishing the guilt of the accused to a court in Lebanon.

The STL compensation regime is different from the ICC's provisions. At the ICC, article 75 of the ICC Statute provides that the Court can itself grant reparations to victims,[132] with the details set out in the ICC RPE.[133] In addition, article 79 of the ICC Statute established the Trust Fund for Victims, which may independently

render assistance or make disbursements for the benefit of victims.[134]

The ECCC compensation system is different again. The ECCC itself can provide 'collective and moral reparations' but not 'monetary payments'.[135] However, Civil Parties have the right to seek damages in Cambodian courts following convictions at the Court as reparation for the harm suffered relating to the crimes being prosecuted.[136]

It has been said that under the system at the ECCC, 'Civil Parties have an interest in the result of the public action since they have a clear and direct interest in seeing the accused convicted of the specific crimes that caused their own suffering in order to found their exercise of civil action for damages'.[137] Under the ICC **(p.171)** Statute, however, victims do not need to participate in pre-trial or trial proceedings before the ICC in order to make a claim for reparations, and victims may participate in proceedings without pursuing compensation before the Court.[138]

In sum, the STL procedures for victim participation closely follow the ICC in most significant regards, particularly with regard to the determination of victim status and modalities of participation. Its important differences arise in the STL's decision to exclude participation at the investigative stage, and in the variance in financial reparations between the different courts.

9.4 Is the STL Achieving the Goals of Victim Participation?

This chapter now turns to appraise the STL regime as against the goals of victim participation.

9.4.1 The primary goal of achieving victim benefits

Nowhere in the STL Statute or Rules of Procedure and Evidence are the goals of victim participation set out. However, in a press release encouraging victims to participate in 2011, the STL observed that: '[t]hrough this process the voices of victims will be heard. They will be able to fully participate in the trial before the Tribunal, which will seek the truth behind the attack on 14 February 2005 and also serve justice.'[139] It can therefore be assumed that the STL also seeks to capture the two aspirations most commonly espoused by supporters of victim participation, namely restorative healing and a contribution to establishing the truth.

There are some differences in the ways these benefits are characterized before the STL, however. The STL does not directly allow for financial compensation by the court itself (a judgment convicting an accused must be taken to a Lebanese court to found a claim for compensation at the national level),[140] so the primary recuperative benefit lies in the more amorphous realm of enhanced agency. When it comes to establishing the 'truth', the overall scope is also more limited at the STL. The 'truth' that is sought through an international criminal process is usually a broad one, encompassing both individual and communal harm.[141] The notion of truth sought at the STL reflects the same concerns, but is necessarily narrower before the **(p.172)** STL, since the court is dealing with one terrorist bombing—or, at most, a linked series of such attacks.[142]

Turning to consider STL practice to date, a range of initiatives may compromise the attainment of the goals of victim participation.

First—in contrast to the ICC—participating victims at the STL are not allowed to select their own representatives. This may present a compromise to victim agency, as well as the integrity of the process, as '[v]ictim involvement in the choice of advocate who will speak on their behalf in Court is important to achieve effective participation'.[143]

Secondly, like the other courts, the STL operates a regime of collective representation. Collective representation is not necessarily antithetical to victims' broader interests.[144] However, it means that the 'personal interests' of victims will not usually be assessed on a case-by-case basis: an individual victim's interests will become part of a collective position, taking little account of the fact that the 'potential needs of… diverse victims are chameleon in nature'.[145] Considering the ICC regime, it has been suggested that this 'overly generic way of considering victims' interests fails to see victims in their variety, with distinct needs, expectations and views in relation to ICC proceedings'.[146] Collective representation may detract from the ability of the victim to establish a strong dialogue with the court, limiting healing, as well as the potential for meaningful and varied factual contributions.

Thirdly, the restrictive definition of 'victims' adopted at the STL—as well as at the ICC and ECCC—may restrict the restorative benefits of victim participation, as it may 'leav[e] many victims out of the scope of the cases'.[147] Whilst not all victims will ever be able to participate in criminal proceedings, the process of applying for, and being denied, victim status, may exacerbate trauma. An empirical study of the Cambodian system suggested that victims who had their status denied 'felt anger, helplessness, shame, and worthlessness'.[148] In addition, the narrower the potential pool of victims, the less the proceedings will be able to reflect a fully comprehensive account of victims' experiences.[149]

(p.173) Finally, and perhaps most significantly, by excluding victim participation at the investigative stage, both recuperative effect and the opportunity to contribute to truth are damaged. At the STL, the investigation was largely complete at the time proceedings began. In the view of Human Rights Watch, the 'most essential of all victims' interests is likely to be the interest in seeing that the Court is seized with the matter and that an investigation proceeds'.[150] The contribution at this stage is also the most important from a truth-seeking perspective. During the investigation phase of Case 002 at the ECCC, the Civil Parties filed a number of requests for action including, for example, requests that the investigation focus on the crimes of enforced disappearance and forced marriages and sexual crimes.[151]

In sum, the STL victim regime appears unlikely to fully provide the benefits of restorative healing. Its contribution to the establishment of the truth will also be a narrow one.[152]

9.4.2 The secondary goal of balancing fairness

Like the other courts, the STL expressly seeks to balance victim participation with fairness to the accused, but its Statute does not specify how this is to be attained. In practice, the express question of fair trial rights has been dealt with rather briefly so far. However, the reasoning behind some of the same initiatives that limit the benefits of victim participation shows that the STL is, in substance, attempting to be adequately protective of defence rights.[153]

In prohibiting victims from participating directly in the court process, and requiring them to have a common legal representative instead, the pre-trial judge observed that this would help to ensure the 'integrity, dignity, decorum and objectivity of the proceedings' as well as the duration and efficiency of such proceedings.[154] This follows the rationale for imposing lawyers at the ECCC, which was also that the 'personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings'[155] and the conduct of the **(p.174)** trial in a 'reasonable time is incompatible with the involvement of large numbers of individual Civil Parties who are not represented by a lawyer'.[156]

The definition of 'victim' was also deliberately limited with a view to reducing the number of victims within the system in order to protect the rights of the accused.[157] It has been suggested that the adoption of 'an over-inclusive and imprecise definition of the notion of victim might impair the rights of the accused, who will not be able to easily determine who was actually harmed by the alleged crime attributed to him'.[158] Again, when determining that transient or trifling harm did not constitute physical harm for the purpose of rule 2 of the Rules, the pre-trial judge held that this was consistent with the spirit of that rule, which is to define victims narrowly so as to 'prevent [them] from being too numerous', thereby making the proceedings 'cumbersome and slow' in potential violation of an accused's right to a speedy trial.[159] The requirement of a link between the harm suffered and the charges in the indictment is also intended to limit the flood in applications and number of victims participating in a case.

The decision to preclude involvement at the investigative stage was, once more, taken in order to better protect the goal of protecting the accused's rights to an expeditious trial and to equality of arms.[160] Additional delay might be generated if victims are authorized to present their views and concerns at that stage, as the Prosecutor is required to respond to victim petitions.[161] It has also been said that **(p.175)** there is 'no doubt that the victim's role in fact-finding may be damaging to the accused, especially if one bears in mind that the same victim may have a strong (financial) interest in conviction with a view to reparation proceedings'.[162] Early victim participation might also be considered to interfere with the Prosecutor's interests in an objective and impartial investigation. Until such time as an individual is officially established as a suspect or accused, permitting victims to participate could 'negatively affect the balance between the rights of victims who would

already have legal representation and those of future suspects or accused'.[163]

As a result of the procedures adopted at the STL, such as the imposition of a common legal representative for victims and the prohibition on victims' involvement at the investigation stage, the benefits that a victim will derive through participation in the court process may be attenuated compared to the goals that participation is intended to achieve. However, these same procedures demonstrate that the STL is taking important steps towards achieving the secondary goal of fairness by ensuring that the rights of the defendant are not undermined.

9.5 Conclusion

The STL victim participation regime has been praised for 'strik[ing] an adequate balance between the legitimate judicial, reparative and symbolic interests of victims on the one hand and the fairness and efficiency of the proceedings on the other'.[164]

This chapter suggests that the first of these two goals—the interests of the victims—is not fully being attained. However, at the same time—and largely by virtue of the same initiatives that are limiting the reach of victim participation—important steps are being taken to ensure the fairness of the process. The emergent dissonance between theoretical goals and practice might be taken as a trend in victim participation more broadly. The STL has unique features but its victim participation regime is best understood in a broader context, both in terms of the putative benefits of victim participation, and in the measures taken to reconcile the system with fair trial rights.

One potential solution might simply be to adopt a more moderate and realistic version of what the trial process can offer. This might entail accepting a very attenuated version of healing and truth as goals, or adopting more limited and practical aspirations altogether. This might not prove easy, however: goals such as 'healing' and 'truth' may be lofty aspirational terms but they have become ones of enormous resonance. For the past two decades and more, these and other norms have been adopted by victims and their representatives to articulate their needs from the victim participation process, and will not be readily abandoned.

(p.176) Nor can a solution be found in any trade-off in terms of fair trial rights. A failure to meet the substantive aspirations of victim participation has less substantive import than it would if the situation was reversed and fairness was compromised. Fair trial rights 'represent the fundamental bedrock of modern criminal procedural law, so that it can be even argued that…the only genuine criterion for assessing the quality of criminal justice is the reliance on the "fair trial model"'.[165] Victim rights are far more limited than those of the accused—only the latter convey justiciable entitlements to specific outcomes in the trial process. It would be meaningless to attempt to pin a legal 'right' to the amorphous intended outcomes of victim participation: '[h]ow do you measure closure, how do you measure truth, how do you measure reconciliation? These are not empirical categories.'[166]

It may be that a middle ground will open up, with time, if it transpires that respecting fair trial rights does not necessarily mandate the precautions that are currently being implemented. The fear of victims serving as 'Prosecutor *bis*' may, in particular, be overstated. Witnesses will not generally be permitted to appear as victim-participants at the STL, removing the assumed area of conflict. At the ECCC, Civil Party lawyers have frequently presented opposing positions demonstrating a lack of coordination and support for the prosecution.[167] There will be no danger in allowing amorphous and substantive victim benefits greater conceptual ground, if a corresponding shortfall in fair trial protections does not emerge.

In conclusion, there is no easy solution to the gap that has opened up between the theoretical goals and the practice in victim participation. However, at a minimum it is to be hoped that victim participation proceeds in a more considered way than it began, with a more consistent and realistic scrutiny of its aspirations and potential.[168]

Notes:

* Judge, International Criminal Tribunal for the former Yugoslavia and International Criminal Court.

** Legal Officer in the Office of the Co-Investigating Judges in the Extraordinary Chambers in the Courts of Cambodia. Many thanks go to Michael Herz, Associate Appeals Counsel in the Office of the Prosecutor at the International Criminal Tribunal for Rwanda, who provided research assistance for this chapter. The views expressed in this chapter are the authors' own and do not necessarily represent the views of the International Criminal Tribunal for the former Yugoslavia, International Criminal Court, or the Extraordinary Chambers in the Courts of Cambodia.

([1]) Attachment to SC Res 1757, UN Doc S/RES/1757 (2007) [Statute of the Special Tribunal for Lebanon] art 17.

([2]) Ilaria Bottigliero, *Redress for Victims of Crimes Under International Law* (Leiden/Boston: Martinus Nijhoff 2004) 214.

([3]) The UN Secretary-General described victims' concerns as the 'overriding interest' that would drive the Rome Conference. See Secretary-General's press release, 'UN Secretary-General Declares Overriding Interest of International Criminal Court Conference Must be That of Victims and World Community as a Whole', UN Doc L/ROM/6.r1 (1998).

([4]) Mahmoud Cherif Bassiouni, David Crane and Michael Scharf et al (2013), 'The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes' <http://insct.syr.edu/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf> accessed 13 October 2013. It should be noted, however, that this group was made up almost exclusively of common law lawyers, who may be unfamiliar with the concept of '*partie civile*' in the civil law system.

([5]) *Prosecutor v Ayyash et al*, Case No STL-11-01.

([6]) Annex to GA Res 40/34, UN Doc A/RES/40/34/Annex (1985) [UN Declaration].

([7]) UN Declaration (n6) s A, para 4.

([8]) UN Declaration (n6) s A, para 2: 'A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.'

([9]) UN Declaration(n6) s A, para 6(b): 'Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system'.

([10]) See eg Christine Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case W Res J Int'l L 475, 478, arguing that the Declaration is 'still considered as the foundational text by advocates of extensive victims' rights to participation and reparation'. See also Mariana Pena and Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation?' (2013) IJTJ 1, 2 note 5, referring to the Declaration as establishing a 'right to be heard'.

([11]) Christoph Safferling, 'The Role of the Victim in the Criminal Process—A Paradigm Shift in National German and International Law?' (2011) 11 Int'l Crim L Rev 183, 202.

([12]) See eg 'Letter Dated 12 July 2007 from the Secretary-General Addressed to the President of the Security Council', UN Doc S/2007/424 (2007), para 58.

([13]) Statute of the ICTY (25 May 1993, 32 ILM 1159 (1993)) art 20(1); Statute of the ICTR (8 November 1994, 33 ILM 1598 (1994)) art 19(1). Both provisions required that 'Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused *and due regard for the protection of victims and witnesses*' (emphasis added). Specific provisions going to witness protection are found in ICTR Statute art 21;

ICTY Rules of Procedure and Evidence (ICTY RPE) and ICTR Rules of Procedure and Evidence (ICTR RPE) rr 34, 40, 40bis(B)(iii), 65(B) and (I)(ii), 69, 75, 79(A)(ii) and 96.

([14]) ICTR Statute (n13) art 23(3); ICTR RPE r 105; ICTY RPE r 105.

([15]) See Raquel Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes', (2004) 26 Hum Rts Q 605, 608.

([16]) Dold and Yarwood argue that the concept of victim participatory 'rights' first attained a clear footing in international law in the European Court of Human Rights in the case of *Kelly and Others v The United Kingdom*. In that case, the court held that 'there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.' See *Kelly and Others v The United Kingdom* (2001) 37 EHRR 52, para 98; Beat Dold and Lisa Yarwood, 'Victim Participation at the ICC: Valid Potentiality or Vanguard Pandering?' (2006) 13 African YB Intl Crim L 159, 169.

([17]) Dold and Yarwood, 'Victim Participation at the ICC'(n16) 179.

([18]) See 'UN Secretary-General Declares Overriding Interest of International Criminal Court Conference Must be That of Victims and World Community as a Whole' (n3).

([19]) Internal Rules of the ECCC (3 August 2011) rr 12, 12bis, 23, 23bis, 23ter, 23quater.

([20]) STL Statute (n1) art 17; STL RPE rr 51, 86, 87.

([21]) Christine Evans, 'Reparations for Victims in International Criminal Law' (2011) in *Online Festschrift in Honour of Katarina Tomaševski*, Section 3 <http://rwi.lu.se/wp-content/uploads/2012/04/Reperations-for-Victims-Evans.pdf> accessed 13 October 2013.

([22]) 'Address of Judge Patrick Robinson, President of the International Criminal Tribunal for former Yugoslavia, to the United Nations General Assembly' (8 October 2009) 3 <http://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/091008_pdt_robinson_un_ga.pdf> accessed 13 October 2013.

([23]) Pena and Carayon, 'Is the ICC Making the Most of Victim Participation?' (n10) 2.

([24]) See Gerard J Mekjian and Mathew C Varughese, 'Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court' (2005) 17 Pace Intl L Rev 1, 29 note 111.

([25]) International Federation for Human Rights, 'Victims' Rights Before the Extraordinary Chambers in the Courts of Cambodia (ECCC): A Mixed Record for Civil Parties' (2012), 57 <http://www.fidh.org/IMG/pdf/eccc_victrights_rep_nov2012_en_web.pdf> accessed 13 October 2013.

([26]) REDRESS, 'Rules of Procedure & Evidence for the International Criminal Court: Recommendations to Preparatory Commission regarding Reparation and Other Issues Relating to Victims' (2000) 1; Salvatore Zappalà, 'The Rights of Victims v. the Rights of the Accused' (2010) 8 JICJ 137,153.

([27]) STL, Decision on Victims' Participation in the Proceedings, *Prosecutor v Ayyashet al,* Case No STL-11-01PT/PTJ, Pre-Trial Judge, 8 May 2012, para 96 quoting ICC, Decision on Victims' Participation, *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Trial Chamber, 18 January 2008, paras 97–98; ICC, Decision on the Modalities of Victim Participation at Trial, *Prosecutor v Katanga and Ngudjolo*, Case No ICC-01/04-01/07, Trial Chamber, 22 January 2010, para 59.

([28]) STL press release, '"Don't Be a Victim Twice": Victim's Participation in STL Proceedings' (12 July 2011) <http://www.stl-tsl.org/en/media/press-releases/dont-be-a-victim-twice-/-victims-participation-in-stl-proceedings> accessed 13 October 2013.

([29]) Jerome de Hemptinne, 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon' (2010) 8 JICJ 165, 167.

([30]) Pena and Carayon, 'Is the ICC Making the Most of Victim Participation?' (n10) 3.

([31]) War Crimes Research Office, 'Victim Participation before the International Criminal Court' (American University Washington College of Law 2007) 17 <http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf> accessed 13 October 2013.

([32]) During the Security Council deliberations on the establishment of the Tribunal, the Venezuelan representative suggested that the Prosecutor 'should not confine himself to bringing cases before the Tribunal, but should also present an overall report on all of the violations of international humanitarian law that come to his knowledge, which will provide him with an historical record of great importance'. See Payam Akhavan, 'Justice in the Hague, Peace in the former Yugoslavia? A Commentary on the UN War Crimes Tribunal' (1998) 20 Hum Rts Q 737, 783.

([33]) The ICTR case of *Prosecutor v Akayesu*, Case No ICTR-96-4, was particularly important in this regard. *Akayesu* was a landmark case in prosecuting rape as a crime against humanity and an act of genocide. The initial indictment did not, however, include sexual violence charges. The judges requested the Prosecutor to amend the indictment once evidence as to sexual violence had emerged from victims in the course of provision on testimony on other issues.

([34]) de Hemptinne, 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon' (n29) 167.

([35]) ICC, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of a Case, *Prosecutor v Katanga and Ngudjolo*, Case No ICC-01/04-01/07, Trial Chamber, 13 May 2008, paras 31–36.

([36]) Dold and Yarwood, 'Victim Participation at the ICC' (n16) 181.

([37]) Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights' (n15) 1443.

([38]) See eg ICTY, Judgment, *Prosecutor v Aleksovski,* Case No IT-95-14/1-A, Appeals Chamber, 24 March 2000, para 114.

([39]) See eg ICTY, Judgment, *Prosecutor v Stakić,* Case No IT-97-24-T, Appeals Chamber, 22 March 2006, para 346.

([40]) See eg ICTY, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, *Prosecutor v Milošević*, Case No IT-98-29/1-AR73.1, Appeals Chamber, 26 June 2007, para 16 referring to ICTR, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, *Prosecutor v Karemera et al*, Case No ICTR-98-44-AR73(C), Appeals Chamber, 16 June 2006, para 42.

([41]) See eg Rome Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90) art 68; STL Statute (n1) art 17.

([42]) This precludes two alternative interpretations regarding the relationship between fair trial rights and victim benefits. First, it precludes the notion of victim participation as *prima facie* incompatible with fair trial rights. It has been argued that the motivation for victims lies not in criminal justice, with participation being 'a step down a slippery slope…to a time…when personal vengeance ruled the outcome of cases', see Erin O'Hara, 'Victim Participation in the Criminal Process' (2005) 13 J L & Poly 229, 233. An alternative version of this argument is that in allowing individuals to be designated from the outset of the proceedings as 'victims of a crime', this jeopardizes fair trial rights by making it more difficult for the defence to argue at a later stage that the crime in question did not occur, see Antonio Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (vol 2, New York: Oxford University Press

2002) 1403. At the other end of the spectrum, it has been argued that the notion of any tension between victim and accused rights 'shows a profound ignorance of the interests of victims as Civil Parties in the proceedings', as 'it is always in the interest of Civil Parties that Defence rights be totally and fully respected. The feeling of having seen justice done comes at this price.' See eg FIDH Report, 'Victims' Rights Before the Extraordinary Chambers in the Courts of Cambodia (ECCC) (n25).

([43]) Cassese et al, *The Rome Statute of the International Criminal Court* (n42) 1388 (in relation to ICC Statute).

([44]) Cassese et al, *The Rome Statute of the International Criminal Court* (n42) 1388–9 (in relation to ICC Statute).

([45]) See Van den Wyngaert, 'Victims Before International Criminal Courts' (n10) 478, observing with regard to the ICC that '[i]t was left to the Rules and the judges to further explain and develop the victims' participatory regime'.

([46]) See eg Zappalà, 'The Rights of Victims v. the Rights of the Accused' (n26) 141: 'the most appropriate way to balance the rights of the accused against the rights of victims would have been to adopt specific provisions setting out in detail the limits to victim participation in proceedings in light of the rights of the accused'. Cf. Dold and Yarwood, who argue that the absence of substantial imperatives is of benefit, stating that 'a case-by-case approach best suits this underdeveloped area of law', see Dold and Yarwood, 'Victim Participation at the ICC' (n16) 171.

([47]) Christodoulos Kaoutzanis, 'Two Birds with One Stone: How the Use of the Class Action Device for Victim Participation in the International Criminal Court Can Improve Both the Fight Against Impunity and Victim Participation' (2010) 17 UC Davis J Intl L 128.

([48]) Kaoutzanis, 'Two Birds with One Stone' (n47) 111, 129.

([49]) Michelle Staggs Kelsall, Kristine A Baleva, Aviva Nababan et al, 'Lessons Learned from the Duch Trial: A Comprehensive Review of the First Case Before the ECCC' (The Asian International Justice Initiative's KRT Trial Monitoring Group, Phnom Penh 2009) 28.

([50]) Bassiouni et al, 'The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes' (n4) note 18: 'defendants will potentially be deprived of the right to an expeditious trial when victims participate. The cases heard by the new court will be extraordinarily complex, necessitating lengthy trials. Victim participation lengthens the trials even further, often presenting repetitious questioning of witnesses and additional filings for the court to address and decide upon, and for the defense to spend time refuting.'

([51]) Van den Wyngaert 'Victims before International Criminal Courts' (n10) 15.

([52]) ECCC Internal Rules r 23(1).

([53]) See eg ECCC, Transcript (Public), *Prosecutor v Duch*, Case No 001, 22 June 2009, 92.

([54]) ECCC, Decision on Motion for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing, *Prosecutor v Duch*, Case No 001-E72/3, Trial Chamber, 8 October 2009, para 26.

([55]) Bassiouni et al, 'The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes' (n4) note 18:'Regarding equality of arms, victim participation and the ability of victims "to lead and challenge evidence" can create procedural disadvantage for the defense. When victims have the ability to lead evidence, allocation of the burden of proof becomes murky and defendants have a greater burden to contend with all of the additional information presented against them by victim participants.'

([56]) STL Statute (n1) art 25; STL RPE rr 50, 51, 86, 87, 91, 112bis, 113(B), 133, 143, 144(B), 146, 147, 150(D), 168(A), 171(B) and (E), 188(D).

([57]) STL RPE r 51(B)(iii).

([58]) STL RPE r 86(C)(i).

([59]) STL, Decision on Victims' Participation in the Proceedings, *Prosecutor v Ayyash et al*, Case No. STL-11-01PT/PTJ, Pre-Trial Judge, 8 May 2012; STL, Second Decision on Victims' Participation in the Proceedings, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 3 September 2012; STL, Third Decision on Victims' Participation in the Proceedings, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 28 November 2012. In these three decisions, the pre-trial judge accepted the applications of sixty-eight persons for the status of victims participating in the proceedings and ordered that the identities of the applicants and the content of their applications were to remain confidential and *ex parte* pending any possible requests for protective measures. On 2 May 2013, a fourth decision—STL, Fourth Decision on Victims' Participation in the Proceedings, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 2 May 2013—was issued by the pre-trial judge, rejecting a further four applications. On 29 May 2013, the LRV asked to withdraw one participating victim from the proceedings on the basis that he had died, see STL, Request of the Legal Representative of Victims to Withdraw One Participating Victim From the Proceedings, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Legal Representative of Victims, 29 May 2013.

([60]) STL, First Victim Status Decision (n59) para 6; STL, Second Victim Status Decision (n59) note 3; STL, Third Victim Status Decision (n59) para 4; STL, Fourth Victim Status Decision (n59) note 3.

([61]) STL RPE r 86(A): 'If the Pre-Trial Judge has confirmed the indictment under Rule 68, a person claiming to be a victim of a crime within the Tribunal's jurisdiction may request the Pre-Trial Judge to be granted the status of victim participating in the proceedings pursuant to Article 17 of the Statute.'

([62]) STL, Decision on the Prosecutor's Connected Case Submission of 30 June 2011, Case No STL-11-02/CCS/PTJ, Pre-Trial Judge, 5 August 2011. The decision remains confidential at the request of the Prosecutor.

([63]) STL RPE r 2 defines 'victim' as '[a] natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal's jurisdiction'.

([64]) ICC RPE r 85.

([65]) STL, First Victim Status Decision (n59) para 63 referring to Bryan A Garner (ed), *Black's Law Dictionary* (9th edn, St Paul: West 2009) 784.

([66]) STL, First Victim Status Decision (n59) paras 57, 61.

([67]) STL, First Victim Status Decision (n59) para 64.

([68]) Although the ICC Statute (n41) does not refer to 'physical harm', the ICC Pre-Trial Chambers have held that 'harm' within the meaning of ICC RPE r 85(a) includes physical injury, emotional suffering, and economic loss. See eg ICC, Decision on Victims' Participation at the Confirmation of Charges Hearing and in Related Proceedings, *Prosecutor v Ruto, Kosgey and Sang*, Case No ICC-01/09-01/11, Pre-Trial Chamber, 5 August 2011, para 50; ICC, Public Redacted Version, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo,* Pre-Trial Chamber, 17 January 2006, para 172, referring also to the Inter-American and the European Courts of Human Rights.

([69]) STL, First Victim Status Decision (n59) para 65.

([70]) STL, First Victim Status Decision (n59) para 76, referring to *Shorter Oxford English Dictionary* (vol 1, 6th edn, New York: Oxford University Press 2007) 1752.

([71]) STL, First Victim Status Decision (n59) para 78.

([72]) STL, Fourth Victim Status Decision (n59) para 14. The pre-trial judge observed that: '[c]onceptually, the term is factual in nature…the term "attack" by its very vagueness is capable of being interpreted either narrowly (eg limited to the detonation of 14 February 2005 resulting in the killing of Rafiq Hariri and others) or broadly (eg encompassing all manner of preparatory or ancillary acts prior to the detonation)'.

([73]) STL, Fourth Victim Status Decision (n59) para 15. This reading 'confers a legal character to the parameters of the causation elements, thereby providing greater certainty and rigour to the process of VPP status assessments'.

([74]) STL, Fourth Victim Status Decision (n59) para 29: 'For this public decision, it suffices to say that the Applicants have not demonstrated the required nexus between the harm they each claim to have suffered, and a crime pleaded within the indictment against the accused.' More detailed reasons are set out by the pre-trial judge in a confidential and *ex parte* annex to the decision.

([75]) STL, Fourth Victim Status Decision (n59) para 20. The UN Declaration (n6) para 1 also defines a victim by reference to a criminal offence. In its relevant part, victims are defined as 'persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws'.

([76]) ICC, Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, *Prosecutor v Banda and Jerbo,* Case No ICC-02/05-03/09, Pre-Trial Chamber, 29 October 2010, para 2. See also, Judgment on the Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims Participation of 18 January 2008, *Prosecutor v Lubanga,* Case No ICC-01/04-01/06, Appeals Chamber, 11 July 2008, paras 58–65; ICC, Fourth Decision on Victims' Participation, *Prosecutor v Bemba,* Case No ICC-0l/05-0l/08, Pre-Trial Chamber, 12 December 2008, paras 62–63.

([77]) ECCC Internal Rule r 23bis(I)(b).

([78]) ECCC, Decision on Appeals Against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, *Prosecutor v Ienget al,* Case No 002/19-09-2007-ECCC/OCIJ (PTC47 & 48), Appeals Chamber, 27 April 2010, para 28 in relation to Internal Rule 23(1)(a).

([79]) ICC Statute (n41) art 68(3). It is worth noting, however, that the Appeals Chamber curtailed victim participation during the investigation stage, finding that article 68(3) of the ICC Statute, read together with the Rules, does not provide for a general right for victims to participate in the investigation phase, which is not a judicial proceeding as such. However, victims may be permitted to participate on a case-by-case basis if they can demonstrate that their personal interests are affected by the issues arising for resolution. See ICC, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the Democratic Republic of the Congo*, Case No ICC-01/04 OA 4 OA 5 OA 6, Appeals Chamber, 19 December 2008, paras 56–57. Subsequent decisions by the Pre-Trial Chamber in the situations in Kenya and the Central African Republic have further limited victim participation during the investigation phase to instances where judicial determination is required. See ICC, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, *Situation in the Republic of Kenya,* Case No ICC-01/09-24, Pre-Trial Chamber, 3 November 2010, paras 10, 12; ICC, Decision on Victims' Participation in Proceedings Relating to the Situation in the Central African Republic, *Situation in the Central Africa Republic,* Case No ICC-01/05-31, Pre-Trial Chamber, 11 November 2010, para 2.

([80]) ECCC Internal Rules r 59(5).

([81]) STL RPE r 86(B). There are six further discretionary factors that may be considered. The pre-trial judge *may* also consider whether: (v) the applicant having relevant factual information pertaining to the guilt or innocence of the accused is likely to be a witness; (vi) the legitimate personal interests of the applicant at stake

in the trial are different from those of other victims participating in the proceedings, if any; (vii) the proposed participation by the applicant would jeopardize the appearance of integrity, dignity, decorum, and objectivity of the proceedings; (viii) the proposed participation would cause unnecessary delay or inefficiency in the proceedings; (ix) the proposed participation would impact negatively on the security of the proceedings or of any person involved; and (x) the proposed participation would otherwise be in the interests of justice.

([82]) STL, First Victim Status Decision (n59) paras 3, 25. The pre-trial judge held that it would 'be unduly burdensome to require applicants to address all the criteria contained in Rule 86(B) of the Rules in their Applications. Persons requesting VPP status are only required to provide prima facie evidence that they are victims and to indicate the reasons why they wish to participate in the proceedings. The other factors mentioned in Rule 86(B) of the Rules are matters for judicial interpretation only.'

([83]) This term is also referred to in ICC Statute (n41) art 68(3).

([84]) STL, First Victim Status Decision (n59) para 89.

([85]) STL, First Victim Status Decision (n59) para 90.

([86]) STL, First Victim Status Decision (n59) para 90.

([87]) ICC Statute (n41) art 68(3).

([88]) ICC, Decision on Victims' Participation, *Prosecutor v Lubanga,* Case No ICC-01/04-0l/06, Trial Chamber, 18 January 2008, paras 97–98; ICC, *Katanga* Decision on Modalities (n27) para 59 (the relevant finding was not considered by the Appeals Chamber in ICC, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber 11 of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial', *Prosecutor v Katanga and Ngudjolo,* Case No ICC-01/04-01/07 OA 11, Appeals Chamber, 16 July 2010).

([89]) STL, First Victim Status Decision (n59) para 96.

([90]) STL, First Victim Status Decision (n59) para 98.

([91]) STL, First Victim Status Decision (n59) para 101: 'After having conducted an individual assessment of the Applications, the Pre-Trial Judge finds that, in respect of those applications that meet the other criteria in Rule 86(B) of the Rules, there are no reasons to conclude, at this stage, that "the" applicants' participation in the proceedings would be prejudicial to, or inconsistent with, the rights of the accused to a fair and impartial trial.' See also STL, Second Victim Status Decision (n59) para 8; STL, Third Victim Status Decision (n59) para 7. The question was not analysed in the Fourth Victim Status Decision, as the applicants were denied status on other grounds, see STL, Fourth Victim Status Decision (n59) para 30.

([92]) STL, Decision on Defence Motion of 17 February 2012 for an Order to the Victims' Participation Unit to Refile its Submission inter partes and Inviting Submissions on Legal Issues Related to Applications for the Status of Victim Participating in the Proceedings, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 5 April 2012, para 34: 'Determining an applicant's status as VPP is a different question [from the question of fair trial rights applicable in proceedings], requiring the Pre-Trial Judge to apply Rule 86(B) of the Rules, having first heard the submissions on legal issues pursuant to Rule 86(C) of the Rules.'

([93]) ICC *Lubanga* Victims' Participation Decision (n88) para 104: 'Once the Trial Chamber has determined that the interests of a victim or group of victims are affected at a certain stage of the proceedings, the Trial Chamber will determine if participation in the manner requested is appropriate and consistent with the rights of the defence to a fair and expeditious trial.'

([94]) See (n81).

([95]) STL, First Victim Status Decision (n59) para 102(i).

([96]) It has been suggested that by virtue of this provision, the STL prohibits dual status. See eg Zappalà, 'The Rights of Victims v. the Rights of the Accused', (n26) 151, observing that 'another sensitive issue is the ability

of victims to appear as witnesses in the trial…at the Lebanon Tribunal, at least in general terms, it has been appropriately excluded'. However, the pre-trial judge has confirmed that that is not the case. See STL, Decision on the VPU's Access to Materials and the Modalities of Victims' Participation in Proceedings Before the Pre-Trial Judge, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 18 May 2012, 60–1: '[Rule] 50(0) of the Rules permits VPPs to give evidence if a Chamber decides that the interests of justice so require. The Rules therefore provide for the circumstance where a VPP—notwithstanding his capacity as a VPP—can be called to give evidence as a witness. This circumstance, where a VPP also appears as witnesses (so-called "dual status victims") generates distinct considerations…One consideration is that the participation of dual status victims may require tailored protective measures. It must be managed carefully in order to safeguard the rights of the accused to a fair and expeditious trial, as well as the interests of the Prosecution and the VPPs themselves. Should the situation of dual status victims arise, the applicable modalities shall be determined by the appropriate Chamber in due course.'

([97]) ICC, *Lubanga* Victim Participation Decision (n88) paras 133–134.

([98]) STL RPE r 86(C)(ii). The pre-trial judge confirmed this in the First Victim Status Decision, *proprio motu*, as none of the applicants in those cases had applied to represent themselves, see First Victim Status Decision (n59) para 112. The provisions of the ICC are set out less forcefully in art 68(3) of the ICC Statute, which provides that the views and concerns of victims 'may be presented by [their] legal representatives…where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence'. A pre-trial judge has interpreted the ICC provisions to mean that 'a victim's participation in the proceedings is not conditional upon him or her being assisted by a legal representative', see ICC, Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-Limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, *Prosecutor v Kony et al*, Case No ICC-02/04-01/05, Pre-Trial Chamber, 1 February 2007, para 10.

([99]) STL RPE rr 51(C)(i), 51(G)(i).

([100]) ICC RPE r 90(1); ICC Regulations reg 67.

([101]) ICC RPE r 90(2). See also ICC, Decision on Legal Representation (n98) para 12.

([102]) ICC, Decision on Legal Representation (n98) r 90(3).

([103]) See also STL, First Victim Status Decision (n59) paras 119–120; STL, Second Victim Status Decision (n59) para 15; STL, Third Victim Status Decision (n59) para 11.

([104]) STL, First Victim Status Decision (n59) para 121; STL, Second Victim Status Decision (n59) para 16; STL, Third Victim Status Decision (n59) para 12. See also, STL, Decision on Victim Modalities (n96) para 20.

([105]) Karim AA Khan and Daniella Rudy, 'The Right of the Civil Parties to Participate v the Right of the Accused to a Fair and Expeditious Trial: Challenges at the ECCC?' *Oxford Transitional Justice Research Working Paper Series* (2010) 2 <http://otjr.csls.ox.ac.uk/materials/papers/41/KhanandRudy_TheRightofCivilPartiesvTheRightoftheAccused.pdf> accessed 13 October 2013.

([106]) STL, Decision on Victim Modalities (n96) para 18.

([107]) STL, Decision on Victim Modalities (n96) note 16, referring to ICC, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *Prosecutor v Ruto, Kosgey and Sang,* Case No ICC-01/09-01/11, Pre-Trial Chamber, 5 August 2011, para 84: 'In particular, in order for the Chamber to grant them rights under the said legal basis, victims must justify that their personal interests are affected by the specific issue(s) under consideration.' See also, ICC *Lubanga* Victim Participation Decision (n88) paras 96–97.

([108]) ICC, *Lubanga* Victim Participation Decision (n88) para 96.

([109]) STL, First Victim Status Decision (n59) para 96.

([110]) STL, Decision on Victim Modalities (n96) para 19.

([111]) STL RPE r 87(A): 'Unless the Pre-Trial Judge or the Trial Chamber, *proprio motu* or at the request of either Party, determines any appropriate restriction in the interests of justice, a victim participating in the proceedings is entitled to receive documents filed by the Parties, in so far as they have been disclosed by one Party to the other as well as the file, excluding any confidential and *ex parte* material, handed over by the Pre-Trial Judge to the Trial Chamber before commencement of trial pursuant to Rule 95 (amended 30 October 2009).'

([112]) STL, Decision on Victim Modalities (n96) para 26.

([113]) STL, Decision on Victim Modalities (n96) para 29.

([114]) STL, Decision on Victim Modalities (n96) para 31.

([115]) STL, Decision on Victim Modalities (n96) para 50.

([116]) STL, Decision on Victim Modalities (n96) paras 73, 79.

([117]) STL, Decision on Victim Modalities (n96) para 4. The pre-trial judge makes a first determination on victim-participant status on a 'prima facie' basis, and this later has to be approved by Trial Chamber. See STL, Decision on Victim Modalities (n96) para 3.

([118]) STL, Response of the Legal Representative of Victims to the Ayyash and Badreddine Joint Request for a Variance of the Deadline Set for Re-Filing of the Defence Pre-Trial Briefs, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Victims Legal Representative, 7 August 2013.

([119]) STL, Public Redacted Version of the Submissions of the Legal Representative of Victims Pursuant to the 15 April 2013 Order of the Contempt Judge, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Victims Legal Representative, 30 May 2013. Making legal submissions on the matter of contempt, the legal representative suggests that '[i]nsofar as it is within the gift of the LRV to express a preference or make a recommendation in this regard, and mindful that no unnecessary delays should be caused, at this point, to the process for preparation for trial, the LRV would find it most opportune that the Contempt Judge order the Registrar to appoint an *amicus curiae* to investigate the matter'.

([120]) STL, Decision on the Legal Representative of Victims' First, Second and Third Motions for Protective Measures for Victims Participating in the Proceedings, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 19 December 2012.

([121]) STL, Decision on the Legal Representative of Victims' Resubmission of Eight Requests for Protective Measures (Confidentiality), *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 14 March 2013.

([122]) STL RPE r 143.

([123]) STL RPE r 147.

([124]) STL RPE rr 87(B) and 146(B)(ii).

([125]) STL RPE r 87(B).

([126]) STL RPE r 87(B).

([127]) STL RPE r 144(B).

([128]) STL RPE r 87(B).

([129]) ICTY, Judgment, *Prosecutor v Mrkšić and Šljivančanin*, Case No IT-95-13/1-A, Appeals Chamber, 5 May 2009, para 400. See also ICTY, Judgment, *Prosecutor v Hadžihasanović and Kubura*, Case No IT-01-47-A, Appeals Chambers, para 316.

([130]) UN Declaration (n6) principles 4, 8–13.

([131]) STL Statute (n1) art 25:

> (1.) The Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal.
> (2.) The Registrar shall transmit to the competent authorities of the State concerned the judgement finding the accused guilty of a crime that has caused harm to a victim.
> (3.) Based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not such victim had been identified as such by the Tribunal under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation.
> (4.) For the purposes of a claim made under paragraph 3 of this article, the judgement of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person.

([132]) ICC Statute (n41) art 75(2).

([133]) ICC RPE rr 94–7.

([134]) ICC RPE r 98(5).

([135]) ECCC Internal Rules r 23quinquies(1): '1. If an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties. Collective and moral reparations for the purpose of these Rules are measures that: a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and b) provide benefits to the Civil Parties which address this harm. These benefits shall not take the form of monetary payments to Civil Parties.'

([136]) Given the status of the Cambodian courts, this 'right' has little meaning and is rhetorical rather than substantial.

([137]) FIDH Report, 'Victims' Rights Before the Extraordinary Chamber in the Courts of Cambodia (ECCC) (n25) 7. By way of reparations, the ECCC in the *Duch* case included in the judgment the names of all Civil Parties and the names of their deceased relatives who had died as a result of the crimes committed by the accused. The Trial Chamber also ordered that all of the accused's statements of apology or acknowledgment of responsibility be compiled and published on the website of the ECCC. All other requests for reparations were rejected. See ECCC, Judgment, *Prosecutor v Duch,* Case No 001-18-07-2007-ECCC, Trial Chamber, 26 July 2010, paras 667–674. This was confirmed on appeal, see ECCC, Appeal Judgment, *Prosecutor v Duch*, Case No 001/18-07-2007-ECCC/SC, Supreme Court Chamber, 3 February 2012, para 717.

([138]) War Crimes Research Office Report (n31) 17.

([139]) STL press release, '"Don't Be a Victim Twice": Victim's Participation in STL Proceedings'(n28).

([140]) Antonio Cassese, Explanatory Memorandum to the STL's Rules of Procedure and Evidence (25 November 2010), explaining that victims are not full civil parties, as the main *raison d'être* of '*parties civiles*', namely their participation in criminal proceedings for the purpose of seeking compensation, is removed (para 15).

([141]) Mina Rauschenbach and Damien Scalia, 'Victims and International Criminal Justice: A Vexed Question?' (2008) 90 IRRC 450: '[t]he quest for truth is not…confined to the individual and his personal identity, but concerns also the community'.

([142]) It has been observed that '[c]oncerning a country like Lebanon, where many other political

assassinations, terrorist attacks and also war crimes, have been committed, it is somehow surprising that the scope of activity of the STL is so limited'. See Cécile Aptel, 'Some Innovations in the Statute of the Special Tribunal for Lebanon' (2007) 5 JICJ 1107, 1109.

([143]) Pena and Carayon, 'Is the ICC Making the Most of Victim Participation?' (n10) 11.

([144]) Collective representation may, for example, offer a way in which a potential conflict between victim-participant and victim-witness may be resolved. As a result of such representation, it 'could be assumed that the personal involvement of a victim does not reach such a level that his or her participation would be incompatible with the role of a witness'. Claus Kreß, 'Witnesses in Proceedings before the International Criminal Court: An Analysis in the light of Comparative Criminal Law' in Horst Fischer and others (eds), *International and National Prosecution of Crimes Under International Law: Current Developments* (Arno Spitz Verlag 2001) 309 ff, 320ff.

([145]) Dold and Yarwood 'Victim Participation at the ICC'(n16) 178.

([146]) Pena and Carayon 'Is the ICC Making the Most of Victim Participation?' (n10) 16.

([147]) Pena and Carayon 'Is the ICC Making the Most of Victim Participation?' (n10) 12.

([148]) Phuong N Pham, Patrick Vinck, Mychelle Balthazard et al, 'Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia' (2011) 3 J Hum Rts Practice 264, 264.

([149]) Kaoutzanis, 'Two Birds with One Stone' (n47) at 133.

([150]) Human Rights Watch, 'Commentary to the Second Preparatory Commission Meeting on the International Criminal Court, Article 15' (1999).

([151]) See eg ECCC, Co-Lawyers of Civil Parties' Investigative Request Concerning the Crime of Enforced Disappearance, *Prosecutor v Ieng et al,* Case No 002, Co-Lawyers for Civil Parties, 2 July 2009; ECCC, Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations, *Prosecutor v Ieng et al,* Case No 002, Co-Lawyers for Civil Parties, 23 July 2009; ECCC, Co-Lawyers for the Civil Parties' Fourth Investigative Request Concerning Forced Marriages and Sexually Related Crimes, *Prosecutor v Ieng et al,* Case No 002, Co-Lawyers for Civil Parties, 9 December 2009.

([152]) There is one final way in which individual healing may be limited by the victim participation regime. In contrast to other courts, the STL does not establish a clear victim protection regime. Bearing in mind that security issues continue to be a significant concern for victims involved in international proceedings, this may be considered to be a step backwards. See Aptel, 'Some Innovations in the Statute of the STL' (n142) at 1121.

([153]) See John RWD Jones and Miša Zgonec-Rožej, 'Rights of Suspects and Accused', Chapter 10.

([154]) STL, First Victim Status Decision (n59) para 102(iv).

([155]) ICC, *Lubanga* Victim Participation Decision (n88) para 116.

([156]) ECCC, Decision on Motion for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing, *Prosecutor v Duch*, Case No 001-E72/3, Trial Chamber, Dissenting Opinion of Judge Lavergne, 8 October 2009.

([157]) Antonio Cassese, Explanatory Memorandum to the STL's Rules of Procedure and Evidence (12 April 2012) para 19. The question was posed as to 'how to prevent victims from being too numerous and thereby "flooding" the Tribunal, making its proceedings cumbersome and slow, and at the same time impairing the balance that must exist between Prosecution and Defence?' In response to this question, the memorandum observes that: 'it was decided that, first, the notion of "victim" must be defined rather narrowly so as to include only those natural persons who have suffered material, physical or mental harm *as a direct result* of an attack within the jurisdiction of the Tribunal. Legal persons, as well as individuals who may have suffered

indirect harm, are thus excluded. Second, victims who wish to participate in proceedings must be screened by the Pre-Trial Judge before they can do so. He may (i) exclude persons whose status as a victim is doubtful; (ii) limit the number of victims who may participate in proceedings; or (iii) designate one legal representative to act on behalf of multiple victims.'

([158]) de Hemptinne 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon'(n29) 170. Cf Zappalà 'The Rights of Victims v. the Rights of the Accused' (n26) 155, arguing that '[t]he definition [of victim] is based on a strange misunderstanding of the role of victims in criminal proceedings; it unduly emphasizes the harm suffered (which, in addition, is left undefined), it is highly ambiguous and it creates conditions for endless debates. Such a definition, rather than contributing to clarifying the Statute which should have been the intention increases uncertainty regarding the procedural framework for victim participation.'

([159]) STL, First Victim Status Decision (n59) para 65.

([160]) Cassese, Explanatory Memorandum to the STL RPE (12 April 2012) (n157) para 20: 'As regards the stage during which participation by victims is allowed, [the RPE] permits victims to participate in proceedings only after confirmation of the indictment (ie after the close of the investigations, or at least after the bulk of the investigations has been completed). This procedure is consistent with the aims of (i) avoiding confusion that might somehow hamper the actions of the Prosecutor, and (ii) preventing possible delay in the proceedings.'

([161]) de Hemptinne 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon' (n29) 174.

([162]) Alexander Zahar and Göran Sluiter, *International Criminal Law* (New York: Oxford University Press 2008) 76.

([163]) de Hemptinne 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon' (n29) 174.

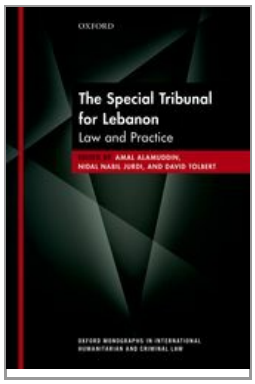
([164]) de Hemptinne 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon' (n29) 179.

([165]) Zappalà, 'The Rights of Victims v. the Rights of the Accused' (n26) 144.

([166]) Seth Mydans, 'In Khmer Rouge Trial, Victims Will Not Stand Idly By' *New York Times* (New York, 17 June 2008).

([167]) Cambodian Human Rights and Development Association, Victims Participation Before the Extraordinary Chambers in the Courts of Cambodia, Baseline Study of the Cambodian Human Rights and Development Association's Civil Party Scheme for Case 002, January 2013, 4 <http://www.cambodiatribunal.org/assets/pdf/reports/Victims-participation-before-ECCC-Baseline-Study-Jan-2013. pdf> accessed October 2013.

([168]) See eg Zappalà, 'The Rights of Victims v. the Rights of the Accused' (n26) 159: 'There is no doubt that the inclusion in the ICC Statute of victim participation in the proceedings was not the result of thorough reflection on the status and role of victims of international crimes in international law.' See also Victims Rights Working Group, 'The Importance of Victim Participation' (Submission to the Hague Working Group of the Assembly of States Parties, 8 July 2013) <http://www.vrwg.org/VRWG_DOC/2013_July_VRWG_HWG_ParticipationFINALrevised.pdf> accessed 13 October 2013: 'with no or little consideration given to the actual substance of victims' participation and how… it can be made more meaningful for victims'.



The Special Tribunal for Lebanon: Law and Practice

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Rights of Suspects and Accused

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[–] Abstract and Keywords

This chapter presents distinctive features of the Special Tribunal for Lebanon (STL) that may impinge upon the rights of the defendants. It sets out the STL's legal framework with regard to the rights of defendants as established by the International Covenant on Civil and Political Rights (ICCPR), and then examines how those rights have been interpreted and applied in practice. Special attention is given to decisions by the STL, which impact adversely on the rights of the defendants in contravention of the STL's legal framework.

Keywords: international criminal tribunal, Lebanon, defendants' rights, International Covenant on Civil and Political Rights

10.1 Introduction

While international criminal courts and tribunals always pay lip service in their statutes, rules of procedure, and evidence to the rights of suspects and accused, the experience

of defence counsel at these courts and tribunals has been more chequered. There have been occasions when it seems that those rights are more honoured in the breach than in the observance.

At the Special Tribunal for Lebanon ('STL' or 'Tribunal'), it is still early days. The first trial has not yet begun. It can safely be said that the STL's Statute[1] and Rules of Procedure and Evidence ('RPE' or 'Rules') contain adequate provision for the rights of suspects and accused persons. However there have been, and continue to be, areas of concern in practice from the defence perspective. To give but a few examples: the STL Appeals Chamber's ruling on the applicable law,[2] which needlessly took place before any defence counsel had even been assigned; the decision on trials *in absentia*,[3] which failed to address the issue of how the right to retrial would be exercised after the STL is dissolved; and the decisions on the legality of the tribunal,[4] which refused any review of Security Council action. These are just some of the problem areas.

(p.178) Moreover, perhaps more than any other international or hybrid tribunal, the STL is more vulnerable to charges of being a creature of politics. Even for hardened defence counsel who are accustomed to the political context in which the other international criminal courts and tribunals operate, *realpolitik* has sometimes never seemed so real as at the STL.

In this chapter, the authors first present distinctive features of the STL that may impinge upon the rights of the defendants. They then set out the STL's legal framework with regard to the rights of defendants as established by the International Covenant on Civil and Political Rights (ICCPR),[5] before examining how those rights have been interpreted and applied in practice. Special emphasis will be given to decisions by the STL which impact adversely on the rights of the defendants in contravention of the STL's legal framework.

10.2 Defence Rights and the STL's Distinctive Features

The provisions protecting the rights of suspects and accused persons at international criminal courts and tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC), the hybrid tribunals such as the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Court of Cambodia (ECCC), have generally been modelled on the international human rights standards designed to protect defendants in criminal proceedings.[6] The nominal protection of the defendants' rights at the STL is similar to the protection provided for at these international criminal courts and tribunals.

There is, however, at least one striking difference: the statutes of the ad hoc tribunals and the ICC require that the accused be present at trial and do not provide for trials *in absentia*.[7] The requirement that the defendant be present at his trial is a corollary of adversarial proceedings, where the nature of the proceedings is such that both parties need to be present. By contrast, in inquisitorial proceedings of the continental, civil law tradition, trials *in absentia* are unexceptional.

There are several other features which distinguish the STL from the other international criminal courts and tribunals, some of which may impinge, at least indirectly, on the rights of suspects and accused.

(p.179) First, the STL was set up to deal with a single event, namely the assassination of former Lebanese Prime Minister Rafiq Hariri on 14 February 2005, in a blast that also killed twenty-two others and injured many more. In contrast to the other international criminal tribunals which were set up to try a whole host of international crimes committed in a region at a certain time without reference to a particular victim or event, the STL does not have competence to prosecute and try any other alleged terrorist acts or crimes under international law committed in Lebanon.[8]

Secondly, the STL is competent only over certain crimes, under Lebanese domestic law, notably terrorism. It may of course be contended that the Hariri killing was not an act of terrorism but an act of political assassination, not terrorist in nature. In any event, all other international criminal courts and tribunals, by contrast, have jurisdiction over the core crimes under international law: genocide, crimes against humanity, and war crimes.[9]

Thirdly, there is a significant difference in the determination of the existence of a threat to peace and security—a precondition for the adoption of measures under Chapter VII of the UN Charter[10] by the Security Council—between the situations in the former Yugoslavia and Rwanda, on the one hand, and the situation in Lebanon, on the other. While there were on-going armed conflicts in the former Yugoslavia and Rwanda, a single terrorist act without any cross-border effects, in the case of Lebanon, was determined by the Security Council to have constituted a threat to international peace and security.[11]

Fourthly, the method by which the STL was set up was highly unusual and indeed controversial. Whilst it was originally envisaged that the STL would be established by an agreement between Lebanon and the United Nations, it proved impossible to ratify the draft Agreement through the proper Lebanese constitutional process, given the extent to which the proposal for the STL split the various political factions **(p.180)** in Lebanon. So instead the United Nations Security Council brought the Agreement into force by a Chapter VII resolution. It was simply unprecedented to use the Security Council's Chapter VII powers in this way—to bypass a country's democratic process.

Fifthly, the STL emulates the inquisitorial model of criminal proceedings to a much greater extent than the ICTY, ICTR, and SCSL, in particular through the institution of a pre-trial judge, who deals with the pre-trial phase and who is responsible for passing a dossier, or case file, to the Trial Chamber, the participation of victims in the proceedings, and a rule which provides that the judges start off the questioning of the witnesses rather than the parties.[12]

Sixthly, the STL has an institutionalized Defence Office, which is independent of the Registrar and which differs in other key respects from the Defence Office or other bodies entrusted with defence matters at the other international criminal courts and tribunals.

In the course of this chapter, the authors examine whether, and if so to what extent, these institutional peculiarities impact upon the rights of the defence.

10.3 The STL's Legal Framework

There are numerous provisions in the STL's Statute and its RPE relating to the rights of suspects and accused. The provisions explicitly regulating the rights of defendants are set out in Part III of the STL Statute, where the rights of the victims are also to be found. The rights of defendants are contained in two main provisions, both of which set out the fundamental fair trial guarantees: article 15 and article 16 of the STL Statute.

Article 15 deals with the rights of suspects during an investigation. Suspects have to be informed of these rights by the Prosecutor prior to questioning, in a language they speak and understand. Article 16 deals with the rights of the accused. The rights of suspects during an investigation are further elaborated in rules 65 and 66 of the STL's RPE, while rule 69 of the same simply provides that, '[a]n accused shall enjoy the rights enshrined in Article 16 of the Statute, as well as, *mutatis mutandis*, the rights conferred on suspects by Rules 65 and 66'.

The difference between an accused and a suspect is set out in the definitional part of the STL RPE, namely rule 2. A suspect is '[a] person who the Prosecutor has reasonable grounds to believe has committed a crime'.[13] Once a person is formally charged with an offence, then he is referred to as 'an accused', rather than as a suspect. Thus an accused is '[a] person against whom one or more counts in an indictment have been confirmed in accordance with Article 18(1) of the Statute and Rule 68(I)(iii)'.[14]

Given that in all likelihood the only trial(s) before the STL will be held *in absentia*, two other definitions in rule 2 of the RPE are relevant in this context. The **(p.181)** 'defence' is defined as '[t]he accused/suspect and/or Defence counsel'. 'Defence counsel' is defined as '[a] person representing or eligible to represent a suspect or accused pursuant to Rules 58 and 59 of the Rules'. Thus, while a defence counsel who is assigned to represent an accused *in absentia* falls within the definition of 'the defence', for the purposes of the Rules, he or she is obviously not 'an accused'. Thus where the Rules explicitly refer to 'an accused', for example in rule 91(I)(i), (ii), and (iii), those are matters on which defence counsel evidently cannot speak on the accused's behalf.[15]

Where victims' personal interests are affected, the STL allows their views and concerns to be presented and considered during the proceedings.[16] However, a request to participate in the proceedings by a person claiming to be a victim of a crime within the Tribunal's jurisdiction may be denied by a pre-trial judge if the applicant's proposed participation would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Other factors that may affect the accused's rights must also be taken into account, such as whether the proposed participation would cause unnecessary delay or inefficiency in the proceedings.[17]

10.3.1 The right to equality before the STL

The right to equality before the courts is a subset of the general right to equality and

derives from article 14(1) of the ICCPR.[18] Article 16 of the STL Statute requires that all accused be equal before the Tribunal.

10.3.2 The right of the accused to be tried by a competent, independent, and impartial tribunal established by law

The right of the accused to be tried by a competent, independent, and impartial court established by law is enshrined in article 14(1) of the ICCPR.[19] The requirement that the judges of the STL be independent and impartial is enshrined in article 9 of the STL Statute. This article provides that the judges must be of high moral character, impartiality, and integrity, with extensive judicial experience. It further provides that judges must be independent in the performance of their functions and must not accept or seek instructions from any government or any **(p.182)** other source. As regards judges' competence, in the overall composition of the chambers, account must be taken of the established competence of judges in criminal law and procedure and international law.

There are a number of other mechanisms designed to ensure the judges' impartiality and independence. The mandate of the judges is limited to a three-year period, although the judges are eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.[20] Judges enjoy privileges and immunities while in Lebanon in order to prevent undue interference by the Lebanese authorities.[21] The Rules of Procedure and Evidence provide for mechanisms for the disqualification of a judge and may allow a judge to be excused from the exercise of a function on his or her own initiative.

STL judges are appointed directly by the UN Secretary-General.[22] This contrasts with other tribunals where the selection of judges is bestowed upon a representative body. The UN General Assembly thus elects the ICTY and ICTR judges and the Assembly of States Parties to the ICC Statute selects the ICC judges. Appointment by the UN Secretary-General, provided it follows a stringent selection process, including interviews, is arguably better geared to selecting the best candidates than processes allowing an element of 'horse-trading' between states. It has also been used for the election of judges at other hybrid tribunals, including the SCSL and ECCC. The Lebanese Government has no official decision-making power in the appointment of the judges, not even of the Lebanese judges. However, article 2 of the Agreement Establishing the STL provides that the Secretary-General and the Lebanese Government consult on the appointment of judges. The Lebanese Government also draws a list of candidates for the appointment of Lebanese judges.[23]

10.3.3 Double jeopardy (*non bis in idem*)

The principle of double jeopardy or *non bis in idem* is enshrined in article 14(7) of the ICCPR, which requires that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.[24]

The STL Statute, in article 5, deals with *non bis in idem* as a general rule and an exception.

The general rule is embodied in the prohibition on national courts **(p.183)** trying a person in respect of acts for which he or she has already been tried before the STL.[25] The exception consists in the provision whereby a person who has been tried by national courts may be subsequently tried before the STL for the same acts if the national court proceedings were not impartial or independent, were designed to shield the accused from criminal responsibility for crimes within the jurisdiction of the Tribunal, or the case was not diligently prosecuted.[26]

In addition, rule 23(1) of the RPE provides that no person shall be tried before the Tribunal with respect to conduct that formed the basis of charges of which the person has been convicted or acquitted by the Tribunal. According to rule 23(2) of the RPE, when the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any state for a crime for which that person has already been tried by the Tribunal, at the President's request, the Trial Chamber shall issue a reasoned request that the court permanently discontinue its proceedings.

10.3.4 The principle of legality

The principle of legality is enshrined in article 15 of the ICCPR, which provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.[27] Notwithstanding this provision, a person may be tried and punished for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.[28] Other international and regional instruments also enshrine the principle of legality.[29]

The STL, unlike the ICC, does not set out the principle of legality in its Statute.[30] Article 2 of the STL Statute defines as the applicable criminal law provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations, and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy.[31] The forms of individual criminal responsibility are detailed in article 3 of the STL Statute.

(p.184) 10.3.5 The presumption of innocence

The presumption of innocence is a universal principle of criminal law, although the precise meaning and implications of the phase may vary from one legal system to another. It is enshrined in article 14(2) of the ICCPR and in many other international and regional instruments.[32] Generally, the presumption of innocence means that the person charged with a crime must be treated as being innocent until proved guilty—in other words, the prosecution bears the burden of proving guilt and the accused does not have to prove his innocence.

The STL Statute, as well as other human rights instruments and statutes of other international criminal courts,[33] seemingly limits this right to the 'accused'.[34] However, it

has been argued that the presumption of innocence should also extend to the investigative phase.[35] The ICC Statute affords this right to 'everyone', which suggests that suspects also enjoy it.[36]

The presumption of innocence, as set out in the STL Statute, relates to both the burden of proof and the standard of proof. Accordingly, article 16(3) of the STL Statute specifies that the burden of proof is on the Prosecutor, who must prove the guilt of the accused. As regards the standard of proof, the relevant chamber may convict an accused only if the Prosecutor proves the guilt of the accused beyond a reasonable doubt. Conversely, if the court has a reasonable doubt that the defendant committed the crime in question, the accused must be acquitted (*in dubio pro reo*).

The presumption of innocence is also reflected in the privilege against self-incrimination and the right to silence, as explained later.

10.3.6 Privilege against self-incrimination and the right to silence

The right not to be compelled to testify against oneself and the right not to confess guilt are set out in article 14(3) of the ICCPR.[37] Article 15 of the STL Statute provides that a suspect who is to be questioned by the Prosecutor shall not be compelled to incriminate himself or herself or to confess guilt. The suspect has the right to remain silent, without such silence being considered in the determination **(p.185)** of guilt or innocence, and to be cautioned that any statement that he or she makes shall be recorded and may be used in evidence.[38] The suspect has to be informed of these rights prior to questioning, in a language he or she speaks and understands. The accused enjoys the same rights and must not be compelled to testify against himself or herself or to confess guilt.[39]

10.3.7 The right to be informed of the allegations and charges that the accused will have to meet

The right to be informed in detail of the nature and cause of the charge against a person, in a language that he or she understands, is provided for in article 14(3)(a) of the ICCPR.[40] An accused has to be informed promptly and in detail, in a language that he or she understands, of the nature and cause of the charge against him or her.[41] A suspect, who has not yet been charged with any crimes, has a right to be informed, prior to questioning by the Prosecutor, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the STL.[42]

10.3.8 The right to defend oneself personally or through counsel

The right to defend oneself personally or through counsel is enshrined in article 14(3)(d) of the ICCPR.[43] At the STL, both the suspect and the accused have the right to be represented by defence counsel.[44] The suspect has the right to be questioned in the presence of counsel unless he or she has voluntarily and expressly waived the right to counsel and, in case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease and shall only resume when counsel for the suspect is present.[45] The accused has the right to decline the proffered legal assistance and to defend himself or herself in person.[46]

In order to be considered qualified to represent a suspect or accused, counsel must satisfy the conditions prescribed in rule 58(A) of the RPE. To be included in the list of counsel, which is maintained by the head of the Defence Office, counsel must possess extensive competence in criminal law and/or international law or other relevant competence.[47] In the performance of their duties, counsel are bound **(p.186)** by the Code of Professional Conduct for Counsel and the codes of practice and ethics governing their profession as well as, if applicable, the Directive on the Appointment and Assignment of Defence Counsel.[48] They are also obliged to undertake any mandatory continuing professional training as directed by the Head of the Defence Office.[49]

While in Lebanon, the Lebanese Government must ensure that the counsel of a suspect or an accused who has been admitted as such by the STL shall not be subjected to any measures that may affect the free and independent exercise of his or her functions.[50] Counsel also enjoy immunity from personal arrest or detention and from seizure of personal baggage, the inviolability of all documents relating to the exercise of his or her functions as counsel of a suspect or accused, immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as a counsel,[51] and immunity from any immigration restrictions during his or her stay in Lebanon, as well as during his or her journeys to and from the STL.[52]

10.3.9 The right to choice of counsel and the right to free legal assistance

The suspect's and accused's right to counsel of his or her choosing and the right to free legal assistance derives from article 14(3)(d) of the ICCPR.[53] The STL grants the suspect and the accused the right to have legal assistance of his or her own choosing, of which he or she has to be informed in case he or she does not have legal assistance.[54]

A suspect or an accused has the right to be represented by a counsel of his or her own choosing. Whenever the interest of justice so demands, the head of the Defence Office can assign a counsel to a suspect or accused who lacks the means to remunerate such counsel. Such assignments are carried out in accordance with the procedure established in the Directive on the Assignment of Defence Counsel.[55] This directive also applies to any person detained under the authority of the Tribunal.[56]

(p.187) In the case of a trial *in absentia*, the STL must ensure that the accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal.[57] Whenever the accused refuses or fails to appoint a defence counsel, Counsel is appointed by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.[58] This is, of course, what has happened in the *Ayyash et al* case.

10.3.10 The right to an interpreter

Defendants in criminal proceedings who do not understand or speak the language used by the court are generally entitled to have the free assistance of an interpreter. The right to an interpreter is stipulated in article 14(3)(f) of the ICCPR.[59] This right should be

available at all stages of the criminal proceedings. Accordingly, at the STL, a suspect who is to be questioned by the Prosecutor has the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used for questioning.[60] Similarly, an accused is entitled to the free assistance of an interpreter if he or she cannot understand or speak any of the Tribunal's official languages (English, French, and Arabic).[61]

10.3.11 The right to the preparation of a defence

The right to the preparation of a defence is stipulated in article 14(3)(b) of the ICCPR.[62] The STL Statute recognizes this right as being one of the minimum guarantees to which an accused is entitled, in full equality. Specifically, it provides in article 16(4)(b) that an accused is entitled to have adequate time and facilities for the preparation of his or her defence and to communicate without hindrance with counsel of his or her own choosing. This right is fundamental to the principle of the equality of arms, which is an essential element of the right to a fair trial, as further explained later.

The meaning of what adequate time is depends on the circumstances of each case. The facilities, however, must include access to all of the documents and other evidence that the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel.[63] The accused has a right to communicate freely with counsel, which denotes the ability of counsel and the accused to communicate with each other in conditions giving full respect for the confidentiality of their **(p.188)** communications.[64] Importantly, counsel should be able to represent their clients without any restrictions, influence, pressure, or undue interference from any quarter.[65] Article 16(5) of the STL Statute entitles the accused to make statements in court at any stage of the proceedings, provided such statements are relevant to the case at issue.[66]

The right to the preparation of a defence is related to other rights, including the right to be informed of the charges, the right to defend oneself personally or through counsel, the right to choice of counsel and the right to free legal assistance, the right to the free assistance of an interpreter, the right to examine witnesses against him or her and to call witnesses under equal conditions, and the right of the accused to disclosure of, and access to, the Prosecution's evidence.

10.3.12 The right to a fair and public hearing

The right to a fair and public hearing is stipulated in article 14(1) of the ICCPR.[67] The right to a fair trial requires that the entire criminal process be conducted in accordance with the notion of fairness. Article 16(2) of the STL Statute provides that the accused is entitled to a fair and public hearing. This right, however, is subject to measures which the STL may order for the protection of victims and witnesses.

In addition to the general requirements set out in article 16(2), the STL Statute further elaborates in article 16(4) the requirements of a fair trial with regard to the determination of any criminal charges. However, it should be pointed out that article 16(4) only enumerates *minimum* guarantees that need to be fulfilled to ensure a fair trial. Their

observance therefore is not always sufficient to guarantee the fairness of a trial as required in article 16(2). Thus, the right to a fair trial depends on the entire conduct of the trial rather than the mere observance of individual fair trial guarantees.[68]

One of the elements of the broader concept of a fair trial is the principle of the equality of arms. This requires that each party be provided with a reasonable opportunity to present its case under conditions which do not place him or her at a substantial disadvantage vis-à-vis the opponent.[69] Thus, a judicial body must ensure that neither party is put at a disadvantage when presenting its case.[70] According to the ICTY and ICTR's jurisprudence, equality of arms does not **(p.189)** imply ensuring parity of resources between the parties, such as material equality of financial or personal resources.[71]

An important element of the right to a fair trial and the principle of the equality of arms is the obligation of the Prosecutor to make available to the accused all the evidence that is material to the preparation of the defence. Accordingly, article 16(4)(f) of the STL Statute lists among the minimum fair trial guarantees for the accused the accused's right to examine all evidence to be used against him or her during the trial in accordance with the STL's RPE. The Prosecutor's disclosure obligations, which are detailed in section 7 of the RPE, include the disclosure of any exculpatory material.[72]

As regards the right to a public hearing, which allows for public scrutiny of the judicial proceedings in order to ensure that the trial is fair and that the rights of the accused are fully respected, the RPE provides for some exceptions to the publicity of the trial which are in line with international standards.[73] In accordance with rule 137 of the RPE, closed sessions may be ordered by the Trial Chamber for reasons of public order, morality, security, a state's national security interests, non-disclosure of the identity of a victim or witness, or in the interests of justice generally.

10.3.13 The right to examine witnesses

The right to examine witnesses, which is expressed in article 14(3)(e) of the ICCPR,[74] is an inherent element of the principle of equality of arms. Article 16(4)(e) of the STL Statute entitles an accused to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf, under the same conditions as witnesses against him or her. 'This right is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witness as are available to the prosecution.'[75] The right to examine witnesses is related to the right to the preparation of a defence.

10.3.14 The right to be tried without undue delay

The right to a trial without undue delay as stipulated in article 14(3)(c) of the ICCPR[76] is incorporated in article 16(4)(c) of the STL Statute. This right refers not only to the time by which the trial should commence but also the time by which it **(p.190)** should end and judgment be rendered.[77] Thus, it must be complied with at all stages of the criminal proceedings, both in first instance and on appeal.[78]

10.3.15 The right to be present during the trial

The right of an accused to be tried in his or her presence, which derives from article 14(3)(d) of the ICCPR,[79] is guaranteed in article 16(4)(d) of the STL Statute. However, the STL Statute expressly provides that the STL may, under certain conditions, conduct proceedings in the absence of the accused. According to the UN Human Rights Committee, trials *in absentia* are permissible only exceptionally and for justified reasons. Where such trials are conducted, the UN Human Rights Committee considers that 'strict observance of the rights of the defence is all the more necessary'.[80]

Article 22 of the STL Statute allows trials *in absentia* if the accused waived his or her right to be present, has not been handed over to the Tribunal by the state authorities concerned, or has absconded or otherwise cannot be found. The accused's right to be present at trial may also be restricted by the Trial Chamber's order to remove the accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning that such conduct may result in the removal of the accused from the courtroom.

10.3.16 The right of appeal

Article 14(5) of the ICCPR provides that everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law.[81] Accordingly, article 26 of the STL Statute grants a person convicted by the Trial Chamber the right to appeal his or her conviction. Similarly to the ICTY and ICTR, the Appeals Chamber may hear appeals from persons convicted or from the Prosecutor on the ground of an error on a question of law invalidating the decision or an error of fact that has occasioned a miscarriage of justice.[82] The ICC Statute includes among grounds of appeal not only errors of law, errors of fact, and procedural errors, but also any other ground that affects the fairness or reliability of the proceedings or decisions.[83] In accordance with the practice of other international criminal courts, the STL Appeals Chamber may **(p.191)** affirm, reverse, or revise the judgment and/or sentence and, if it is the interests of justice, it may order that the accused be retried by a Trial Chamber.[84]

10.4 The Defence Office

At the STL, the institutional responsibility for protecting the rights of the defence is invested in an organ of the STL, namely the Defence Office. This office is envisaged as a fourth organ of the Tribunal, headed by the Principal Defender.[85] The Defence Office is independent from other organs of the STL, namely the Chambers, the Prosecutor, and the Registry, and it receives no instructions from them or from any entities or oganizations. An independent Head of the Defence Office, responsible for the appointment of the office staff and the drawing up of a list of defence counsel, is appointed by the Secretary-General in consultation with the President of the Tribunal.[86]

The STL is the first international criminal tribunal to establish a defence office as a separate organ of the court. While the SCSL introduced the concept of a defence office, headed by the Principal Defender, which had not existed at the ICTY or ICTR, the SCSL Defence Office is not in itself an independent organ of the SCSL but is within another organ of the court, the Registry, albeit that the SCSL Defence Office enjoys a high degree

of autonomy within the Registry.[87] At the ICTY and ICTR, administrative bodies within the Registry deal with the defence, notably on legal aid issues, but neither has a permanent institution within the court such as the STL Defence Office. Again, in contrast to the ICTY and ICTR, the ICC created the Office of Public Counsel for the Defence (OPCD).[88] The OPCD, unlike the STL Defence Office, falls within the remit of the Registry, but this is solely for administrative purposes and it otherwise functions as a wholly independent office.[89] At the ECCC, a Defence Support Section was created to ensure fair trials through effective representation of the accused. Although the Defence Support Section was established by the Office of Administration, it is autonomous with regard to substantive defence matters. The Defence Support Section is responsible for providing indigent accused with a list of lawyers who can defend them and for providing legal and administrative support to lawyers assigned to work on the cases.[90]

The establishment of an independent and autonomous defence office at the STL is intended to reinforce the principle of the equality of arms.[91] The Defence Office **(p.192)** has been put on a notional equal footing with the Office of the Prosecutor, at least for certain purposes but not in terms of the means and resources available for their work. For example, the head of the Defence Office, for the purposes connected with pre-trial, trial, and appellate proceedings, enjoys equal status with the Prosecutor in respect of rights of audience and negotiations *inter partes*.[92] The head of the Defence Office has rights of audience in relation to matters of general interest to defence teams, the fairness of the proceedings, or the rights of a suspect or accused.[93] Like the Prosecutor, the head of the Defence may seek cooperation from any states, entity, or person, as well as the Lebanese authorities to provide the defence with relevant information and assistance in conducting investigations.[94]

The Defence Office's mandate to protect the rights of the defence includes providing support and assistance to defence counsel and to the persons entitled to legal assistance including, where appropriate, by providing legal research, collection of evidence and advice, and appearing before the pre-trial judge or a chamber in respect of specific issues.[95] However, the Defence Office does not act before the STL as defence counsel and therefore does not defend the interests and rights of specific suspects or accused before the court. The Defence Office appoints defence counsel and members of their team and provides assistance to them.[96] The Defence Office, however, takes no instructions from suspects or accused and is not involved in countering the factual allegations against them.[97]

It remains to be seen whether the STL Defence Office, as an enhanced version of the defence offices that existed at the other international criminal tribunals, will succeed in reducing the institutional inequality of arms between the prosecution and the defence which appears to be endemic at the other international criminal tribunals. So far, the Defence Office has excelled both in defending the institution of the defence and ensuring that defence teams for the accused are adequately resourced and supported.

10.5 The Rights of Suspects and Accused in Practice

The foregoing sets out the normative position regarding the rights of suspects and accused in the STL's legal provisions. What follows is a review of how those **(p.193)** rights have been treated in practice, in the STL's case law on a number of important topics in this preliminary pre-trial phase.[98]

10.5.1 The definition of terrorism under the STL

Article 2(a) of the STL Statute gives the Tribunal jurisdiction over 'acts of terrorism' as defined in the Lebanese Criminal Code. Prior to the assignment of counsel to represent the suspects *in absentia* and following a rule amendment specifically designed to allow for this unusual procedure, the pre-trial judge submitted a preliminary question to the Appeals Chamber seeking clarification of the definition of terrorist acts in relation to international law.[99] In its interlocutory decision of 16 February 2011, while acknowledging that it could not apply international law directly to defining crimes within the STL Statute, the Appeals Chamber nonetheless used this law to interpret the meaning of the relevant provisions of Lebanese criminal law.[100] According to the Appeals Chamber, international law can provide guidance to the Tribunal's interpretation of the Lebanese Criminal Code and thus help resolve any ambiguities.[101]

In its decision, which has been widely criticized,[102] the Appeals Chamber determined that a crime of 'international terrorism' was recognized under customary international law. It then defined this crime as consisting of: (a) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, or arson) or threatening such an act; (b) with the intent to spread fear among the population (which would generally entail the creation of public danger), or directly or indirectly to coerce a national or international authority to take some action, or to refrain from taking it; and (c) the involvement of a transnational element in the act.[103]

The Appeals Chamber's decision is problematic for a number of reasons, chief among which is that it expands the Tribunal's applicable law to include customary international law, contrary to article 2(a) of the STL Statute, which refers exclusively to 'the provisions of the Lebanese Criminal Code' as the applicable criminal law. The Appeals Chamber arguably interpreted Lebanese law in such as way as to **(p.194)** enable it to find and define a crime of international terrorism under customary international law.[104] The Appeals Chamber's judicial creativity, which is effectively law making,[105] raises doubts about the conformity of this decision with the principle of legality and the right of the accused to be protected against retroactive criminal law.[106]

In this regard, the Appeals Chamber's interpretation of Lebanese criminal law is problematic because it disregards or retracts two related elements of the definition of terrorism normally applicable under Lebanese criminal law. The Appeals Chamber's definition discards the restrictive list of means by which a crime of terrorism may be legally constituted under Lebanese law.[107] Consequently, it removes an element of the *mens rea* required under Lebanese law, namely proof of an awareness that the act would be committed using one of these means.[108] Arguably, none of the defendants could have had notice of a definition of acts of terrorism, which had not existed before the Appeals

Chamber's decision defining it.[109]

From the procedural perspective, the Appeals Chamber's decision is also problematic because it was adopted before a trial at the STL had even started, before any defendant had appeared before the tribunal,[110] in the absence of a suitably adversarial procedure, and without any right of appeal.[111] The Appeals Chamber **(p.195)** was authorized to adopt this decision only after the judges of the STL, sitting in plenary session, amended the Tribunal's RPE granting the Appeals Chamber the power to exercise an advisory function regarding preliminary issues placed before that chamber by the pre-trial judge.[112] In this respect, the process constituted judicial legislation in two senses: the judges first gave themselves the power to legislate—a power not given to them by the Statute—and then legislated. Once appointed,[113] defence counsel assigned to the accused *in absentia* requested the Appeals Chamber to reconsider its decision.[114] The Appeals Chamber, however, deciding in *sua causa*, dismissed the defence challenges because it considered that the defence had failed to show that the accused suffered an injustice from the contested decision.[115]

10.5.2 Trials *in absentia* and the right to a retrial

Article 22 of the STL Statute marks a clear departure from the Statutes of the ICC, ICTY, ICTR, SCSL, or ECCC, in that a trial is possible without the accused being present. The issue of trials in absence are discussed in more detail elsewhere in this book.[116] However, it is important to point out in this chapter the main concerns regarding the trials in *absentia* and the right to a retrial from the perspective of the rights of defendants.

Although both STL Trial and Appeals Chambers have considered that the rights of the accused could be effectively guaranteed in the context of a trial *in absentia*,[117] in particular considering the accused's right to a retrial,[118] defence counsels' daily practice has shown that the absence of the accused significantly affects their ability **(p.196)** to conduct an effective defence and therefore the accused's right to prepare its defence.[119]

A trial conducted in the absence of the accused deprives the defence of the accused's personal testimony and knowledge of the case and therefore necessarily reduces the amount of evidence potentially available to the defence. Indeed, the accused is generally the primary source for providing both some contrary evidence himself in terms of his own statements given to counsel and documentary evidence he can produce. Alternatively, the accused is usually able to direct counsel to witnesses who could potentially support the accused's position or other documents not in his possession but which could be useful for his case. As *Jordash and Parker* recalled, 'however important the work of the professional lawyer it can never be a substitute; the armaments of a skilled defence advocate will always fall short without the ammunition supplied by an accused'.[120]

Trials *in absentia* raise further ethical problems for defence counsel deriving from the

fact of not being able to take instructions from the accused. Instructions are generally considered as binding decisions made by an accused towards his counsel relating to his case. These instructions may relate to all aspects of the case, but principally involve deciding upon (i) the objectives of representation; (ii) whether to enter a plea of guilt; (iii) whether to testify; (iv) whether to appeal; or (v) accepting a plea agreement.[121]

The STL Statute and RPE in principle guarantee to any person tried in their absence the right to a retrial once they are arrested.[122] From the perspective of the rights of defendants, the principal deficit—both in the STL's legal instruments and in its case-law—is the failure anywhere to spell out how a person convicted in their absence will be able to exercise their right of retrial before the STL once the STL's mandate has expired. There is no reason for not clarifying this issue, either by the STL, or by the United Nations amending the STL Statute, all the more so, now that the problem has been specifically raised in the defence motions contesting the decision to hold a trial *in absentia*.[123]

It is also not entirely clear that a person convicted in his absence by the STL will be granted a retrial as of right, since STL rule 109(E)(ii) only states that he may 'request a retrial'. Nor is it clear whether that trial will, or should be, before a new panel of judges and whether it will be a complete trial *de novo* or whether, for **(p.197)** example, transcripts from the trial in absence could be introduced in the retrial, to the prejudice of the accused.

10.5.3 The legality of the STL

The manner in which the STL was established has been contested as being contrary to the accused's right to be tried by a court established by law. It had originally been intended that the STL would be created by an agreement between Lebanon and the UN, as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia had been. The Lebanese Parliament, however, did not ratify the draft agreement signed in 2007 by the representatives of the Lebanese Government and the UN. Consequently, at the request of the Lebanese Prime Minister, the Security Council, acting under Chapter VII of the UN Charter, adopted resolution 1757 (2007), which brought the provisions of the agreement and thus the STL's Statute into force.[124]

Counsel for the four accused submitted separate motions challenging the legality of the STL's establishment arguing, among other things, that the Tribunal was set up illegally, that the Security Council exceeded its powers when it created the STL, and that the STL cannot guarantee the fair trial rights of the accused.[125] Having rejected its competence to judicially review Security Council Resolution 1757 (2007),[126] the Trial Chamber held that the STL was established by law because: (a) it had been created by the UN Security Council, which is a body having the power to establish a criminal tribunal; and (b) the STL Statute and RPE provided the four accused with all the necessary fair trial rights as required by international human rights law.[127]

Defence counsel appealed. The Appeals Chamber dismissed the defence appeals[128] and affirmed the Trial Chamber's decision that the STL was legally **(p.198)** established by Security Council Resolution 1757 (2007).[129] The Appeals Chamber held, Judge

Baragwanath dissenting, that the Trial Chamber was correct in finding that it lacked the authority to review Security Council Resolution 1757 (2007).[130] The Appeals Chamber disapproved of the Trial Chamber's consideration of defence arguments challenging the legality of the STL, including the argument that the STL had not been 'established by law', and found that the Trial Chamber's human rights analysis, albeit limited, constituted 'an error'.[131]

The highly restrictive, even antediluvian, approach adopted by the Appeals Chamber departs from the evolving practice of various international or regional judicial bodies,[132] which affirmed their competence to review, directly or indirectly, the lawfulness of Security Council resolutions.[133] It runs directly counter to the historic *Tadić* jurisdiction decision of the Appeals Chamber of the ICTY, where the Appeals Chamber reviewed the legality of its own creation—applying the principle known as *compétence de la compétence*—and thus reviewed, incidentally, the legality of the resolution establishing the ICTY.[134] The Appeals Chamber's approach in *Tadić* was followed by the Appeals Chamber of the ICTR in the *Kanyabashi* case[135] and by the Appeals Chamber of the SCSL in the *Kallon* case.[136] The STL Appeals Chamber did not find the reasoning of the ICTY Appeals Chamber in *Tadić* persuasive[137] although, astonishingly, it had itself previously approved it in its own decision in the *El Sayed* case two years earlier.[138]

It is arguable, to say the least, that in order to ensure the right of the accused to be tried by a court established by law, the STL was obliged to engage in a review of the **(p.199)** lawfulness of Security Council Resolution 1757 (2007) and to consider the merits of the defence challenges, including that the STL was established *ultra vires* the Security Council's powers under the UN Charter. On this point, Judge Baragwanath's dissenting opinion that the right of the accused to a fair trial requires a review of the lawfulness of the STL is considerably more persuasive than the majority view.[139] Having engaged in a (limited) judicial review of this nature—which did not, however, engage with the weightiest of the defence arguments, which was that the *procès-verbaux* of the Security Council debates before the adoption of Resolution 1757 themselves revealed the complained-of abuse of power—Judge Baragwanath dismissed the defence challenges and ruled that the STL had been lawfully established.[140]

10.5.4 Cooperation by the Lebanese authorities with the defence

Under the Agreement Establishing the STL, Lebanon, alone among states, is obliged to cooperate with all organs of the STL, particularly with the prosecution and the defence, at all stages of the proceedings.[141] Accordingly, Lebanon is obliged to comply with any request for assistance, without delay, and in accordance with the timeframe specified in the request.[142] If the Lebanese authorities fail to comply with the request within thirty days of notification of the request to the Lebanese authorities, or such longer delay as is provided in the request, the pre-trial judge or a chamber, as appropriate, upon the parties request, may issue an order to the Lebanese authorities to compel the requested assistance.[143]

The Prosecutor and the head of the Defence Office, the latter at the request of the

defence, are both authorised to request the Lebanese authorities to question witnesses, search premises, seize documents and other potential evidence, or undertake any other investigative measures in Lebanon or request permission to have their staff conduct such measures themselves.[144] The STL and the Lebanese Government signed a memorandum setting out the modalities of cooperation between the Lebanese authorities and the defence.[145] According to the memorandum, the Lebanese authorities are obliged to provide assistance to the defence teams to conduct its investigations, including providing the defence teams with all the documents, testimony, or other evidence in their possession.[146]

In practice, however, the Lebanese authorities have repeatedly failed to provide assistance to the defence teams upon their request within the deadlines prescribed, thus leaving the defence without access to material and information relevant to the preparation of their defence. At the time of writing, the Lebanese authorities have **(p.200)** provided scarce information and/or assistance requested by the defence in multiple requests. In contrast, the prosecution has not reported any problems with obtaining assistance from the Lebanese authorities. Consequently, the defence has so far had no choice but to prepare its case almost exclusively on the basis of disclosure received from the prosecution, which is not in line with the adversarial aspects of investigations before the STL.[147]

The continued lack of cooperation by Lebanon interferes with the defence's right to have adequate time and facilities for the preparation of their defence. This is particularly true with regard to telecommunications evidence, given that the prosecution's case is built almost entirely upon such evidence of communications between the accused on various phone networks and cell phones.[148] Lebanon's failure to fulfill the pending requests for cooperation, together with the prosecution's inability to meet its disclosure obligations, have prompted the pre-trial judge to postpone the start of the trial.[149] The failure and delays by the Lebanese authorities in responding to the defence requests for information violate the accused's right to preparation of a defence and the right to a fair trial, including the principle of equality of arms. The pre-trial judge has been seized of this problem but to date has been unable to overcome the lack of cooperation on the part of Lebanon.[150]

The head of the Defence Office, like the Prosecutor, may seek cooperation in a manner consistent with the Statute from any state, entity, or person to assist with **(p.201)** the defence of suspects and accused before the Tribunal.[151] However, as the defence have argued in their motions seeking cooperation, other information providers that have been asked to provide assistance, as required by rule 15 of the RPE, have also failed to provide information relevant to the case.[152] Many of them, including permanent members of the UN Security Council, have simply ignored the requests without even acknowledging them.[153] The ICTY and ICTR also had a chequered history of state cooperation but, in the case of the ICTY at least, pressure was brought to bear on uncooperative states to a greater extent than is happening at the STL. Clearly, this attitude on the part of states not only undermines the defence's ability to prepare for its

defence but raises serious doubts as to whether states are truly committed to ensuring all of the conditions for a fair trial.

10.5.5 Disclosure

Under rules 110 and 113 of the RPE, the prosecution has an obligation to provide the defence with full and timely disclosure of all incriminating and exculpatory material so that the latter can prepare its defence. Systemic problems commonly encountered by defence counsel practising before the international criminal courts and tribunals, which have occurred at the STL as well, are first, the prosecution's tendency to interpret its disclosure obligations narrowly, and secondly, the need for the judges to show much greater willingness to become involved in the disclosure process and, if necessary, to sanction members of the Office of the Prosecutor for disclosure breaches. Counsel at the STL have been vocal from the start about failings in the disclosure regime.

In the 'Joint Defence Motion to Vacate Tentative Date of Start of Trial', filed on 23 January 2013, the defence set out the outstanding material that the prosecution had by that date failed to disclose as required by the RPE, including a number of witness statements, material related to experts, and material disclosable under rule 110(B) of the RPE. The defence also argued that the disclosure of exculpatory material had been extremely tardy and that the prosecution's disclosure failures inevitably jeopardized the right of the accused to have adequate time and facilities to prepare for trial.[154] The pre-trial judge confirmed that the prosecution had failed to meet its disclosure obligations, which contributed to the postponement of the trial.[155]

(p.202) The defence has also identified a number of technical, software, and translation issues, which have prevented it from being able to access, analyse, and understand disclosure from the prosecution.[156] This includes the lack of disclosure of the Lebanese investigative files, many of which documents appear prima facie from their description to be highly relevant for the defence lines of enquiry. The pre-trial judges rejected the prosecution's position that the Lebanese investigative files are covered by rule 110(B) and thus subject to inspection rather than disclosure. Considering that disclosure of the file through inspection would be impractical and contrary to common sense, the pre-trial judge ordered the prosecution to disclose to the defence the entirety of this file as it was received by the Tribunal.[157]

The absence of the accused, arguably, justifies additional time for the defence to prepare for trial proceedings. The absence of the accused raises a number of difficulties with regard to the preparation of the defence. Specifically, there are difficulties in understanding the full detail of the charges without instructions from the client, there is additional work required to investigate all reasonable possible defences available to the accused rather than being able to rely on instructions as to which line(s) of defence to pursue, there are difficulties in initiating contact with any specific witnesses who may be of assistance to the defence, and it is arguably impossible even to agree on any specific facts in the indictment absent clear instruction from the accused.[158]

It is important to point out that the resources and personnel of the defence cannot

compete with those of the prosecution and its predecessor, the United Nations International Independent Investigation Commission (UNIIIC). The STL Office of the Prosecutor (OTP) was operating for almost three years (from the STL's establishment in 1 March 2009) before defence counsel were even assigned in February 2012. The UNIIIC, for its part, was created in April 2005 by UN Security Council Resolution 1595 and was therefore operational for some four years before the STL OTP took over its work. The investigation and prosecution should, therefore, have been at an advanced stage by the time defence counsel were assigned, given that the crime base is a one-off event. Yet, at the time of writing, the prosecution has amended the indictment on several occasions and has updated its pre-trial brief and list of witnesses and exhibits accordingly.[159] The prosecution should not, however, be allowed to constantly modify its case **(p.203)** according to a time-scale of its own devising in violation of an accused's right to prepare his defence and/or to be tried without undue delay. The consequences of these amendments is that defence teams worked for almost two years on the basis of an indictment and material which by now may be redundant or irrelevant.

While similar disparities exist at the ICTY and ICTR between the prosecution and defence, the vast amount of time and resources devoted to investigating the Hariri case, compared to the time that the defence will have to investigate before the trial starts in January 2014, is exceptionally disproportionate. The imbalance between the prosecution and defence in terms of resources and personnel does not, of course, violate the principle of equality of arms per se. However, a reasonable degree of parity is obviously required. In any event, the principle of equality of arms does require that the defence have sufficient time to examine all the evidence disclosed by the prosecution.[160] That right is continually under threat given the political and financial imperatives to hold the trial as soon as possible.

Rule 114 of the RPE authorizes the pre-trial judge or the trial chamber to impose sanctions on a party or on a victim participating in the proceedings who fails to perform its disclosure obligations pursuant to the Rules. To date, despite a number of breaches of its disclosure obligations by the Office of the Prosecutor, the pre-trial judge has not imposed any sanctions on the prosecutor. In order to ensure a fair trial, it is essential for judges to engage in detail with the disclosure process and, if necessary, to sanction anyone who fails to meet their disclosure obligations.

10.5.6 Expert witnesses

Although it has been accepted in the ICTY and ICTR's jurisprudence that the equality of arms does not mean equality of means and resources,[161] there clearly have to be some limits to the extent of this imbalance between the prosecution and the defence, should the proceedings be considered in accordance with the accused's right to a fair trial and the principle of equality of arms.

An important example, which raises doubts as to the equality of arms in the STL proceedings, is the use of expert witnesses. Although there are no specific restrictions on the number of expert witnesses that the defence teams can engage, given the limited

resources allocated to the defence, they would in all likelihood not be able to afford many more than four, or at most five, experts for the preparation of their defence (depending, of course, on the scope of each expert's assignment). The prosecution, in contrast, has signalled its intention to use expert statements or reports of over 100 expert witnesses.[162] It is beyond dispute that the defence would **(p.204)** never be approved funds for such a high number of experts. The extent of imbalance with regard to the number of expert witnesses between the prosecution and the defence therefore appears to exceed all reasonable limits, contrary to the principle of equality of arms.

The prosecution has also been criticized for its failure to meet its disclosure obligations with regard to the expert witnesses.[163] Depending on the final trial date and the prosecution's ability to remedy the outstanding deficiencies, it remains to be seen whether the defence will have sufficient time to fully review and analyse all the expert reports in accordance with its right to be able adequately to prepare its defence.

10.5.7 Languages used before the STL

The STL Statute and the STL RPE provide that the official languages of the STL are Arabic, French, and English and the pre-trial judge and chamber are given the authority to decide that one or two of the languages may be used as working languages (ie language(s) in which the judge or chamber conducts its judicial proceeding in a particular case).[164] An accused has the right to use his or her own language during proceedings before the pre-trial judge or chamber.[165] Decisions on any written or oral submission are rendered in English or French. The most important decisions, including judgements, sentences, decisions on jurisdiction, and other decisions which the pre-trial judge or a chamber decides address fundamental issues are translated into Arabic.[166]

With regard to disclosure, rule 110(A) of the RPE requires that the prosecutor must make available to the defence, in a language which the accused understands, copies of the supporting material which accompanied the indictment, witness statements, depositions, and transcripts,[167] as well as all exculpatory material.[168] The pre-trial judge has determined in *Ayyash et al*, taking into account the rights of the accused as well as the resource limitations of the STL, that the prosecutor must disclose this material in English and Arabic, and furthermore in the original language if that language is neither English nor Arabic.[169] However, material of fundamental importance, following an order to that effect by the pre-trial judge or **(p.205)** chamber, is to be translated into French in its entirety or summarized by the prosecutor and such summaries are to be translated into French.[170]

10.5.8 Unjustified pressures on the defence

A critical aspect of the right to a fair trial is that counsel be permitted to defend his or her client without fear or favour. Any judicial system—especially an entirely novel one—needs to nurture and encourage this spirit rather than to curtail it. On occasions at the STL, the environment created by the judges has not been one that encourages counsel fearlessly to act in the interests of their client. Two examples illustrate this.

In one set of motions, counsel argued that the mandate of the previous Prosecutor, Mr Bellemare, expired on 13 November 2010 and accordingly requested that the pre-trial judge declare the indictment, which was submitted on a later date,[171] as well as other related filings, null and void.[172] The defence argued that the UN Secretary-General appointed the Prosecutor on 14 November 2007 so his three-year mandate, which was not subsequently renewed, had expired on 13 November 2010.[173] The pre-trial judge dismissed the defence challenge by finding that Prosecutor Bellemare's term did not begin on 14 November 2007, but rather started running on the day when he commenced his duties, that is on 1 March 2009.[174] However, recognizing the importance of the issue, the pre-trial judge certified the issue as appropriate to be considered by the Appeals Chamber.

The Appeals Chamber dismissed the defence appeal and confirmed the pre-trial judge's decision.[175] After having considered the defence appeal, the Appeals Chamber stated the following:

> We are puzzled that counsel would expend their resources on such matter. We remind counsel that under Rule 126(G) payment of fees will be withheld for the production of filings that are frivolous or an abuse of process. While we find that counsel's Appeal **(p.206)** has not yet reached that threshold, we warn them that we will not tolerate the filing of appeals that lack any serious legal or factual basis.[176]

This language may rightly be regarded as inappropriate and unjustifiable. The defence challenge clearly raised a point of vital importance, which, if resolved in its favour, would have enormous implications for the case, perhaps even bringing it to a halt. The question of when the previous Prosecutor's mandate expired was far from obvious and its resolution had been obstructed by the failure of the UN to produce the one document that would resolve it, namely the Prosecutor's letter of appointment. Moreover, the pre-trial judge had considered the issue worthy of bringing to the attention of the Appeals Chamber. In these circumstances, to issue a thinly veiled threat against the defence was not only improper but potentially intimidating. This is all the more striking when considered in the context of the fact that there is no such provision for curtailing payment to prosecuting counsel for filing frivolous motions; a clearer breach of the equality of arms would be hard to imagine.

Another example refers to the defence request for an extension of the page and word limit for their preliminary motions challenging the STL's jurisdiction. The defence filed separate motions seeking an extension of the page and word limits for the motions challenging jurisdiction. The Badreddine defence team requested an extension to seventy pages, arguing that the ICC has allowed up to 100 pages for requests of this importance. The Trial Chamber decided to allow an extension of the word limit to a maximum of 10,000 words but went on to state that 'it regards the Badreddine Defence request as particularly unjustified and excessive'.[177] This judicial statement was made in the context of a challenge which, if correct, would mean that the whole institution of the STL itself—and all its associated rules and practice directions setting out word limits—would be

unlawful. To impose any word limits on such a challenge is, therefore, arguably misconceived in itself. But it is certainly inappropriate to brand any attempt to submit lengthy argument on an issue of such seminal importance as '*particularly unjustified and excessive*'. The purpose of word limitations, generally, is to enable a busy court to deal with a plethora of motions without being bogged down in excessively lengthy pleadings. At the time of the legality challenge, the Trial Chamber had only one case before it and little more than the legality challenge to occupy its three judges and their legal assistants. Again, then, in this context, to insist on strict word limits and to harshly criticize a request for more pages to make full argument on an issue of fundamental importance appears singularly inappropriate.

The judges should abstain from putting pressure on the defence when the defence is acting in good faith in representing the interests of the accused. They should refrain from criticizing the defence when the defence attempt to follow the rules of procedure, which are not entirely clear. A fear of judicial criticism of **(p.207)** defence challenges can introduce a chilling effect into the trial arena, deterring the defence from bringing forward challenges that they deem necessary or appropriate for the purpose of acting in the accused's best interests. Judges should intervene with critical comments or threats of disciplinary action when it is absolutely clear that the defence is abusing the process or unduly delaying the proceedings with frivolous motions—and they should, of course, be equally ready to intervene in the same way against the prosecution. Judges' threats of sanctions would otherwise constitute unlawful interference with the right of the accused to prepare his or her defence and the right to a fair trial.

10.6 Conclusion

The STL is very much a test-tube case in the laboratory of international criminal justice. It has barely begun to find its feet and of course, the one trial that is likely to take place will in all probability not start for many months. Steps such as instituting a truly independent Defence Office are to be welcomed as very positive affirmations of defence rights in an environment where such rights are often readily forgotten (see, for example, the almost total absence of discussion of defence rights at the Rome Conference for the International Criminal Court). But like the price of liberty, the price of a fair trial, with full respect for defence rights at all stages of the proceedings, is eternal vigilance. Tribunal watchers should, therefore, always be vigilant that there is no encroachment on those rights, in particular as a result of political pressures being put on the Tribunal to deliver the 'results' desired by its backers.

Notes:

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([1]) Attachment to SC Res 1757, UN Doc S/RES/1757 (2007).

([2]) STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *Prosecutor v Ayyash et al*, Case No STL-11-01/I/AC/R176bis, Appeals Chamber, 16 February 2011.

([3]) STL, Decision on Trial *In Absentia, Prosecutor v Ayyash et al*, Case No STL-11-01/TC, Trial Chamber, 1 February 2012.

([4]) STL, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Trial Chamber, 27 July 2012; STL, Decision on Defence Appeals Against the Trial Chambers 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/AC/AR90.1, Appeals Chamber, 24 October 2012.

([5]) (New York, 16 December 1966, 999 UNTS 171).

([6]) See, in particular ICCPR (n5) art 14; European Convention on Human Rights (Rome, 4 November 1950, 213 UNTS 221) art 6; African Charter on Human and Peoples' Rights (Banjul, 27 June 1981, 1520 UNTS 217) art 8; Arab Charter on Human Rights (Tunis, 22 May 2004, 12 IHRR 893) art 16.

([7]) The r 61 proceedings held at the ICTY in its early days (in five cases: *Prosecutor v Nikolić*, Case No IT-94-2; *Prosecutor v Martić,* Case No IT-95-11; *Prosecutor v Vukovar,* Case No IT-95-13; *Prosecutor v Rajić,* Case No IT-95-12; *Prosecutor v Karadžić and Mladić*, Case Nos IT-95-5 and IT-95-18) in some ways resembled trials in absence but with the important difference that they did not result in the conviction of the accused. See John RWD Jones and Steven Powles, *International Criminal Practice* (3rd edn, Oxford: Oxford University Press 2003) 566–73, in particular 'Rule 61 Hearing Not a Trial' 569.

([8]) This is subject to one caveat, which is that the STL also has jurisdiction over any cases that are sufficiently 'connected' to the Hariri killing if they are 'of a nature and gravity similar to' that attack, see STL Statute (n1) art 1. To date, the STL Prosecutor has not publicly indicted anyone for any 'connected cases'. The Tribunal has ordered the Lebanese judicial authorities to defer the connected cases to the competence of the STL. See STL, Orders Directing the Lebanese Judicial Authorities Seized with the Cases Concerning the Attack Perpetrated Against Mr Elias El-Murr on 12 July 2005, the Attack Perpetrated Against Mr Marwan Hamadeh on 1 October 2004, and the Attack Against Mr George Hawi on 21 June 2005 to Defer to the Special Tribunal for Lebanon, Case No STL-11-02/D/PTJ, Pre-Trial Judge, 19 August 2011. However, the prosecution seems to use the evidence related to the connected cases in the case against *Ayyash et al* as evidence of an alleged consistent pattern of conduct of Mr Badreddine and Mr Ayyash.

See STL, Decision on Defence Motion to Strike Out Part of the Prosecutor's Pre-Trial Brief, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Trial Chamber, 8 March 2013.

([9]) Although the SCSL had a provision in its Statute for the prosecution of domestic crimes (see Annex to Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002, 2178 UNTS 138) art 5: crimes under Sierra Leonean law), it was not used, thus giving the appearance of being little more than a genuflection to the concept of a hybrid international–national tribunal.

([10]) (San Francisco, 26 June 1945, 1 UNTS XVI).

([11]) See SC Res 827, UN Doc S/RES/827 (1993) establishing the ICTY; SC Res 955, UN Doc S/RES/955 (1994) establishing the ICTR; SC Res 1757, UN Doc S/RES/1757 (2007) establishing the STL, and the debates in the Security Council that preceded their adoption.

([12]) STL RPE r 145.

([13]) STL RPE r2.

([14]) STL RPE r2.

([15]) On this subject, see STL, Pre-Trial Brief Submitted by the Defence for Mr Mustafa Amine Badreddine Pursuant to Rule 91(I), *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Badreddine Defence, 9 January 2013 in particular paras 2–6.

([16]) STL Statute (n1) art 17(1); STL RPE r 86(A).

([17]) STL Statute (n1) art 17; STL RPE r 86(B).

([18]) See also Arab Charter on Human Rights (n6) art 12; International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966, 660 UNTS 195) art 5(a); Convention on the Elimination of Discrimination Against Women (New York, 18 December 1979, 1404 UNTS 419) art 15(2).

([19]) It is also enshrined in Arab Charter on Human Rights (n6) art 13(1) and European Convention on Human Rights (n6) art 6(1). See also Statute of the ICTY (25 May 1993, 32 ILM 1159 (1993)) arts 12 and 13; Statute of the ICTR (8 November 1994, 33 ILM 1598 (1994)) arts 11 and 12; Rome Statute of the ICC (Rome, 17 July 1998, 2187 UNTS 90) arts 40 and 41.

([20]) STL Statute (n1) art 9(3).

([21]) Annex to SC Res 1757, UN Doc S/RES/1757 (2007) [Agreement Establishing the Special Tribunal for Lebanon] art 11. The judges enjoy privileges and immunities

accorded to diplomatic agents in accordance with the Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961, 500 UNTS 95).

([22]) Agreement Establishing STL (n21) art 2; STL Statute (n1) art 9(2).

([23]) Agreement Establishing STL (n21) arts 5(a) and (c).

([24]) See Arab Charter on Human Rights (n6) art 19; Protocol 7 to European Convention on Human Rights (n6) art 4; American Convention on Human Rights (San José, 22 November 1969, 1144 UNTS 143) art 8(4). See also ICTY Statute (n19) art 10; ICTR Statute (n19) art 9; SCSL Statute (n9) art 9; ICC Statute (n19) art 20.

([25]) STL Statute (n1) art 5(1).

([26]) STL Statute (n1) art 5(2). In considering the penalty to be imposed on a person convicted of a crime under this Statute, the STL shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served. See STL Statute (n1) art 5(3).

([27]) ICCPR (n5) art 15(1).

([28]) ICCPR (n5) art 15(2).

([29]) The principle of legality is also provided for in Arab Charter on Human Rights (n6) art 15; European Convention on Human Rights (n6) art 7(1); American Convention on Human Rights (n24) art 9; African Charter of Human and People's Rights (n6) art 7(2).

([30]) See ICC Statute (n19) arts 22, 23, and 24. The other international criminal tribunals, like the STL, do not set out the principle of legality in their statutes.

([31]) STL Statute (n1) art 2 additionally provides as applicable criminal law arts 6 and 7 of the Lebanese Law of 11 January 1958 on 'increasing the penalties for sedition, civil war and interfaith struggle'.

([32]) See Universal Declaration of Human Rights (10 December 1948, GA Res 217A (III), UN Doc A/810 (1948) 71) art 11; ICCPR (n5) art 14(2), Arab Charter on Human Rights (n6) art 16; American Declaration of the Rights and Duties of Man (Bogotá, 1948, Organisation of American States Res XXX (1948)) art XXVI; American Charter on Human Rights (n24) art 8(2); African Charter of Human Peoples Rights (n6) art 7(b); UN Standard Minimum Rules for the Treatment of Prisoners (Geneva, 30 August 1955, UN Doc A/CONF/611 annex 1) r 84(2).

([33]) See ICTY Statute (n19) art 21(3); ICTR Statute (n19) art 20(3).

([34]) STL Statute (n1) art 16(3).

([35]) Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press 2003) 381.

([36]) ICC Statute (n19) art 66.

([37]) These rights are also set out in Arab Charter on Human Rights (n6) art 16(6); American Convention on Human Rights (n24) arts 8(2)(g) and 8(3); Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (New York, 9 December 1988, GA Res 43/173, UN Doc A/RES/43/173 (1988)) principle 21. According to the European Court of Human Rights, these rights are implicit in the right to a fair trial set out in European Convention on Human Rights (n6) art 6(1).

([38]) STL Stature (n1) art 15(b); STL RPE r 65(A)(iv).

([39]) STL Statute (n1) art 16(4)(h); STL RPE r 69.

([40]) This right is also enshrined in Arab Charter on Human Rights (n6) arts 14(1) and 16(1); European Convention on Human Rights (n6) art 6(3)(a); American Convention on Human Rights (n24) art 8(2)(b).

([41]) STL Statute (n1) art 16(4)(a).

([42]) STL Statute (n1) art 15(a); STL RPE r 65(A)(i).

([43]) This right also derives from Arab Charter on Human Rights (n6) art 16(3); Universal Declaration of Human Rights (n32) art 11(1); American Convention on Human Rights (n24) art 8(2)(d); European Convention on Human Rights (n6) art 6(3)(c); African Charter on Human and People's Rights (n6) art 7(1)(c); UN Basic Principles on the Role of Lawyers (Havana, 7 September 1990, UN Doc A/CONF.144/28/Rev.1 (1990) 118) principle 1.

([44]) STL Statute (n1) arts 15(c) and 16(4)(d).

([45]) STL Statute (n1) art 15(e); STL RPE r 65(B).

([46]) STL Statute (n1) art 16(4)(d).

([47]) STL RPE r 59(B).

([48]) STL RPE r 58(B). See also STL, Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims Appearing before the Special Tribunal for Lebanon (14 December 2012, STL/CC/2012/03).

([49]) STL RPE r 58(C).

([50]) Agreement Establishing STL (n21) art 13(1).

([51]) Such immunity continues to be accorded after the termination of counsel's functions as a counsel of a suspect or accused. See Agreement Establishing STL (n21) art 13(2)(c).

([52]) Agreement Establishing STL (n21) art 13(2).

([53]) See Arab Charter on Human Rights (n6) arts 16(3) and (4); European Convention on Human Rights (n6) art 6(3)(c); American Convention on Human Rights (n24) art 8(2)(d); African Charter on Human and People's Rights (n6) art 7(1)(c).

([54]) STL Statute (n1) arts 15(c) and 16(d).

([55]) STL RPE r 59. The Directive on the Assignment of Defence Counsel was adopted by the Head of Defence Office and approved by the Plenary.

([56]) STL RPE r 67.

([57]) STL Statute (n1) art 22(2)(b).

([58]) STL Statute (n1) art 22(2)(c); STL RPE r 57(D)(viii).

([59]) This right is also guaranteed in Arab Charter on Human Rights (n6) art 16(4); European Convention on Human Rights (n6) art 6(3)(e); American Convention on Human Rights (n24) art 8(2)(a).

([60]) STL Statute (n1) art 15(d); STL RPE r 65(A)(iii).

([61]) STL Statute (n1) art 16(4)(g).

([62]) Arab Charter on Human Rights (n6) arts 16(2) and (3); American Convention on Human Rights (n24) art 8(2)(c); European Convention on Human Rights (n6) art 6(3)(b).

([63]) Human Rights Committee, General Comment 13, art 14 (Twenty-first session 1984) para 9.

([64]) HRC, General Comment 13 (n63). The right to communication with counsel is stipulated in European Convention on Human Rights (n6) art 6(3)(c); African Charter on Human and People's Rights (n6) art 7(1)(c); UN Basic Principles on the Role of Lawyers (n43) principles 8 and 22; Principles for the Protection of Detainees (n37) principle 18; Prisoner Treatment Rules (n32) r 93.

([65]) HRC General Comment 13 (n63) para 9.

([66]) The Statute further provides that chambers shall decide on the probative value, if any, of such statements.

([67]) See also UDHR (n32) art 10; European Convention on Human Rights (n6) art 6(1); Arab Charter on Human Rights (n6) art 13.

([68]) HRC General Comment 13 (n63) para 5.

([69]) *Nideröst-Huber v Switzerland* (1998) 25 EHRR 709, para 23.

([70]) ICTY, Judgment, *Prosecutor v Tadić*, Case No IT-94-1-A, Appeals Chamber, 15 July

1999, para 48.

([71]) ICTR, Judgment, *Prosecutor v Kayishema and Ruzindana*, Case No ICTR-95-1-A, Appeals Chamber, 1 June 2001, paras 67–69; ICTY, Judgment, *Prosecutor v Kordić and Čerkez*, Case No IT-95-14/2-A, Appeals Chamber, 17 December 2004, para 176.

([72]) STL RPE r 133; cf ICTY RPE r 68; ICTR RPE r 68.

([73]) HRC General Comment 13 (n63) para 6.

([74]) See also Arab Charter on Human Rights (n6) art 16(5); European Convention on Human Rights (n6) art 6(3)(d); American Convention on Human Rights (n24) art 8(2)(f).

([75]) HRC General Comment 13 (n63) para 12.

([76]) See also Arab Charter on Human Rights (n6) art 14(5); American Convention on Human Rights (n24) art 8(1); African Charter on Human and People's Rights (n6) art 7(1)(d); EC European Convention on Human Rights HR (n6) art 6(1).

([77]) HRC General Comment 13 (n63) para 10.

([78]) HRC General Comment 13 (n63) para 10.

([79]) See also Arab Charter on Human Rights (n6) art 16(3).

([80]) HRC General Comment 13 (n63) para 11.

([81]) See also Arab Charter on Human Rights (n6) art 16(7).

([82]) ICTY Statute (n19) art 25; ICTR Statute (n19) art 24.

([83]) The last ground may be invoked by the convicted person or the Prosecutor on that persons' behalf. See ICC Statute (n19) art 81(1).

([84]) STL RPE r 188(C). See also ICTY RPE r 117(C); ICTR RPE r 118(C); ICC Statute (n19) art 83(2).

([85]) STL Statute (n1) art 7.

([86]) STL Statute (n1) art 13. The present incumbent is Maître François Roux.

([87]) SCSL RPE r 45.

([88]) ICC Regulations reg 77.

([89]) ICC Regulations reg 77(2).

([90]) Internal Rules of the ECCC (3 August 2011) r 11.

([91]) See Antonio Cassese, Explanatory Memorandum to the STL's Rules of Procedure and Evidence (12 April 2012) para 22, according to which the Defence Office assists in redressing the imbalance often observed in adversarial systems between the prosecution and defence, the former generally being well-equipped and capable of counting on numerous competent investigators and prosecutors, the latter often being at a disadvantage with regard to the manpower and equipment.

([92]) STL RPE r 57(C). In order to address the difficulties that the defence may encounter while investigating in Lebanon, a Memorandum of Understanding between the Lebanese Government and the Defence Office has been agreed upon. See Memorandum of Understanding between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation (28 July 2010).

([93]) STL RPE r 57(F). See further, Practice Direction on the Role of the Head of the Defence Office in Proceedings Before the Tribunal (30 March 2011).

([94]) STL RPE rr 14–16.

([95]) STL Statute (n1) art 13; STL RPE r 57.

([96]) On 2 February 2012, the Head of the Defence Office appointed eight defence counsel to defend the rights and interests of accused tried *in absentia*. See STL, Assignment of Counsel for the Proceedings Held *In Absentia* Pursuant to Rule 106 of the Rules, *Prosecutor v Ayyash et al,* Case No STL-11-01/I/PTJ, Defence Office, 2 February 2012.

([97]) STL RPE r 57(I).

([98]) The time of writing is September 2013.

([99]) STL, Order on Preliminary Questions Addressed to the Judges of the Appeals Chamber Pursuant to Rule 68, Paragraph (g) of the Rules of Procedure and Evidence, *Prosecutor v Ayyash et al*, Case No STL-11-01/I, Pre-Trial Judge, 21 January 2011.

([100]) Interlocutory Decision on the Applicable Law: *Prosecutor v Ayyash et al* (n2) paras 33, 45.

([101]) Interlocutory Decision on the Applicable Law: *Prosecutor v Ayyash et al* (n2) paras 45–46.

([102]) See eg Ben Saul, 'Legislating from a Radical Hague: the United Nations Special Tribunal for Lebanon Invents an International Crime of Terrorism' (2011) 24 LJIL 677; Kai Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?' (2011) 24 LJIL 655; Stefan Kirsch and Anna Oehmichen, 'Judges Gone Astray: The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon' (2009) Durham Law Review Online <http://durhamlawreview.co.uk/attachments/article/26/Judges%20gone%20astray.pdf>

accessed 6 october 2013; Matthew Gillett and Matthias Schuster, 'Fast-Track Justice, The Special Tribunal for Lebanon Defines Terrorism' (2011) 9 JICJ 989. Cf Manuel J Ventura, 'Terrorism According to the STL's Interlocutory Decision on the Applicable Law, A Defining Moment or a Moment of Defining?' (2011) 9 JICJ 1021.

([103]) STL, Interlocutory Decision on the Applicable Law: *Prosecutor v Ayyash et al* (n2) para 85.

([104]) Guénaël Mettraux, 'Terrorism and the Special Tribunal for Lebanon' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Cheltenham: Edward Elgar 2014) (forthcoming).

([105]) STL, Sabra Motion for Reconsideration of Rule 176bis Decision—'International Terrorism', *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/AC/R176bis, Sabra Defence, 13 June 2012, para 34; STL, Request by the Oneissi Defence for Reconsideration of the Interlocutory Decision on the Applicable Law of 16 February 2011, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/AC, Oneissi Defence, 13 June 2012, para 36; STL, Request for Reconsideration of the Interlocutory Decision on the Applicable Law Rendered by the Appeals Chamber on 16 February 2011, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/AC/R176bis, Badreddine Defence Request for Reconsideration of the Interlocutory Decision on the Applicable Law Rendered by the Appeals Chamber on 16 February 2011, 13 June 2012, paras 34–40. See also Kirsch and Oehmichen 'Judges Gone Astray' (n102) 19; Gillett and Schuster, 'Fast-Track Justice' (n102) 5–6.

([106]) Sabra Motion for Reconsideration (n105) paras 22, 32–36; Oneissi Request for Reconsideration (n105) paras 49–61. For the Appeals Chamber argument that its approach does not violate the principle of legality see Interlocutory Decision on the Applicable Law: *Prosecutor v Ayyash et al* (n2) paras 46, 131–145. See also eg Gillett and Schuster, 'Fast-Track Justice' (n102) 15–17.

([107]) Interlocutory Decision on the Applicable Law: *Prosecutor v Ayyash et al* (n2) para 130; Sabra Motion for Reconsideration (n105) paras 21, 33; Gillett and Schuster, 'Fast-Track Justice' (n102) 13.

([108]) Sabra Motion for Reconsideration (n105) paras 21, 33; Guénaël Mettraux, 'Terrorism and the Special Tribunal for Lebanon' (n104).

([109]) Guénaël Mettraux, 'Terrorism and the Special Tribunal for Lebanon') (n104); Gillett and Schuster, 'Fast-Track Justice' (n102) 15–17.

([110]) The interests of the defence were represented by the head of the Defence Office who was invited, together with the Prosecutor, to file written submission regarding this question. See STL, Scheduling Order, *Prosecutor v Ayyash et al*, Case No STL-11-01/I, President, 21 January 2011; STL, Defence Office's Submissions Pursuant to Rule 176bis(B), *Prosecutor v Ayyash et al,* Case No STL-11-01/I/AC/R176bis, Defence Office,

31 January 2011; STL, Prosecutor's Brief Filed Pursuant to the President's Order of 21 January 2011 Responding to the Questions Submitted by the Pre-Trial Judge (Rule 176bis), *Prosecutor v Ayyash et al,* Case No STL-11-01/I/AC/R176bis, Prosecution, 31 January 2011.

([111]) Gillett and Schuster, 'Fast-Track Justice' (n102) 5–8; Badreddine Defence Request for Reconsideration of the Interlocutory Decision on the Applicable Law Rendered by the Appeals Chamber on 16 February 2011 (n105) paras 14–15, 38–40.

([112]) The preliminary question was submitted by the pre-trial judge on the basis of rule 68(G), which authorizes a pre-trial judge to submit to the Appeals Chamber any preliminary question on the interpretation of the Agreement, Statute, and Rules regarding the applicable law that he deems necessary in order to examine and rule on indictment. The Appeals Chamber issued an interlocutory decision on the basis of Rule 176bis authorizing the Appeals Chamber to issue an interlocutory decision on any question raised by the pre-trial judge under rule 68(G), without prejudging the rights of any accused. Both rules were adopted by the judges on 10 November 2010 as an amendment of the Tribunal's RPE.

([113]) The head of the Defence Office assigned counsel to each of the accused in order to protect their interest before the Tribunal after the Trial Chamber decided to hold a trial *in absentia*. STL, Assignment of Counsel for the Proceedings Held *in Absentia, Prosecutor v Ayyash et al,* (n96).

([114]) Sabra Motion for Reconsideration (n105); Oneissi Request for Reconsideration (n105); Badreddine Defence Request for Reconsideration of the Interlocutory Decision on the Applicable Law Rendered by the Appeals Chamber on 16 February 2011 (n105); STL, Defence for Salim Jamil Ayyash's Joinder in the Defence for Mustafa Amine Badreddine's Request, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Ayyash Defence, 13 June 2012; STL, Prosecution Consolidated Response to the Defence Requests for Reconsideration of the Decision on Applicable Law, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Prosecution, 3 July 2012.

([115]) STL, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/AC/R176bis, Appeals Chamber, 18 July 2012, see particularly paras 3, 37, 51.

([116]) See Paola Gaeta, 'Trial *in Absentia* Before the Special Tribunal for Lebanon: Between Myth and Reality', Chapter 12.

([117]) Decision on Trial *In Absentia, Prosecutor v Ayyash et al* (n3); STL, Decision on Defence Appeals Against the Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/AC/AR126.1, Appeals Chamber, 1 November 2012.

([118]) Appeals Chamber Decision on Trial *In Absentia, Prosecutor v Ayyash et al* (n117)

para 14.

([119]) STL Statute (n1) art 22(2)(c): 'Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.' See also STL Statute (n1) art 16(4)(b): an accused is entitled 'to have adequate time and facilities for the preparation of his or her defence and to communicate without hindrance with counsel of his or her own choosing'.

([120]) Wayne Jordash and Tim Parker, 'Trials *In Absentia* at the Special Tribunal for Lebanon—Incompatibility with International Human Rights Law' (2010) 8 JICJ 487, 502.

([121]) Code of Professional Conduct for Defence Counsel (n48) art 8(B)(iii). See also Pascal Chenivesse and Daryl Mundix, 'Ethics Before the Special Tribunal for Lebanon', Chapter 13.

([122]) STL Statute (n1) art 22(3); STL RPE rr 108–109.

([123]) See eg Badreddine Defence Request for Reconsideration of the Interlocutory Decision on the Applicable Law Rendered by the Appeals Chamber on 16 February 2011 (n105) paras 33–43; STL, Decision on Reconsideration of the Trial *In Absentia* Decision, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Trial Chamber, 11 July 2012.

([124]) STL, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Trial Chamber, 27 July 2012, paras 5–14. SC Res 1757, UN Doc S/RES/1757 (2007) ordered that the Agreement and the STL Statute would enter into force on 10 June 2007 unless Lebanon ratified the agreement prior to that date. This, however, has not happened so the STL was established by SC Res 1757. See also STL, Prosecution Consolidated Response to Defence Preliminary Motions Challenging the Legality of the Special Tribunal for Lebanon, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Prosecution, 6 June 2012; STL, Observations of the Legal Representative for Victims on Illegality Motions, *Prosecution v Ayyash et al,* Case No STL-11-01/PT/TC, Legal Representative for Victims, 6 June 2012.

([125]) STL, Motion on Behalf of Salim Ayyash Challenging the Legality of the Special Tribunal for Lebanon, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Ayyash Defence, 4 May 2012; STL, Preliminary Motion Challenging Jurisdiction of the Special Tribunal for Lebanon Filed by the Defence of Mr Badreddine, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Badreddine Defence, 9 May 2012; STL, The Defence for Mr Hussein Hassan Oneissi's Motion Challenging the Legality of the Tribunal, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Oneissi Defence, 10 May 2012; STL, Sabra's Preliminary Motion Challenging the Jurisdiction of the Special Tribunal for Lebanon, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Sabra Defence, 9 May 2012.

([126]) Decision on Jurisdiction and Legality, *Prosecutor v Ayyash et al* (n124) para 55.

([127]) Decision on Jurisdiction and Legality, *Prosecutor v Ayyash et al* (n124) paras 66–88.

([128]) STL, Appellate Brief of the Defence for Mr Badreddine Against the 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Badreddine Defence, 24 August 2012; STL, Appeal Brief of the Oneissi Defence Against the Trial Chamber Decision Relating to the Defence Challenges to the Jurisdiction and Legality of the Tribunal, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Oneissi Defence, 24 August 2012; STL, Interlocutory Appeal on Behalf of Mr Ayyash Against the Trial Chamber's 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal' Dated 30 July 2012, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC Ayyash Defence, 24 August 2012. See also STL, Prosecution Consolidated Response to Ayyash, Baddredine and Oneissi Defence Appeals of the Trial Chamber's 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', *Prosecution v Ayyash et al*, Case No STL-11-01/PT/TC, Prosecution, 14 September 2012.

([129]) Appeals Chamber Decision on Legality and Jurisdiction (n4) para 2.

([130]) Appeals Chamber Decision on Legality and Jurisdiction (n4) paras 36–53.

([131]) Appeals Chamber Decision on Legality and Jurisdiction (n4) para 54.

([132]) Appeals Chamber Decision on Legality and Jurisdiction (n4) paras 36–50.

([133]) See Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications* [1996] ECR I-3953, paras 13–14, 21–26; Joined Cases C-402/05 P and C-415/05 P *Kadi & Al Barakaat v Council and Commission* [2008] ECR I-6351, paras 299–300, 326; *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, para 102; *Nada v Switzerland* (2012) ECHR 1691, paras 195–198, 212–213.

([134]) ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadić*, Case No IT-94-1-AR72, Appeals Chamber, 2 October 1995, paras 20–25.

([135]) ICTR, Decision on the Defence Motion for Jurisdiction, *Prosecutor v Kanyabashi*, Case No ICTR-96-15-T, Trial Chamber, 18 June 1997.

([136]) SCSL, Decision on Constitutionality and Lack of Jurisdiction, *Prosecutor v Kallon, Norman and Kamara,* Case No SCSL-2004-15-AR72(E), 13 March 2004, para 37.

([137]) Appeals Chamber Decision on Jurisdiction and Legality (n4) paras 41–44.

([138]) STL, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, *In the Matter of El Sayed*, Case No CH/AC/2010/02, Appeals Chamber, 10 November 2010, paras 43–44. The STL Appeals Chamber cited the *Tadić* Jurisdiction Decision with approval in footnote 69 of that Decision. Cf Appeals Chamber Decision on Jurisdiction and Legality (n4) paras 16–17, 49.

([139]) STL, Separate and Partially Dissenting Opinion of Judge Baragwanath to Appeals

Chamber Decision on Jurisdiction and Legality (n4), see particularly paras 7, 47, 49, 66, 78–79, 81–82.

([140]) Appeals Chamber Decision on Jurisdiction and Legality (n4) paras 7, 91–92, 95.

([141]) Agreement Establishing the STL (n21) art 15(1).

([142]) Agreement Establishing the STL (n21) art 15(2); STL RPE r 20(A).

([143]) STL RPE r 20(A).

([144]) STL RPE r 16.

([145]) MoU on Modalities of Cooperation (n92).

([146]) MoU on Modalities of Cooperation (n92) arts 3–5.

([147]) STL, Motion Seeking the Cooperation of Lebanon, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Sabra Defence, 27 September 2012; STL, Second Motion Seeking the Cooperation of Lebanon—Telecommunications Information, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Sabra Defence, 4 February 2013; STL, Third Motion Seeking the Cooperation of Lebanon—Terrorist Groups, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Sabra Defence, 4 April 2013; STL, Fourth Motion Seeking the Cooperation of Lebanon—Information on Mr Sabra, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Sabra Defence, 4 April 2013; STL, Public Redacted Version of the Joint Defence Motion to Vacate Tentative Date of Start of Trial Filed on 23 January 2013, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Defence Counsel, 24 January 2013, para 48; STL, Public Redacted Version of Defence Submissions Regarding the Pre-Trial Judge Setting a Date for the Start of Trial Pursuant to Rule 91(C), *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Defence Counsel, 23 July 2013.

([148]) Motion Seeking the Cooperation of Lebanon, *Prosecutor v Ayyash et al*, (n147); Second Motion Seeking the Cooperation of Lebanon, *Prosecutor v Ayyash et al* (n147) para 34.

([149]) On 21 February 2013, at the request of the defence, the tentative trial date, which was initially scheduled for 25 March 2013, was postponed by the pre-trial judge. On 2 August 2013, the pre-trial judges set a new tentative date for the start of the trial for 13 January 2014, but this may change in the future if new circumstances arise, such as new amendments to the indictment. See STL, Order Setting a Tentative Date for the Start of the Trial Proceedings, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 19 July 2012; STL, Decision Relating to the Defence Motion to Vacate the Date for the Start of Trial, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 21 February 2013, paras 19–24; STL, Order Setting a New Tentative Date for the Start of Trial Proceedings, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 2 August 2013, paras 44–54.

([150]) See STL, Decision on the Defence Request Seeking to Obtain the Cooperation of Lebanon, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 11 February 2013; STL, Order for Additional Information, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 25 March 2013; Public Transcript of the Status Conferences Held on 11 September 2013 and on 3 July 2013, *Prosecutor v Ayyash et al,* Case No STL-11-01 <http://www.stl-tsl.org/en/the-cases/stl-11-01/transcripts> accessed 6 October 2013.

([151]) STL RPE r 15. See also STL RPE r 14.

([152]) See Motion Seeking the Cooperation of Lebanon, *Prosecutor v Ayyash et al,* (n147) para 37. See also STL, Prosecution Response to Sabra Defence Motion Seeking the Cooperation of Lebanon, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Prosecution, 8 October 2012, para 14.

([153]) See Motion Seeking the Cooperation of Lebanon, *Prosecutor v Ayyash et al,* (n147) para 37.

([154]) Defence Motion to Vacate Trial Date (n147); STL, Prosecution Response to 'Joint Defence Motion to Vacate Tentative Date for Start of Trial', *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Prosecution, 29 January 2012; STL, Order on a Working Plan and the Joint Defence Motion Regarding Trial Preparation, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 25 October 2012; STL, Decision Relating to the Prosecution Request to Extend the Time Frame to File All of the Rule 113 Material, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 11 June 2013.

([155]) Decision on Defence Motion to Vacate Trial Date, *Prosecutor v Ayyash et al* (n149). For the status of disclosure see Order Setting a New Tentative Date, *Prosecutor v Ayyash et al* (n149) para 46.

([156]) Defence Motion to Vacate Trial Date, *Prosecutor v Ayyash et al* (n147) paras 32–47; Prosecution Response Defence Motion to Vacate Trial Date, *Prosecutor v Ayyash et al* (n154) paras 15–21; STL, Public Redacted Version of 'Decision on Issues Related to the Inspection Room and Call Date Records' Dated 18 June 2013, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 19 September 2013.

([157]) Defence Motion to Vacate Trial Date, *Prosecutor v Ayyash et al* (n147) paras 40–47; STL, Order on the Defence Request to Compel Disclosure of the Lebanese Investigating Case Files, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 8 February 2013.

([158]) Defence Motion to Vacate Trial Date, *Prosecutor v Ayyash et al* (n147) para 54; Prosecution Response Defence Motion to Vacate Trial Date, *Prosecutor v Ayyash et al* (n154) para 24.

([159]) See Redacted Version of the Decision Relating to the Prosecution Request of 21

June 2013 for Leave to Amend the Indictment of 6 February 2013 Dated 31 July 2013, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 2 August 2013.

([160]) Defence Motion to Vacate Trial Date, *Prosecutor v Ayyash et al* (n147) para 57.

([161]) ICTR, Judgment, *Prosecutor v Kayishema and Ruzindana*, Case No ICTR-95-1-A, Appeals Chamber, 1 June 2001, paras 67–69; ICTY, Judgment, *Prosecutor v Kordić and Čerkez*, Case No IT-95-14/2-A, Appeals Chamber, 17 December 2004, para 176.

([162]) STL, Prosecution Updated Notice Pursuant to Rule 161(A), *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Prosecution, 2 April 2013; STL, Corrigendum to 'Prosecution Updated Notice Pursuant to Rule 161(A)', *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Prosecution, 3 April 2013; STL, Update and Further Corrigendum to 'Prosecution Notice Pursuant to Rule 161(A)', *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Prosecution, 16 April 2013; STL, Update and Further Corrigendum to 'Prosecution Notice Pursuant to Rule 161(A)', *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Prosecution, 1 May 2013; STL, Final Update and Further Corrigendum to 'Prosecution Notice Pursuant to Rule 161(A)', *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Prosecution, 15 May 2013.

([163]) Defence Motion to Vacate Trial Date, *Prosecutor v Ayyash et al* (n147) para 20; STL, Badreddine Defence Notice Pursuant to Rule 161(B), *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Badreddine Defence, 24 January 2013; STL, Badreddine Defence Second Notice Pursuant to Rule 161(B), *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Badreddine Defence, 21 May 2013.

([164]) STL Statute (n1) art 14 of the STL Statute; STL RPE r 10(A) and (B).

([165]) STL RPE r 10(C).

([166]) STL RPE r 10(E).

([167]) STL RPE r 110(A).

([168]) STL RPE r 113.

([169]) STL, Decision on Languages in the Case of *Ayyash et al, Prosecutor v Ayyash et al*, Case No STL-11-01/I/PTJ,.Pre-Trial Judge, 16 September 2011, para 56 and disposition.

([170]) Decision on Languages in the Case of *Ayyash et al* (n169).

([171]) The indictment was issued by the Prosecutor on 10 June 2011 and confirmed on 28 June 2011.

([172]) STL, Request by the Badreddine Defence to Annul the Indictment of 10 June 2011, Confirmed on 28 June 2011, for Absence of Authority, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Badreddine Defence, 25 June 2012; STL, Appellate Brief by the

Badreddine Defence Against the Decision Dismissing its Motion for the Indictment to be Annulled on the Grounds of Absence of Authority, *Prosecutor v Ayyash*, Case No STL-11-01/I/PT/AC/AR126.2, Badreddine Defence, 27 September 2012.

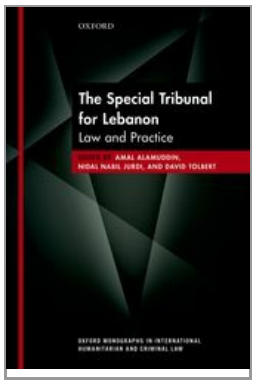
([173]) Badreddine Request to Annul Indictment, *Prosecutor v Ayyash et al* (n172); Badreddine Appellate Brief, *Prosecutor v Ayyash* (n172).

([174]) STL, Decision on the Motion by the Defence For Mr Mustafa Badreddine to Have the Indictment of 10 June 2011, Confirmed on 28 June 2011, Annulled on the Ground of Absence of Authority, *Prosecutor v Ayyash et al*, Case No STL-11-01/I/PT/PTJ, Pre-Trial Judge, 29 August 2012, paras 19–21.

([175]) STL, Decision on Appeal Against Pre-Trial Judge's Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, *Prosecutor v Ayyash et al*, Case No STL-11-01/I/PT/AC/AR126.2, Appeals Chamber, 13 November 2012.

([176]) Decision on Appeal Against Pre-Trial Judge's Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, *Prosecutor v Ayyash et al* (n175) para 22.

([177]) STL, Decision on Extension of Word Limits for the Filing of Preliminary Motions Challenging Jurisdiction, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Pre-Trial Judge, 8 May 2012, para 13.



The Special Tribunal for Lebanon: Law and Practice

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The STL Registry

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[–] Abstract and Keywords

The Special Tribunal for Lebanon's (STL) position as a separate and distinct international organization, outside of the UN umbrella, has created a number of difficulties for the Tribunal's Registry. It first examines how the Registry functions internally within the Tribunal and its relationship to the Management Committee, which has supervisory authority over the administration and financial aspects of the Tribunal. It then highlights the STL's separate and distinct legal personality and the constraints emerging from that status, including its lack of legal capacity to properly function outside Lebanon and the Netherlands. It also discusses the effect of these constraints on the practical work of the Registrar, drawing on the experience and practice of other ad hoc and hybrid tribunals, e.g. the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda. Finally, the chapter examines the efficacy and viability of the STL model.

Keywords: international criminal tribunal, Lebanon, Registrar, legal personality

11.1 Introduction

Following the car bomb explosion that killed former Lebanese Prime Minister Rafiq Hariri and twenty-two others on 14 February 2005, the Government of Lebanon requested that the United Nations establish 'a tribunal of an international character' to investigate and prosecute the perpetrators of this assassination. In the following years, several national and international investigations took place, including, in particular, the United Nations International Investigation Commission ('UNIIIC' or 'the Commission'), which was established as a subsidiary organ of the UN Security Council in April 2005.[1] As described in greater detail elsewhere in these pages, the UN Security Council adopted Resolution 1644, which requested the UN Secretary-General to negotiate an agreement with the Lebanese government for the establishment of an international tribunal. An agreement, in principle, was reached between the UN and the Lebanese authorities but due to a political stalemate in Lebanon, the President of Lebanon refused to ratify it. The Security Council then, acting under Chapter VII of the United Nations Charter, adopted Resolution 17547 establishing the Special Tribunal for Lebanon ('STL' or 'the Tribunal'), which in essence put the draft agreement into effect.

The unique circumstances of the Tribunal's birth as a separate and distinct international organization, which is not under the UN umbrella, created a number of difficult issues for the Tribunal's Registry, headed by the Registrar. Although in a number of ways the STL Registrar's authority does not materially differ from his/her counterparts in other internationalized tribunals, the combination of the limited legal reach of the Tribunal's authority, which is not derived from or linked to the UN, and its location outside the country where the alleged crimes were committed, pose a unique set of challenges to his or her responsibilities as an **(p.209)** administrator. This chapter first examines how the Registry functions internally within the Tribunal and its relationship to the Management Committee, which has supervisory authority of the administration and financial aspects of the Tribunal. Thereafter, it highlights the Tribunal's separate and distinct legal personality and the constraints that emerge from that status, including its lack of legal capacity to properly function outside Lebanon and the Netherlands. In addition, this chapter will discuss the effect of these constraints on the practical work of the Registrar, comparing and drawing on the experience and practice of other ad hoc—the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—and hybrid tribunals. Finally, the chapter will look at the efficacy and viability of the STL model.

11.2 The Tribunal in the Context of Other Internationalized Courts and Tribunals

As addressed in more detail elsewhere in this book,[2] as a legal matter, the STL was created by a UN Security Council resolution rather than a bilateral agreement between the United Nations and the country where the alleged crimes were committed. The latter approach was taken for most of the other 'hybrid' or 'mixed' tribunals, so named because of the combination of national and international components in the judicial organ of the institution (and often also the prosecutorial and sometimes other administrative or

registry functions).[3] Other examples of hybrid courts include the Special Panels for Serious Crimes in the District Court of Dili in East Timor (SPSC), the Regulation 64 Panels in the courts of Kosovo, the War Crimes Chamber in the Court of Bosnia and Herzegovina (which is a national hybrid court established in cooperation with the Office of the High Representative for Bosnia-Herzegovina and other international actors without direct UN involvement), the Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC).[4] However, despite the Security Council's role in bringing the Tribunal to life,[5] the STL is a **(p.210)** separate and independent organization from the United Nations. It is a freestanding international organization in its own right,[6] unlike its predecessor institution, the UN Independent International Investigation Commission ('UNIIIC' or 'the Commission'). As a result, the administrative and legal structure of the two institutions vary significantly.

Despite the peculiarities of its birth, the STL resembles other international and hybrid courts and tribunals in terms of its structure and basic operations. In this regard, the role of the Registry, headed by the Registrar, within an internationalized judicial institution has been established through years of practice at other internationalized courts, including the International Criminal Court (ICC). Although there is more clarity regarding the Registrar's authority within these institutions than in the STL, the STL Registry's role does remain 'an amalgam of judicial management responsibilities combining features of a *Greffier* in the civil law system, some aspects of the common law functions of a clerk of the court, together with administrative duties imported from the United Nations system, especially those that fall within the Secretary-General's responsibilities'.[7] Thus, in the STL, the responsibilities largely mirror those assigned to the Registrars at the ad hoc tribunals[8] but without oversight of the Defence Office[9] and with the added responsibility of overseeing the work of the Victim Participation Unit, which is a feature also reflected in the ICC Statute.[10]

The judicial and administrative functions of the Registrar fall under the general rubric of 'properly servicing and administering the court'.[11] Much of this aspect of the Registrar's responsibility is straightforward. The administrative functions include human resources, budget, finance, procurement, information technology, and security. Additionally, the Registrar oversees the public dissemination of court-related information and outreach efforts within Lebanon. As with other hybrid **(p.211)** courts, the Registrar is responsible for building diplomatic relations with donor states and he or she reports regularly to a management committee, which is composed of key states that provide financial support and oversight over the budget, human resources, and other managerial issues.[12]

In order to properly discuss the STL Registry, it is important to locate it in the historical context of the modern international criminal justice movement. That is, the STL is the latest in a line of international and hybrid courts and was created in an atmosphere of growing criticism of the ad hoc tribunals.[13] This criticism related to a number of factors but primarily focused on the growing costs of these tribunals, due in part to lengthy and expensive trials and appeals, as well as perceptions that the judicial proceedings were

held remotely and far from the affected communities.[14] These conditions led to the development of so-called hybrid models, which were devised with a view to addressing these criticisms. At least in theory, hybrid tribunals are designed to be more streamlined, less expensive, and more flexible.[15] Moreover, as judicial institutions, hybrid courts aim to mend the wide gap left by the ad hoc tribunals in terms of the relationship between these courts and the affected communities. The other hybrid tribunals were established, and conducted their business, including public trials and appeals, in the country where the crimes occurred, with the exception of the Charles Taylor case at the SCSL, which was not held *in situ* for security reasons. This approach was also intended to build judicial capacity with the addition of national judges, prosecutors, and staff working alongside (and presumably learning from) international colleagues. While these conceits can be contested, it is clear that the hybrid model is designed to have these attributes. On the other hand, the establishment of hybrid tribunals raises sometimes complex issues of international legal personality and capacity, much more so than the ad hoc tribunals or the ICC, particularly when acting outside the country in which they were established.

Issues and questions related to these capacity building and cost reduction efforts have been well rehearsed in the literature and all apply to the STL to one degree or another. However, given both the mandate and the unique nature of the STL, the position of the STL Registrar and the Registry raise not only the usual issues regarding the registries of hybrid courts but also a number of issues of first impression that deserve attention and exploration.

The position of the Registry itself in the Tribunal's internal architecture warrants exploration.[16] The Tribunal is comprised of the Chambers, Prosecutor, Registry, and Defence Office, with the latter being an innovation that is unique amongst **(p.212)** internationalized tribunals in being independent from the Registry.[17] The Registry, as the primary administrative organ of the Tribunal, is required to provide service and support to all the organs of the court.[18] As a result, similar to other internationalized tribunals which were established through the United Nations, the Registry is headed by a United Nations staff member, the Registrar,[19] who is appointed by the United Nations Secretary-General, for example to oversee the Financial Regulations and Rules, the Staff Regulations and Rules, and to be the main channel of communication to the Management Committee.[20] The Registrar is the only UN staff member employed in the Tribunal, primarily to ensure compliance with UN financial rules and regulations, which have been adopted by the Tribunal. Compliance with these rules and regulations are deemed essential for donors to the Tribunal, which is supported, in part, by voluntary contributions by states.

The Registrar's reporting lines are multifaceted. As a United Nations staff member, s/he ultimately answers to the United Nations Secretary-General. However, under the financial regulations, s/he also reports to the STL Management Committee[21] with respect to the Tribunal's annual budget and other administrative questions.[22] The Management Committee, which is modeled on a similar **(p.213)** structure in the SCSL, primarily provides administrative and financial oversight of the Tribunal, including the following

specific responsibilities reflected in its terms of reference:

> (a) receive and consider progress reports of the Special Tribunal and provide policy direction and advice on all non-judicial aspects of its operations, including questions of efficiency;
> (b) review and approve the Tribunal's annual budget, take any other necessary financial decisions, and advise the Secretary-General on these matters;
> (c) ensure that all organs of the Tribunal are operating in as efficient, effective and accountable a manner as possible, and that optimum use is made of resources contributed by donor States, without prejudice to the principle of judicial independence;
> (d) assist the Secretary-General in ensuring that adequate funds are available for the operation of the Tribunal including the development of fund-raising strategies, in close consultation with the Registrar;
> (e) encourage all States to cooperate with the Tribunal; and
> (f) report on a regular basis to meetings of representatives of the Group of Interested States for the Special Tribunal.[23]

These terms of reference raise as many questions as they answer. Where do the lines of authority between the Secretary-General, the Management Committee, and the STL President—who has supervisory authority over the Registrar for judicial matters—actually rest? Turning to the question of non-judicial matters, these, prima facie, lie with the Management Committee and the Secretary-General. However, the ultimate authority over these matters appears to rest with the Secretary-General, given that the terms of reference of the Management Committee itself provides that the Committee's role is to 'advise the Secretary-General' and 'assist the Secretary-General'. Nonetheless, in practice, the primary oversight of the Tribunal's non-judicial work has been exercised by the Management Committee, with UN officials (on behalf of the Secretary-General) attending and participating in the Management Committee meetings. This administrative framework largely duplicates that of the SCSL and varies from the usual UN approach, where administrative oversight is carried out by the United Nations Controller.[24]

(p.214) With respect to judicial matters, article 12 of the STL Statute provides that 'under the authority of the STL President, the Registry shall be responsible for the administration of the Tribunal'. In interpreting this provision, in the context of the Registrar's financial authority over the Defence Office, the President has opined:

> [W]hile there are similarities between the Tribunal and other international or 'hybrid' courts and tribunals, our structure mandated by the Statute…is different from the others because of the establishment of the Defence Office as a separate organ. This important structural change assists delivery of the right of the accused both to a fair trial and equality in terms of Article 16 of the Statute. Its creation does limit somewhat the purview of the Registrar's functions.[25]

Moreover, in this decision, the President held that the Registrar's financial authority is

limited, holding that the Registrar's authority 'cannot override the provision of the Statute and must be interpreted in accordance with it'.[26] This decision appears to undercut the financial oversight of the Registrar and raises the possibility that the President can override that authority. While there may be instances where the Registrar is legally obliged to take steps that have financial consequences pursuant to a court order, such as providing additional facilities for a self-represented accused, the broad brush used by the STL President is troubling as it implies a much greater judicial incursion into non-judicial, namely financial, matters than has been seen in other international tribunals. This could potentially result in a clash between the funders of such tribunals who, in theory, could see additional resources mandated by the President outside the regular budgeting and administrative process. Of course, there is often a tension between judicial requirements and financial realities, but the broad language used by the STL President in his decision sets up a possible (and probably unnecessary) collision course between judicial priorities and financial realities and undermines the Registrar's authority.

As noted earlier, the principal reason that the STL Registrar, like his/her counterparts at other international tribunals, is a United Nations staff member, is to ensure that the relevant tribunal is compliant with the UN common system of financial and administrative regulations and rules. This responsibility has parallels in domestic systems, where the chief administrative officer of the court system is often considered to be equivalent to a chief executive officer,[27] although the STL **(p.215)** Registrar and his/her counterparts also have added responsibility for external relations, particularly in the area of diplomatic relations.

11.3 The Tribunal's Legal Personality as an International, Intergovernmental Organization

In line with decisions of the International Court of Justice and the International Law Commission,[28] the United Nations Office of Legal Affairs opined that the STL's legal personality is that of an 'international, intergovernmental organization'.[29] This opinion followed the criteria established by the International Law Commission: an organization that is: '(1) established by treaty or other instrument governed by international law; and (2) possess its own legal personality'[30] is an international organization. Given that the Tribunal is established by a legal instrument that is governed by international law and its legal personality is conferred by the United Nations Security Council Resolution, acting under Chapter VII of the United Nations Charter, the opinion rendered by the UN Office of Legal Affairs is clearly authoritative.

Although it is clear that the Tribunal possesses juridical personality and legal capacity, as a judicial institution the key issue is whether the capacity is sufficient to safeguard its independence and carry out its mandate. While the Tribunal is formally an independent judicial institution with the express legal capacity to perform legal acts such as enter into contracts, acquire property, bring legal actions, and enter into agreements,[31] a review of its legal position shows that this capacity is very narrowly circumscribed.

(p.216) Pursuant to Security Council Resolution 1757, only Lebanon is legally bound to

cooperate with the STL. This status was underlined by the STL Appeals Chamber's interlocutory decision on jurisdiction and legality,[32] which noted that the Tribunal was founded to be independent from the United Nations.[33] Thus, unlike the ad hoc tribunals, the legal instruments of the Tribunal only bind Lebanon.[34] The Netherlands voluntarily agreed to be bound to cooperate through its Headquarters Agreement.[35]

This means that the Tribunal does not benefit from the privileges and immunities provided for in articles 104 and 105 of the UN Charter. These provide, *inter alia*, that 'the Organization shall enjoy in the territory of its Members such legal capacity as may be necessary for the exercise of its functions and fulfillment of its purposes' and that 'Members of the United Nations and officials of the Organizations shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.'[36] Moreover, it follows that the STL does not benefit from the Convention on the Privileges and Immunities of the United Nations, which was adopted pursuant to article 105 of the United Nations Charter.[37] The Convention sets out these privileges and immunities in much greater detail including, for example, immunity from process, the sanctity of UN property, diplomatic immunity, and functional immunity, which are necessary for the United Nations and its organs to function.[38]

Practically speaking, the result is that the Tribunal faces substantial limitations in its ability to carry out its mandate. For example, the STL does not, outside the two aforementioned countries, have the authority to issue orders to implement its **(p.217)** decisions, but rather it must request the assistance of the state and hope that it will voluntarily cooperate; its requests are not legally obligatory.

Other hybrid tribunals including the SCSL, ECCC, and STL, are in a similar situation as they are not part of the United Nations system. The ECCC was founded through a domestic act [39] and later an agreement with the United Nations.[40] The SCSL was also founded pursuant to an agreement between Sierra Leone and the UN, following a non-Chapter VII Security Council resolution[41] instructing the Secretary-General to negotiate an agreement with the Government of Sierra Leone.[42] The SCSL Agreement established the court, not the Security Council resolution.[43]

While these hybrid tribunals each have a distinct legal status and thus also technically operate with the drawback of not benefiting from UN privileges and immunities, they are far less disadvantaged in practice by this lack of status than the STL. The other hybrid tribunals are all located in the territory of the state in which they operate and have generally had the cooperation of those states. On the other hand, the STL was, as discussed, established by the UN Security Council and has its headquarters outside the state where the alleged crimes were committed. However, even though it was created by the Security Council, it is deemed an organization separate and apart from the United Nations and enjoys only limited popular support in Lebanon. Thus, it is in the anomalous situation of neither enjoying the privileges and immunities of the United Nations, as the ad hoc tribunals do, nor of having the full cooperation of the state that created it, as has been the experience of other hybrid tribunals. This has a number of practical

consequences, which are explored later.

(p.218) An area of particular challenge for the STL Registrar, given the complexities of its mandate and limited international legal capacity, as described earlier, relates to the limited privileges and immunities the Tribunal has, both as an international organization and in carrying out its judicial functions.

11.4 Privileges, Immunities, and Facilities of the Tribunal

International organizations, such as the Tribunal, typically enjoy diplomatic privileges and immunities, which shield them from legal process and application of domestic laws in four principal areas: (i) immunity of the organization's property, assets, and funds; (ii) inviolability of premises; (iii) privileges relating to currency and fiscal matters; and (iv) freedom of communications and inviolability of archives.[44] Furthermore, a headquarters agreement is generally negotiated for the purpose of allowing the international organization at its headquarters to carry out its responsibilities and fulfill its 'primary purpose'. These agreements have been interpreted as creating an obligation on the host state to protect the organization, its staff members, and their families.[45]

In the case of the Tribunal, the annex to Security Council Resolution 1757, which contains the provisions of the draft agreement between Lebanon and the UN, provides that the Tribunal 'shall enjoy immunity from every form of legal process, except in so far as in any particular case the Tribunal has expressly waived its immunity'.[46] This provision is a standard one, including for international/hybrid tribunals. The annex also foresees that the Tribunal's seat will be established outside Lebanon.[47] Article 8 of the annex stipulates that a headquarters agreement between the United Nations, the Government of Lebanon and the host state shall be concluded. On 9 November 2007, the Secretary-General communicated with the then Prime Minister of Lebanon, who informed him that it would be difficult to enter into a tripartite headquarters agreement. Nevertheless, the Prime Minister approved the location of the host state in the Netherlands.[48] A bilateral host state agreement was signed between the United Nations and the Netherlands on 21 December 2007, setting out the conditions for the inviolability of the premises in Leidschendam, the Netherlands.[49]

(p.219) With respect to the Tribunal's relationship with Lebanon, article 8 of the annex foresees that the Tribunal will establish an office in Beirut, Lebanon,[50] which office shall be inviolable.[51] On 17 June 2009, the Registrar entered into a Memorandum of Understanding (MoU) with the Government of Lebanon.[52] The MoU concerned the office of the STL in Beirut and provides for the Tribunal's operations in Lebanon with the required facilities, immunities, and privileges. The MoU is quite similar to a typical headquarters agreement, for example including addressing immunity of its assets, the privileges and immunities necessary for the effective functioning of the Tribunal in the Netherlands and Lebanon including inviolability of its records, archives, and property,[53] as well as exemption from taxes and duties.[54] However, outside of these two countries, the Tribunal faces a number of legal obstacles in conducting its business.

In addition to these described privileges and immunities, international organizations also

have functional immunity, that is, immunity from legal process as necessary to exercise the functions of an organization.[55] The immunities serve to ensure that the organization operates in the respective state without financial or legal impediments. Such immunity is applied to 'every form of legal process'.[56]

The annex to Security Council Resolution 1757 provides details with respect to the privileges and immunities of the Tribunal in Lebanon, including that enjoyed by senior officials of the Tribunal while in Lebanon,[57] with unexceptional provisions regarding waiver of immunity.[58] Staff enjoy immunities in respect of acts undertaken in their official capacity,[59] subject to waiver.[60] The Registrar, as a United Nations staff member, has diplomatic status, including those provided by the UN Immunities Convention, regardless of location. The other STL principals do not enjoy diplomatic status outside of Lebanon and the Netherlands.

(p.220) Under the Headquarters Agreement, the Netherlands guarantees that it will not interfere with any individuals in carrying out their functions vis-à-vis the Tribunal,[61] including staff, witnesses, victims, experts, etc.[62]

Experts are also accorded the privileges provided to representatives of foreign governments on temporary official missions with respect to currency and exchange facilities.[63] Additional privileges and immunities are granted to counsel and persons assisting counsel to the extent necessary for the free and independent exercise of their functions.[64] Protections are also provided to locally recruited personnel of the Tribunal as well as witnesses, victims, experts, counsel, and persons assisting counsel and others participating in the proceedings of the Tribunal. Finally, the Headquarters Agreement also guarantees immunity from process for the members of the Management Committee when they are participating in meetings in the Netherlands, in accordance with article IV of the UN Immunities Convention.[65]

11.5 Consequences of a Separate Legal Personality from the UN

The Tribunal functions as a freestanding international judicial institution with its own juridical personality separate to and apart from the UN. This status raises a number of serious challenges, which impact the administrative and judicial work of the Tribunal. The consequences addressed here are from the viewpoint of the Registrar's mandate to administer and service the work of the Tribunal, although the impact is also felt in other sections of the Tribunal.

At the hybrid and international tribunals, the Registry is seen to be responsible for the 'non-judicial' aspects of the Tribunal's work, which is a somewhat misleading phase. The intention of this phrase is

> to ensure that the Registry does not interfere with judicial prerogatives. It is suggested that the limitation should be read narrowly only to cover any administrative aspects of the court's judicial decision-making process, such as the judges' deliberations or consultations amongst the judges themselves. It is not intended to affect the Registry's duties to provide for the management of the

> court's judicial activities, including scheduling and support services…protective measures and security measures for victims and witnesses.[66]

The judicial responsibilities may also include, *inter alia*, court management and victim participation matters, thus the line between 'judicial' and 'non-judicial' matters can be a blurred one—in contradistinction to the role of court administrators in the domestic context who primarily deal with the management of court records. As noted in the international context the responsibility of a Registrar **(p.221)** involves a myriad of court administration responsibilities that also merge with the requirement to publicly disseminate court-related information, and to manage security, outreach, and legacy.

However, in carrying out these responsibilities and duties, the Registrar and the Tribunal as an institution face a number of limitations administratively and judicially.[67] In contrast to the ad hoc tribunals, which all United Nations member states are legally obliged to cooperate with,[68] only Lebanon (and—voluntarily—the Netherlands, but arguably this cooperation could be rescinded under certain circumstances) is under a legal obligation to cooperate with the STL.[69] While proposals were made to fill this legal lacuna by the STL entering into separate agreements with third states to ensure needed cooperation, this approach is simply not practicable. A small institution such as the STL does not have the time or resources necessary to negotiate such separate agreements and then abide by separate domestic procedural laws. Moreover, there is little incentive for states to reach such bilateral agreements given that they are not legally required to do so and the complexity that such agreements entail.[70] This limits the Tribunal to making requests for assistance, even regarding court orders and decisions, an odd situation for any judicial institution as the Tribunal is only in a position to require the Government of Lebanon to cooperate.[71] As has been ably discussed elsewhere, these judicial consequences are far-reaching.[72] The consequences on the Registry of this very limited reach of its legal and judicial authority are also significant in a number of areas, both administrative and quasi-judicial, which will be addressed in turn.

(p.222) 11.5.1 Fiscal and financial consequences

Given that the Tribunal does not enjoy privileges and immunities outside of Lebanon (and in the Netherlands only to the extent afforded by the Headquarters Agreement), it is in a much less favorable financial and fiscal position than its Security Council-created counterparts—the ad hoc tribunals—as well as most other international organizations and virtually all UN agencies. Unlike other UN agencies and organs, the Tribunal's purchases and expenditures, including on goods and services, outside of Lebanon and the Netherlands require payment of duties or taxes, unless an alternative arrangement is granted. Moreover, the salaries of the Tribunal's officials and personnel are also not tax exempt, which in practice means that the salaries are effectively much more expensive to fund than those at other UN institutions, which are exempt from taxation.[73] As a result, a large portion of the STL's annual budget is allotted to reimbursing those officials and personnel for the taxes they paid to their respective states. Furthermore, the tax liabilities remain uncertain for other purchases as they hinge on the respective states' tax laws, thus creating additional costs. This also creates additional administrative burdens

not experienced in most other international organizations. Indeed, a significant share of the STL's budget is made up of costs that are directly credited to the states themselves, a situation that does not exist in UN institutions.

11.5.2 Inviolability of records

The archive of the Tribunal, belonging to it or held by it, is inviolable within Lebanon and the Netherlands. The Tribunal is in possession of three types of archives of documents and other material: (1) those generated by the Tribunal; (2) those generated by the UNIIIC; and (3) those handed over by the Lebanese authorities. The documents and other material generated by the UNIIIC, a subsidiary organ of the Security Council, are the property of the United Nations but remain in the custody of the Tribunal's Prosecutor.[74] As such, article 11 of the UN Immunities Convention provides that 'the archives of the United Nations, and generally all documents belonging to it or held by it, shall be inviolable wherever located'.[75] There is also material provided in confidence by third parties, both states **(p.223)** and non-state entities. The United Nations Legal Counsel has opined that the transfer of the material from the UNIIIC to the successor organization, the Tribunal, does not affect the status of these documents and other material, and it thus remains the property of the UN.[76] The Legal Counsel further stated that '[i]nviolability entails that documents cannot be disclosed to a third party, copied or used, including in judicial proceedings without the consent of the United Nations'.[77] Furthermore, the inviolability extends to documents held by the Tribunal, which may include third-party documents given to the United Nations on a confidential basis wherever they are located.[78] Thus, on a formal basis, the Tribunal has no enforceable right to these documents and must seek the permission of the United Nations to use them. This is an anomalous situation for a judicial institution to find itself with respect to its predecessor institution. Nonetheless, this may be more of a problem in theory than in practice, as the UN has repeatedly indicated that it has a 'long standing policy of maximum cooperation with the international tribunals…[and] endeavor[s] to cooperate in the fullest good faith'.[79]

Except for the UNIIIC material, the other material in the possession of the Tribunal is inviolable with respect to Lebanon and the Netherlands.

11.5.3 Indirect influence of states

A consequence of the funding model employed to fund the STL is that it allows for the exercise of an indirect influence by states upon the proper functioning of the Tribunal that should be avoided in any court, particularly one established by the UN Security Council. The Registrar is required to administer the court independently without political influence. However, this duty is quite difficult to carry out, given his/her responsibility to engage in diplomatic relations, often with the very states that he/she must raise voluntary contributions from. While other international organizations may experience some pressure from powerful contributing states, there is perhaps no other international organization that experiences this so directly as the STL.

An international judicial organization that is established on the basis of voluntary

contributions on an annual budget cycle is a risky model in itself because it requires **(p.224)** the Registrar to spend much of his/her time meeting with diplomats and informing them of the work of the Tribunal in order to secure funding.[80] This is exacerbated by the fact that fifty-one per cent of that budget comes from Lebanon itself and could be influenced by the vagaries of the political situation on the ground there. Although Lebanon has a legal obligation to pay, it is a country in constant political turmoil and the payment of the contribution to the STL is a politically charged one. With respect to the remainder of the budget, the Registrar must court and persuade donors to contribute on an annual basis, an unseemly task at best for an international judicial official. If he/she does the fundraising job well with particular states, then charges will be made, unfairly, of influence peddling. It is not a model that bears repeating.

11.5.4 Impact on victims and witnesses

With respect to judicial matters, the presumption of the creators of the Tribunal appears to have been that victims and witnesses appearing at, or participating in, STL proceedings will only reside in the Netherlands or Lebanon because there are no provisions in the STL Statute or the annex to Security Council Resolution 1757 to address victims and witnesses from elsewhere. Given the nature of the crimes being investigated, this was an unrealistic assumption. More importantly, by not making provisions for witnesses outside these two countries, this approach indirectly places a burden upon the Tribunal to enter into bilateral agreements with each state where it foresees a requirement to protect a victim or witness. This is an unreasonable expectation, considering the limited mandate of the Tribunal. Most states will not enter into separate bilateral agreements because of the length of time required to negotiate such agreements for potentially such a small group of people. Thus, states may forego any formal legal agreement for one that is more ad hoc, which may not provide adequate protection to those concerned. Moreover, the lack of protection and the greater uncertainty that arises out of such a patchwork legal regime will inevitably have a chilling effect on victims and witnesses and thereby place at risk the proceedings. Victims and witnesses are less likely to participate without adequate provision that protects them in their travel and obliges their home state to ensure their safety on their return. However, some of these concerns can be addressed or mitigated by a liberal application of the Rules, which permit participation (including testifying) in proceedings via a video-conference link[81] (and more marginally via the Tribunal sitting outside the host state).[82]

(p.225) 11.5.5 Freedom of movement

Although the Headquarters Agreement and the MoU Office of the STL in Lebanon permit freedom of movement and limit restrictions from immigration regulations, the states in which the person will transit to and from will be unlikely to recognize the same privileges.[83] It is thus necessary to enter into separate agreements with those transit states, unless the travel is otherwise permitted without a visa (ie between certain EU states).[84] The travel restriction will likely hamper the free movement of those who are participating in the proceedings of the Tribunal and at least potentially some Tribunal officials and staff. Furthermore, the Tribunal may face regional challenges, especially to the extent that the Syria conflict spills into Lebanon, particularly if the Tribunal has to

evacuate or relocate some or all of its staff out of Lebanon.[85] In 2006, the UNIIIC was required to evacuate temporarily from Lebanon to Cyprus. However, it had the protections afforded by the UN Immunities Convention and operated under the auspices of the United Nations, thus it was able to continue its work.[86] The Tribunal is independent from the United Nations and not under the umbrella of the UN Immunities Convention, therefore, the more likely scenario, if an evacuation were to occur, is that the Tribunal would have to evacuate its personnel directly to the Netherlands where they would receive the benefits and protections granted under the Headquarters Agreement, although to the potential detriment of their work.

In principle, the Tribunal, as a judicial institution, should be granted privileges and immunities in any country where it may be conducting activities on behalf of **(p.226)** the Tribunal or any transit country. Although the Headquarters Agreement agrees to recognize the United Nations *laissez-passer*, the annex to Resolution 1757 does not provide for such privileges to be issued to its officials or personnel, since the Tribunal is not part of the United Nations system. This excludes all staff (with the exception of the Registrar) from benefiting from UN *laissez-passers*, which is a distinct disadvantage. This travel document is necessary in order to permit the Tribunal and those associated with it to move freely and to independently exercise their functions. The discrepancy undercut the efforts the Commissioner put in place to ensure a smooth transition between the UNIIIC and the Tribunal.[87] The staff that did transition to the Office of the Prosecutor of the Tribunal are indeed working under different conditions of service than at its predecessor.

The United Nations *laissez-passer* was issued to the personnel of the UNIIIC and other ad hoc tribunals. The ICC has entered into a special agreement to ensure that its personnel can freely travel with a United Nations *laissez-passer*.[88] Nonetheless, when the SCSL Registrar, on behalf of the judges, requested the United Nations to obtain a *laissez passer,* the request was rejected in the following terms:

> [The] Special Court for Sierra Leone was established as a *sui generis* treaty-based organ. The appointment of judges…is regulated by the agreement…the judges of the Special Court enjoy the privileges and immunities specified in the agreement… the [Special Court] is, therefore, an independent judicial institution established by a bilateral agreement. The judges…are not officials of the United Nations and their status is not regulated by decision of either the General Assembly or the Security Council.[89]

Although the Tribunal's status varies from that of the SCSL, meaning that the Tribunal was founded through a Security Council resolution instead of a bilateral agreement, the situations are otherwise analogous and the result the same.

11.5.6 General cooperation with states and other international organizations

The Tribunal's MoU with Lebanon and the Headquarters Agreement ensure that both Lebanon and the Netherlands are legally obligated to cooperate fully with the Tribunal. As

a non-UN tribunal, the UN Immunities Convention does not apply **(p.227)** to the STL so it does not benefit from the compulsory cooperation provided by its legal regime. The other hybrid Tribunals followed a similar legal model but they had fewer difficulties as they were primarily operating only in their respective counties, with a cooperative government. Nonetheless, the President of the SCSL argued that the court encountered difficulties in securing third state cooperation. Moreover, the SCSL President believed that the difficulty 'could be effectively addressed through a Security Council resolution endowing the Special Court with broad Chapter VII powers to enforce compliance by States with its orders and requests'.[90] The SCSL relied on the experience of the ad hoc tribunals where third states did comply with the judicial orders. The response of the United Nations was as follows:

> I wish to point out that the ICTY and the international *ad hoc* tribunal for Rwanda (ICTR) were established as subsidiary organs of the Security Council under Chapter VII resolutions and endowed with powers for the purpose only of enforcing cooperation, 'in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law' and more specifically, for the identification and location of persons, taking testimony, service of documents and the surrender or transfer of accused to the international tribunals (articles 29, 28 of the ICTY and ICTR Statutes, respectively).[91]

The response also indicated that the UN Secretariat consulted informally the members of the Security Council who 'expressed their unwillingness to act upon this request'. Instead, the United Nations 'strongly urged' the SCSL 'to work directly with the governments concerned either informally or more formally through the negotiation of bilateral agreements in order to obtain compliance with the Special Court's requests'.[92] As this precedent makes clear, the Tribunal, when exercising its functions outside of the Netherlands and Lebanon, must enter into separate agreements or other ad hoc arrangements in order to ensure the facilities necessary to carry out its mission; this has already proven to be difficult prior to the commencement of trial. This is a mistake in design, which clearly should not be repeated.

11.6 Conclusion

As this discussion demonstrates, the STL Registry indeed occupies a very 'special' place in the universe of internationalized courts and tribunals. While created under a UN Security Council resolution, the Registrar manages a court with very limited juridical capacity beyond the walls of the institution itself. This was certainly true in practical terms in the early days of the ad hoc tribunals as they struggled to obtain cooperation with states. However, this was primarily a political problem brought on by ongoing conflict and recalcitrant governments. In the case **(p.228)** of the STL, not only does it have a political problem with gaining the necessary cooperation to do its work, that political problem is compounded by a lack of legal power, with a legal personality that is not recognized and does not have to be respected beyond two (key) states. Thus, it faces both a political problem with obtaining the cooperation that it needs and also a legal one.

This very narrow legal footprint of course hampers all of the organs of the Tribunal, as it

impacts the prosecution's and defence's abilities to conduct investigations and prepare cases to proceed. Moreover, the very narrow extent to which the Tribunal is recognized by other states places fundamental restrictions and impediments on the Registrar's job that go beyond what other internationalized courts and tribunals have faced. As a practical matter, the SCSL and the ECCC, as well as other hybrid courts, have had the support of the government and much of the populace of the country in which they were investigating. It was clear that this was not the case for the STL, as it was placed in the far away Netherlands for security concerns, much as the ad hoc tribunals were located far from the scenes of the crimes. However, in the latter case they carry out their work with the facilities of the UN behind them.

The STL's situation is complicated by the fact that witnesses require special arrangements to be made by a Tribunal that is stretched for resources. Those resources are further burdened by additional expenses that result from the lack of the heretofore basic exemptions for international organizations, resulting in the incurring of additional costs for duties and for compensating staff for the taxes that they pay. Given that the Tribunal was created by the UN Security Council, it is a difficult situation to comprehend without taking political considerations into account.

Amid these difficulties sit the Registry and the STL Registrar. As the present writers and others who have worked in internationalized courts and tribunals well know, the Registry is a place where practical solutions to difficult problems are born. Many of the issues that must be addressed do not require high legal theories or even diplomatic tools, but they often do require legal arguments to ensure that the Tribunal receives the support and assistance it needs. Picking up the phone and explaining that certain immunities apply to a cross-border shipment to a border guard or a government official, reference to the UN Immunities Convention or, better yet, recitation of particular provision of the Convention can be decisive. The Tribunal's Registrar and his/her staff do not have this at hand and it is akin to having a proverbial hand tied behind one's back.

Moreover, while one can argue about the suitability of creating an independent Defence Office, and there are arguments in these pages that show the benefits of the approach, it is troubling to see that STL decisions have been justified on the basis of the creation of this Office to undermine the financial guardianship of the Tribunal Registrar. If followed elsewhere, this could have a serious impact on the confidence of donors and supporters on the financial integrity of these institutions.

All in all, the STL's Registrar is in an unenviable position, with obstacles and pitfalls that no other Registrar of an internationalized tribunal or court has faced. Indeed, it has a set of institutional arrangements that does not bear repeating.

For future Registrars of internationalized tribunals, a model too 'special' indeed.

Notes:

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Secretary-General on the ECCC, Deputy Chief Prosecutor, ICTY.

** Legal Advisor, Office of the Registrar, Special Tribunal for Lebanon. The views expressed herein are those of the author and do not necessarily reflect the views of the STL.

([1]) Res 1595, UN Doc S/RES/1595 (2005).

([2]) See Nicolas Michel, 'The Creation of the Tribunal in its Context', Chapter 2; Bahige Tabbarah, 'The Legal Nature of the Special Tribunal for Lebanon', Chapter 3.

([3]) See Sarah MH Nouwen, '"Hybrid Courts": The Hybrid Category of a New Type of International Crimes Courts' (2006) 2(2) Utrecht L Rev 190.

([4]) Nouwen, '"Hybrid Courts"' (n3). For purposes of the discussion in this chapter, reference to 'hybrid' courts or tribunals will be limited to the SCSL and ECCC as the other hybrid processes were not freestanding courts or tribunals but are either connected to an international peacekeeping or stabilization mission (East Timor and Kosovo) or part of a national court system (Bosnia State Court). See generally David Tolbert and Andrew Solomon, 'United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies' (2006) 19 Harv Hum Rts J 29.

([5]) The Special Tribunal for Lebanon was established in 2007 pursuant to SC Res 1757, UN Doc S/RES/1757 (2007). The provisions of the draft Agreement between the United Nations and the Lebanese Republic, which were brought into force by the Resolution are contained in Annex to SC Res 1757 [Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon]. See also STL, Decision on the Defence Appeals Against the Trial Chamber's 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', *Prosecutor v Ayyash et al,* Case No STL-11-01, Appeals Chamber, 24 October 2012, paras 25, 26, and 31: 'Given that Lebanon did not ratify the draft agreement, its *provisions* entered into force by virtue of the Security Council's powers under Chapter VII of the United Nations Charter. In summary, the Tribunal was not established by an international agreement but by Resolution 1757, adopted by the Security Council pursuant to Chapter VII of the United Nations Charter.'

([6]) See Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, UN Doc S/2006/893 (2006) para 6: '[T]he special tribunal is neither a subsidiary organ of the United Nations, nor is it a part of the Lebanese court system.'

([7]) David Tolbert, 'Reflections on the ICTY Registry' (2004) 2 JICJ 480.

([8]) See eg Annex to SC Res 1757 (n5) art 4, which states that a Registrar 'shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Tribunal.' The Registrar's judicial responsibilities include overseeing court management, language services section, victim and witnesses,

and victim participation. See also Attachment to SC Res 1757, UN Doc S/RES/1757 (2007) [Statute of the Special Tribunal for Lebanon] art 12; STL Rules of Procedure and Evidence rr 48, 50–51, 54.

([9]) Rupert Skilbeck, 'Ensuring Effective Defence in Hybrid Tribunals' (2010) Revue Québécoise de Droit International 91. At the other ad hoc tribunals, this role was managed by an administrative unit within the Registry. At the ICC, the role developed into a semi-independent role of the Office of Public Counsel for the Defence, but within the Registry. At the STL, the Defence Office is an independent organ, separate from the Registry.

([10]) STL RPE r 51.

([11]) STL Statute (n8) art 12(1).

([12]) See Annex to SC Res 1757 (n5) art 6.

([13]) Ralph Zacklin, 'The Failings of Ad Hoc International Tribunals' (2004) 2 JICJ 541.

([14]) The ICTY is located in the Netherlands; the ICTR is seated in Tanzania.

([15]) The trial *in absentia* is posited on the idea that it respects the national legal system of Lebanon and may inadvertently save on costs. See STL Statute (n8) art 22; STL RPE rr 105*bis*–109. See also, Paola Gaeta, 'Trial *in Absentia* Before the Special Tribunal for Lebanon: Between Myth and Reality', Chapter 12.

([16]) STL Statute (n8) art 12; STL RPE r 48.

([17]) See (n9). Rupert Skilbeck, *Ensuring Effective Defence in Hybrid Tribunals* (2010) Revue québécoise de droit international (Hors-série), 91–102. At the other ad hoc Tribunals, the role was managed by an administrative unit within the Registry. At the ICC, the role developed into a semi-independent role of the Office of Public Counsel for the Defence, but within the Registry. At the STL, the Defence Office is an independent organ, separate from the Registry.

([18]) STL Statute (n8) art 12; STL RPE r 48, which states '[t]he Registrar shall assist the Chambers, the Judges, the Prosecutor and the Head of the Defence Office in the performance of their functions'. The ad hoc tribunals, as organs linked to the UN Secretariat, operate under the umbrella and authority of the UN. The ICC, on the other hand, is independent from the UN and answers to the authority of the Assembly of State Parties. In the context of the ICC, the role of the Registry has been diluted in order to ensure adequate independence between the organs, especially the Prosecution. See Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Munchen: Verlag CH Beck 2008) 995.

([19]) On 10 March 2008, Robin Vincent was appointed as the first Registrar of the Special Tribunal. Mr Vincent took office in New York on 28 April 2008 and was relocated to The

Hague on 7 July 2008 to prepare the premises for occupation. See Third Report of the Secretary-General Submitted Pursuant to Security Council Resolution 1757, UN Doc S/2008/734 (2007).

([20]) STL Statute (n8) art 12(3); Annex to SC Res 1757 (n5) art 4, which provides that the Secretary-General is to appoint a UN staff member as the Registrar. The Registrar is expected to develop the administrative and judicial infrastructure of the Tribunal. He is also expected to assist with the transition from the UNIIIC. See Report of the Secretary-General Submitted Pursuant to Security Council Resolution 1757, UN Doc S/2007/525 (2007).

([21]) The Management Committee is established pursuant to Annex to SC Res 1757 (n5) art 6. The Tribunal's annual budget is approved by the Management Committee per the Financial Regulations, which were promulgated upon approval of the Management Committee. Initially, the donor states were contributing the funds to the STL through the UN trust fund. The account was administered under the STL Financial Regulations and Rules. Once the funds were transferred, the Tribunal became financially independent from the UN. However, pursuant to regulation 1.3 of the STL Financial Regulations and Rules, '[t]he Registrar is responsible and accountable to the Management Committee for the effective and efficient financial administration of the Tribunal'. See Interoffice Memorandum to the Chief Executive Officer, United Nations Joint Staff Pension Fund (UNJSPF), Regarding the Legal Status of the Special Tribunal for Lebanon in view of its Application for Membership to UNJSPF (UN Juridical Yearbook (2008), 24 November 2008) 440.

([22]) On 15 May 2008, the Tribunal submitted its application for membership to the UNJSPF. In July 2008, the application was approved by the Pension Fund Board subject to confirmation from the Chief Executive Officer that he is satisfied that the conditions of service of the Special Tribunal are aligned with those of the United Nations common system. See Secretary-General's Third Report (n19) para 17. The Secretary-General also reported that in December 2008, the General Assembly admitted the Special Tribunal as a member of the UNJSPF, effective 1 January 2009. See Fourth Report of the Secretary-General Submitted Pursuant to Security Council Resolution 1757, UN Doc S/2009/106 (2007) para 16. On 7 October 2008, the Management Committee adopted the Staff Regulations and Rules. See Secretary-General's Third Report (n19) para 16.

([23]) Second Report of the Secretary-General Submitted Pursuant to Security Council Resolution 1757, UN Doc S/2008/173 (2008) para 28.

([24]) For a thorough comparative assessment of the financing structure of the hybrid tribunals see, Giorgia Tortora, 'The Financing of the Special Tribunals for Sierra Leone, Cambodia and Lebanon' (2012) 13 Int C L R 93–124.

([25]) STL, Decision on the Head of Defence Office Request for Review of the Registrar's Decision Relating to the Assignment of a Local Resource Person, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PRES, President, 21 December 2012, para 24.

([26]) Decision Relating to the Assignment of a Local Resource Person, *Prosecutor v Ayyash et al* (n25) note 43.

([27]) Within the domestic system, such as Canada and the United Kingdom, the Registrar may be regarded as equivalent to the chief executive officer of an organization. See Jane Lanigan (ed), *Handbook of Best Practices for Registrars of Final/Appellate, Regional and International Courts and Tribunals* (London: Commonwealth Secretariat 2012) 4–5: 'The principle that judges should be free from interference from the executive branch of the government is well established, but the extent to which the principle has been recognized in the setting up of administrations surrounding a court or tribunal has varied. Although judges are not public servants, court staff within the administrative office that supports a court or tribunal most often are. In some jurisdictions, registrars and deputy registrars of courts and tribunals perform quasi-judicial functions (in addition to their administrative management duties) but are, nevertheless, public servants…The chief executive "must act in accordance with any direction given by the President of the Court" but, that said, the chief executive, officers and staff of the court are public servants. Their standard of conduct and behavior are governed by those applicable to public servants…and may not be inconsistent with the standards of behaviour required by public servants.'

([28]) See Giorgia Gaja, 'First Report on Responsibility of International Organizations' UN Doc A/CN.4/532 (2003) paras 15–20. See also 'Reparation for Injuries Suffered in the Service of the United Nations', Advisory Opinion, ICJ Rep 1949 (11 April), 147.

([29]) The UN Office of Legal Affairs submitted the application for membership of the UNJSPF of the Special Tribunal for Lebanon. See Interoffice Memorandum (n21).

([30]) Draft Articles on the Responsibility of International Organisations with Commentaries (Geneva, 3 June 2011, ILC Yearbook, Vol II(2) (2011)) art 2(a). See also commentary to art 2, para 12. The International Law Commission further states that '[t]he fact that paragraph (a) considers that an international organization 'may include as members, in addition to States, other members' does not imply that a plurality of States as members is required. Thus an international organization may be established by a State and another international organization. Examples may be provided by the Special Court for Sierra Leone and the Special Tribunal for Lebanon.'

([31]) On the Tribunal's juridical capacity, see Annex to SC Res 1757 (n5) art 7; Memorandum of Understanding between the Government of the Republic of Lebanon and the Special Tribunal for Lebanon Concerning the Office of the Special Tribunal in Lebanon (Beirut, 17 June 2009) art 3; Agreement between the Kingdom of the Netherlands and the United Nations Concerning the Headquarters of the Special Tribunal for Lebanon (New York, 21 December 2007, *Tractenblad* 2007, 228) art 4.

([32]) See SC Res 1757 (n5):'Reaffirming its determination that this terrorist act and its implications constitute a threat to international peace and security…' For a critical assessment, see Bardo Fassbender, 'Reflections on the International Legality of the Special Tribunal for Lebanon' (2007) 5 JICJ 1091.

([33]) Appeals Chamber Decision on Jurisdiction and Legality, *Prosecutor v Ayyash et al* (n5) para 39.

([34]) See Statute of the ICTY (25 May 1993, 32 ILM 1159 (1993)) art 29; Statute of the ICTR (8 November 1994, 33 ILM 1598 (1994)) art 29, requiring all member states of the UN to cooperate with the tribunals.

([35]) See STL Headquarters Agreement (n31) part V ('Cooperation Between the Tribunal and the Host State'): 'The Dutch Government voluntarily accepted the UN Secretary-General's invitation to act as the host state of the Special Tribunal…The Government is of the opinion that the Headquarters Agreement does not contain any provisions that derogate from the Constitution or require such derogations.' The official implementing legislation contains additional provisions that enable the Netherlands to cooperate with the Special Tribunal. The Netherlands' cooperation is partly inspired by the constitutional obligation to promote the development of the international legal order, see *Grondwet voor het Koninkrijk der Nederlanden* (The Constitution of the Kingdom of the Netherlands) (Boekje Grondwet 2008) art 90. The establishment of the Tribunal on Dutch territory is also legitimized by article 92 of the Constitution, which provides that certain powers, such as judicial powers, may be conferred on international institutions by or pursuant to a treaty—in this case, a resolution of the UN Security Council based on the UN Charter. See Peter van Huizen, 'Netherlands State Practice for the Parliamentary Year 2008–2009' (D Stephens tr) (2010) 41 NYIL 305.

([36]) Charter of the United Nations (San Francisco, 24 October 1945, 1 UNTS XVI).

([37]) Convention on the Privileges and Immunities of the United Nations (UN Immunities Convention) (New York, 13 February 1946, 1 UNTS 15).

([38]) See Chittharanjan Felix Amerasinghe, *Principles of Institutional Law of International Organization* (2nd edn, New York: Cambridge University Press 2005), 316.

([39]) Law on the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (Phnom Penh, 6 June 2003).

([40]) Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (Phnom Penh, 6 June 2003).

([41]) SC Res 1315, UN Doc S/RES/1315 (2000). The Security Council reiterated that the situation in Sierra Leone constituted a threat to international peace and security in the region. However, instead of invoking its Chapter VII authority, it requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone: 'The Secretary-General of the UN has in the past suggested that the Security Council take measures to oblige third states to cooperate with the Court. He even made the proposal that the Council endow the court with Chapter VII powers "for the specific purpose of

requesting the surrender of an accused from outside the jurisdiction of the court".' See Bert Swart, 'Cooperation Challenges for the Special Tribunal for Lebanon' (2007) 5 JICJ 1156. See also Report of the Secretary-General on the Establishment of a Special Court for Sierra-Leone, UN Doc S/2000/915 (2000) para 10. On 11 June 2001, the SCSL announced through a Press Release that 'the President of Court, Justice Geoffrey Robertson, has written a letter to the Secretary-General of the United Nations Kofi Annan. The letter asks the Secretary-General to recommend that the UN Security Council pass a resolution under Chapter Seven of the UN Charter calling on member states to abide by the orders of the Court.' SCSL, Press Release, 11 June 2001.

([42]) SC Res 1315, UN Doc S/RES/1315 (2000).

([43]) Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002, 2178 UNTS 138) art 1(1): '[t]here is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996'.

([44]) Amerasinghe, *Principles of Institutional Law of International Organization* (n38) 320.

([45]) Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, New York: Cambridge University Press 2009) 145–6. See also A Sam Muller, *International Organizations and their Host States: Aspects of their Legal Relationship* (The Hague: Kluwer Law International 1995) 194ff.

([46]) Annex to SC Res 1757 (n5) art 10.

([47]) Annex to SC Res 1757 (n5) art 8: '[the] location of the seat shall be determined having due regard to considerations of justice and fairness as well as security and administrative efficiency, including the rights of victims and access to witnesses, and subject to the conclusion of a headquarters agreement between the United Nations, the Government and the State that hosts the Tribunal.'

([48]) Secretary-General's Second Report (n23) paras 4–6.

([49]) STL Headquarters Agreement (n31) art 6.

([50]) Annex to SC Res 1757 (n5) art 8.

([51]) Annex to SC Res 1757 (n5) art 9.

([52]) MoU Office of the STL in Lebanon (n31). See also Memorandum of Understanding Between the Government of the Republic of Lebanon and the Office of the Prosecutor of the Special Tribunal for Lebanon Regarding the Modalities of Cooperation Between Them (Beirut, 5 June 2009); Memorandum of Understanding Between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation (28 July

2010).

([53]) STL Headquarters Agreement (n31) art 11.

([54]) STL Headquarters Agreement (n31) art 15.

([55]) Amerasinghe, *Principles of Institutional Law of International Organization* (n38); Klabbers, *An Introduction to International Institutional Law* (n45) 148.

([56]) Annex to SC Res 1757 (n5) art 10; STL Headquarters Agreement (n31) art 11; MoU Office of the STL in Lebanon (n31) art 7; Thomas Henquet, 'International Organisations in the Netherlands: Immunity from the Jurisdiction of the Dutch Courts' (2010) 57(2) NILR276.

([57]) Annex to SC Res 1757 (n5) art 11(1).

([58]) Annex to SC Res 1757 (n5) art 11. The authority to waive the immunity of judges, the Prosecutor, the Deputy Prosecutor, the Registrar, and the head of the Defence Office lies with the Secretary-General in consultation with the President of the Tribunal. See also STL Headquarters Agreement (n31) art 28(a); MoU Office of the STL in Lebanon (n31) art 15.

([59]) See Annex to SC Res 1757 (n5) art 12.

([60]) Annex to SC Res 1757 (n5) art 12. The authority to waive the immunity of both international and Lebanese personnel lies with the Registrar. See STL Headquarters Agreement (n31) art 28(b); MoU Office of the STL in Lebanon (n31) art 16.

([61]) STL Headquarters Agreement (n31) art 18.

([62]) STL Headquarters Agreement (n31) arts 22–26.

([63]) STL Headquarters Agreement (n31) art 25.

([64]) STL Headquarters Agreement (n31) art 22.

([65]) STL Headquarters Agreement (n31) art 27.

([66]) Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Munchen: Verlag CH Beck 2008) 985–94.

([67]) This was not the case for the UNIIIC, where the UN 'in Resolution 1595 (2005) and 1636 (2005) and 1644 (2005), the Security Council called upon all states "to cooperate fully" with the Commission, while it has refrained from doing the same where the STL is concerned'. See Swart, 'Cooperation Challenges for the Special Tribunal for Lebanon' (n41) 1159.

([68]) ICTY Statute (n34) art 29.

([69]) Annex to SC Res 1757 (n5) art 15.

([70]) Annex to SC Res 1757 (n5) art 7 anticipates such agreements being negotiated with third states; however, '[a]s far as national laws are concerned, the prospects of the Tribunal seems to be limited. Notwithstanding the fact that the obligation to cooperate enshrined in the Statutes of ICTY and the ICTR [has] led many states to adapt their legislation [it] is still primarily focused on cooperation in criminal matters between states… most national statutes enabling the competent authorities to cooperation with the ICTY and the ICTR or, for that matter, the ICC, do not cover cooperation with the special Court of Sierra Leon, the Special Tribunal for Lebanon or any other international court or tribunal that might be established in the future.' See Swart 'Cooperation Challenges for the Special Tribunal for Lebanon' (n41) 1158–9.

([71]) Swart 'Cooperation Challenges for the Special Tribunal for Lebanon' (n41) 1159: 'Two paradoxes present themselves here. The first is that an internationalized tribunal established by the Security Council for the very purpose of adjudicating terrorist crimes has fewer means of obtaining the assistance of UN member states than these states mutually have pursuant to national statutes, international conventions and Security Council Resolutions. A second—perhaps unforeseen and unintended—paradox flows from the fact that the STL has priority of jurisdiction over the national courts of Lebanon…As a consequence, the competent Lebanese authorities can no longer request the assistance of other states in these matters; to request international assistance necessarily presupposes jurisdiction over the offences with regard to which assistance is requested. Thus, the opportunities for international cooperation have been reduced rather than enlarged by the creation of the STL.'

([72]) Swart 'Cooperation Challenges for the Special Tribunal for Lebanon' (n41) 1153–63.

([73]) The Registrar's salary is tax exempt because of the fact that he/she is a United Nations staff member.

([74]) STL, Prosecution Response on Sabra Defence Motion Seeking the Cooperation of Lebanon, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/PTJ, Prosecution, 8 October 2012, 4–5: 'The [UNIIIC documents] sought are in the custody and control of the Tribunal. Specifically, in accordance with his responsibility to investigate crimes under the mandate of the Tribunal and collect evidence, the Prosecutor is the custodian of these documents.' See also STL RPE r 64, which states that 'the Prosecutor shall be responsible for the retention, storage and security of information and physical and electronic material obtained in the course of the Prosecutor's investigations'.

([75]) Emphasis added. See STL, Public Amicus Curiae Brief on the Inviolability of United Nations Documents, *In the Matter of El Sayed*, UN Amicus Curiae, 1 October 2010. See also STL, Public Letter from the United Nations to the Pre-Trial Judge titled 'Filing in Response to the Scheduling Order of 16 November 2010,' *In the Matter of El Sayed,* UN Legal Counsel, 23 November 2010.

([76]) See UN Amicus Filing (n75) para 8; UN Letter from Legal Counsel to the PTJ (n75).

([77]) UN Amicus Filing (n75) para 14.

([78]) UN Amicus Filing (n75) para 4.

([79]) Secretary-General's Bulletin on Information Sensitivity, Classification and Handling, UN Doc ST/SGB/2007/6 (12 February 2007) para 1.2: 'The criteria applied to the disclosure of documents include, *inter alia,* that the release of the document in question must not: (i) put anyone in danger; (ii) violate a duty of confidentiality owed by the United Nations to a third party (such as a member state); (iii) endanger the security of Member States or prejudice the security or proper conduct of any operation or activity of the United Nations, including any of its peacekeeping operations; or (iv) undermine the Organization's free and independent decision-making process.' See also ICTY, Letter to Judge Kwon from UN Assistant Secretary-General in Charge of the Office of Legal Affairs Dated 2 March 2011, *Prosecutor v Karadžić*, Case No IT-95-5/18-T, UN Assistant Secretary-General in Charge of the Office of Legal Affairs, 3 March 2011. The letter indicates that the United Nations, when applying the criteria will provide the information, but in a redacted form. The information will not be provided only if it is not possible to redact the document.

([80]) For a thorough analysis, see Giorgia Tortora, 'The Financing of the Special Tribunals for Sierra Leone, Cambodia and Lebanon' (2013) 13 Intl Crim L Rev 93.

([81]) STL RPE rr 105, 124.

([82]) Annex to SC Res 1757 (n5) art 8(3); STL RPE r 44.

([83]) There is no direct flight between Lebanon and the Netherlands.

([84]) Asylum was a complication for witnesses who travelled to the Netherlands to testify at the ICC. In the *Katanga* case, the Trial Chamber stated: '[a]dmittedly, as an international organisation with a legal personality, the Court cannot disregard the customary rule of non-refoulement. However, since it does not possess any territory, it is unable to implement the principle within its ordinary meaning, and hence is unlikely to maintain long-term jurisdiction over persons who are at risk of persecution or torture if they return to their country of origin. In the Chamber's view, only a State which possesses territory is actually able to apply the non-refoulement rule. See ICC, Decision on an Amicus Curiae Application and on the 'Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile', *Prosecutor v Katanga and Ngudjolo,* Case No ICC-01/04-01/07, Trial Chamber, 9 June 2011, 64. In addition, the Amsterdam Court ruled that access to Dutch proceedings is available to all persons involved in ICC proceedings and present on Dutch territory; however, it is only when the Dutch law interferes with the proper functioning of the ICC that there may be reason to limit the applicability of Dutch law. For a comprehensive review, see Göran Sluiter, 'Shared Responsibility in

International Criminal Justice: The ICC and Asylum' (2012) 10 JICJ 15.

([85]) In 2006, the UNIIIC evacuated from Beirut, under the auspices of the United Nations. See Report of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 1 January–31 December 2006, UN GAOR 62nd Sess, Supp No 13, UN Doc A/62/13 (2007), 7.

([86]) Annex to Letter Dated 25 September 2006 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2006/760 (2006) [Fifth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005)] para 2. The UNIIIC personnel were able to continue their official duties while temporarily stationed in Cyprus; however, for the Tribunal, a separate agreement would need to be entered into with the Government of Cyprus, as the legal protections granted to the personnel while in Lebanon would not apply.

([87]) Secretary-General's Second Report (n23) paras 19(b)–20: 'Article 17 (a) of the annex to resolution 1757 (2007) provides for appropriate arrangements to be made to ensure that there is a coordinated transition from the activities of the Investigation Commission to the Office of the Prosecutor of the Special Tribunal. As noted by the Commission in its ninth report to the Security Council…transitional activities also rely on the institutional memory and experience gained by its staff. Whereas a principal aspect of the Tribunal's capacity to attract staff of the highest standards depends on competitive compensation practices, consideration is being given to aligning the conditions of service of staff with those prevailing in the United Nations common system in order to maintain a degree of continuity between the staff of the Commission and the Tribunal. Except for the Registrar, who is a United Nations staff member, the terms and conditions of service of staff as described apply uniformly to all staff recruited by the Tribunal.'

([88]) Negotiated Relationship Agreement between the International Criminal Court and the United Nations (New York, 4 October 2004, ICC-ASP/3/Res.1).

([89]) Letter to the Registrar of the Special Court for Sierra Leone (UN Juridical Yearbook (2003)) 519.

([90]) Letter to the President of the Special Court for Sierra Leone (UN Juridical Yearbook (2003)) 541.

([91]) Letter to the President of the Special Court for Sierra Leone (UN Juridical Yearbook (2003)).

([92]) Letter to the President of the Special Court for Sierra Leone (UN Juridical Yearbook (2003)) 542.

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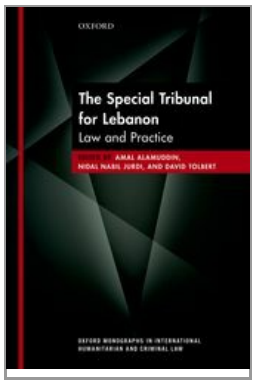

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Trial In Absentia Before the Special Tribunal for Lebanon

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[–] Abstract and Keywords

Article 22 of the Statute of the Special Tribunal for Lebanon (STL) provides for the possibility of holding trials in the absence of the accused — a procedure that has spawned heated debates among international criminal and human rights lawyers. This chapter first distinguishes between trials by default versus trials *in absentia* proper. It argues that, from an international human rights perspective, trials by default are not inherently incompatible with the right of an individual to participate in his/her own trial, and that the right to re-trial can remedy the eventual violation of this right, if any. The chapter then discusses whether trials by default at the STL conform to the right of an accused to attend his/her own trial and to what extent the right to re-trial or a re-examination of the case is endangered at the STL, given its temporary nature. Finally, it considers the legitimacy of trials by default with respect to the practice of 'renditions' implemented in certain circumstances to ensure the presence of the accused at the trial, as a means to ensure that the objectives of criminal justice are achieved.

Keywords: international criminal tribunal, trials by default, trials in absentia proper, renditions

12.1 Introduction

Article 22 of the Statute of the Special Tribunal for Lebanon ('STL' or 'the Tribunal') provides for the possibility of holding trials in the absence of the accused.[1] This procedure, which is among the main innovations of the STL with respect to other international and hybrid criminal courts and tribunals,[2] has sparked a lively debate among international criminal and human rights lawyers. **(p.230)** Some argue that holding trials *in absentia* at the STL would result in the violation of the international human rights minimum standards on fair trial enshrined in the International Covenant on Civil and Political Rights (ICCPR) and in regional international human rights treaties, such as the European Convention on Human Rights.[3] It was also contended, however, that the interpretative framework elucidated by the STL Appeals Chamber in its 'Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging',[4] if applied, would make proceedings *in absentia* at the STL in conformity 'with universal human rights and the highest international standards of criminal justice'.[5]

The present chapter clarifies that the main bone of contention with respect to trials *in absentia* is especially concerned with a specific typology, namely trials by default, and therefore that a correct approach to the matter needs to distinguish the latter from trial *in absentia* proper. It will also clarify that, at least from an international human rights point of view, trials by default are not inherently incompatible with the right of an individual to participate in his/her own trial and that the right to retrial (or at least to a fresh determination of the merits of the case) can remedy the eventual violation of this right, if any. In this respect, this chapter also discusses whether trials by default at the STL conform to the right of an accused to attend his/her own trial and to what extent the right to retrial or a re-examination of the case is endangered at the STL, given its temporary nature. Finally, this chapter briefly discusses the legitimacy of trials by default with respect to the practice of 'renditions' implemented in certain circumstances to ensure the presence of the accused at the trial, as a means to ensure that the objectives of criminal justice are achieved.

12.2 Trials by Default versus Trials *In Absentia* Proper

In the international criminal law literature on trials *in absentia*, rarely is a distinction made between trials by *default* and trials *in absentia* proper. The former relate to criminal proceedings held against an accused who has not been served with the charges and notice of trial and never appears in court. By contrast, trials *in absentia* proper refer to proceedings against an accused who undoubtedly has knowledge of the charges and of the proceedings against him/her because he/she was personally served with the indictment but chooses not to appear in court for the entire duration of the trial, or at some of its hearings, or is excluded from the court due to misconduct of some type.[6]

(p.231) The distinction between proceedings by default and *in absentia* proper is significant. The possibility of holding trials in each of the hypotheses described here is not infrequent in the criminal law systems of civil law countries.[7] By contrast, common law

countries are traditionally opposed to criminal proceedings *in absentia* since they consider the participation of the accused in the criminal proceedings and the right to confrontation as fundamental components of a fair trial. Even in common law systems, however, exceptions to the full presence of the accused at his own trial are envisaged and criminal proceedings *in absentia* proper are allowed in specific circumstances. For instance, in the US, physical presence is not requested with respect to: non-critical occurrences of the criminal proceedings (ie whenever the absence of the accused does not affect due process); cases when the defendant himself has waived (also implicitly) the right to be present or has forfeited it through misconduct; and cases when the defendant has adopted an abusive and disruptive behavior in court, has continued to do so after repeated warnings that he would be removed from the court, and has actually been removed.[8] By contrast, trials by default are generally not allowed, at least not for charges that can lead to a penalty of deprivation of liberty (as is the case in the UK).[9]

With the exception of the Nuremberg Tribunal (which tried Martin Bormann without the defendant ever appearing in court and when there were doubts about whether he was even alive at the time of trial)[10] and—as shall be shown later—the STL, trials by default are not allowed at international and hybrid criminal courts and tribunals. Trials *in absentia* as defined earlier are, however, permitted in particular circumstances.

The Rome Statute of the International Criminal Court (ICC Statute) provides that the trial cannot commence if the person has not appeared in person at the initial hearing before the Pre-Trial Chamber.[11] This provision therefore rules out **(p.232)** trials by default. After the initial appearance, however, trials *in absentia* proper are permitted in specific cases. Article 63 of the ICC Statute, while providing that the accused 'shall be present' at his own trial, adds that he/she may be removed from the court if he/she continues to disrupt the trial.[12] In addition, as a Trial Chamber of the International Criminal Court held in *Ruto*, 'in exceptional circumstances…the Chamber may exercise its discretion under article 64(6)(f) of the Statute to excuse an accused, on a case-by-case basis, from continuous presence at trial'.[13] The Trial Chamber also expressed doubts that the trial would be foreclosed in the case of an accused who absconded from his own trial after having appeared before the Court, thereby also not ruling out the possibility of holding trials *in absentia* in such circumstances.[14] The issue appears to hinge on how to interpret the clause 'shall be present': as an obligation on the Court to ensure that the right to be present is ensured (but allowing the accused the choice of whether to exercise such a right or not) or as a duty for the accused to surrender himself and be present throughout the criminal proceedings. The ICC appears to be leaning towards a duty for the accused to be present, in consideration of all the interests involved in seeing an accused on the dock—although the ultimate decision by this specific Trial Chamber appears to allow ample flexibility on how the notion of 'presence' is actually implemented.[15]

The Special Court for Sierra Leone (SCSL) can hold trials *in absentia* when, having made his/her initial appearance, the accused refuses to appear at the trial or **(p.233)** is at large and does not appear in court,[16] in accordance with the principle *semel praesens*

semper praesens (to be present once at trial entails being present forever). The same principle applies at the Special Panels for East Timor (SPSC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).[17] Trials *in absentia* seem instead to be prohibited in all circumstances before the Regulation 64 Panels in Kosovo.[18]

The Statutes and Rules of Procedure and Evidence (RPE) of both the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are silent on the question of trials *in absentia* but they provide that the accused has the right to be present at his/her own trial.[19] The Report of the UN Secretary-General to the Security Council concerning the establishment of the ICTY considered that this right would imply that 'a trial should not commence until the accused is physically present before the International Tribunal' since '[t]here is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with article 14 [ICCPR] which provides that the accused shall be entitled to be tried in his presence'.[20] At the time of the adoption of the first set of Rules of Procedure **(p.234)** and Evidence of the ICTY, the then President of the Tribunal, the late Antonio Cassese, submitted a *Memorandum on trials by default* to the judges, where he argued that this statement was not correct. He tried instead to convince the other judges to provide in the Rules of Procedure and Evidence for the possibility of holding trials by default in exceptional circumstances and put forward strong arguments to this effect.[21] He was, however, not successful. Some of his fellow judges had indeed expressed strong reservations against trials by default at the early plenary meetings of the ICTY, although they endorsed the possibility of envisaging trials *in absentia* proper in exceptional circumstances.[22]

In the end, the compromise solution was the special procedure enshrined in rule 61 of the Rules of Procedure and Evidence of the ICTY. This procedure allows the Prosecution to call witnesses and produce evidence against an accused who did not surrender or who was not surrendered to the ICTY in a public hearing, at the closing of which the Trial Chamber may determine that 'there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment' and 'issue an international arrest warrant in respect of the accused which shall be transmitted to all states'.[23] In the opinion of Louis Joinet, at the time a member of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, rule 61 proceedings would have permitted reaching the same results of a conviction by default (i.e. the issuance of an international arrest warrant), and would have had the advantage of being compatible with those legal systems opposed to trials by default.[24] Rule 61 hearings **(p.235)** were held in the early years of activity of the ICTY, at a time when there was scant hope of obtaining the arrest and transfer of the accused to the Tribunal,[25] but they were actually considered detrimental to the work of the Office of the Prosecutor by one ICTY Prosecutor.[26]

Be that as it may, the Appeals Chamber of the ICTY unanimously acknowledged proceedings by default in cases of contempt, insisting however that in such cases all necessary guarantees should be offered to the absent defendant.[27] This confirms the

view that the judges of the ICTY considered that the right of the accused to be present at his/her trial, as recognized by the ICTY Statute, does not bar trials *in absentia* (including by default); nonetheless they decided not to provide for such a possibility in the Tribunal's Rules.[28] By contrast, the Rules of Procedure and Evidence of the ICTR expressly provides for trials *in absentia* proper when the **(p.236)** accused refuses to appear before the Trial Chamber. According to rule 82bis, 'the Chamber may order, upon satisfaction of the requirements mentioned in this rule, that the trial proceed in the absence of the accused for so long as his refusal persists'.[29]

The Statute of the STL clearly contemplates both trials *in absentia* proper and trials by default. By referring to 'trial proceedings in the absence of the accused if he or she: (a) has expressly and in writing waived his or her right to be present', article 22(1)(a) clearly refers to the hypothesis of trials *in absentia* proper.[30] Proceedings both *in absentia* proper and by default are envisaged by subparagraph (c) of the same provision, concerning the accused who 'has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge'. The accused who absconds voluntarily decides not to face the charges against him at trial, either by escaping notification and arrest or by subsequently evading justice once notified and eventually held in custody. The first scenario would be one of default, the second of *in absentia* proper. More ambiguous is the case of subparagraph (b), which allows trials in the absence of the accused when the latter 'has not been handed over to the Tribunal by the State authorities concerned'. If the accused is detained by the requested state, and wishes to participate in his trial but is prevented from doing so by the detaining state, absence is justified and arguably proceedings *in absentia* shall not be commenced.[31] In contrast, if the accused is not detained and the requested state simply fails or refuses to execute the arrest warrant and to surrender the accused, the case can be one of default or *in absentia* proper, depending on whether the charges and process were served on the accused in person or through indirect means. In accordance with article 22(3), however, if a defendant is convicted *in absentia* and he/she does not accept the judgment, he/she will **(p.237)** have the right to a retrial in his/her presence before the STL 'if he or she had not designated a defence counsel of his or her choosing'.

12.3 Notification and Trials by Default

As shown earlier, trials *in absentia* proper are provided for in exceptional circumstances both in domestic systems and at some international and hybrid courts and tribunals. The rationale for this procedure is that the course of justice shall continue in the face of a defendant who refuses to participate or disrupts the proceedings in court precisely because he/she intends to obstruct the course of justice. In such circumstances, it can be said that either he/she has relinquished his/her right to participate in his/her own trial or that he/she abuses this right through his/her personal disruptive behaviour in court.

The same rationale seems not to be easily applicable to trials by default, which are held against an accused who has never been found and who was therefore never notified personally. Detractors of proceedings by default submit a variety of reasons to explain

why such trials should not be held. They range from practical considerations (punishment cannot be imposed in case of conviction until the convicted person surrenders or is captured), to policy-orientated reasons (this type of trial has been used mainly by authoritarian regimes in cases against political opponents), including sincere concerns about respect for the rights of the accused (the right to be present at trial is an essential component of the right to defend one's self).

Those arguments could arguably be used also to oppose holding trials *in absentia* proper. Nonetheless, as explained earlier, the national legal systems of many countries and the applicable rules of international and hybrid criminal courts and tribunals often provide that there are circumstances in which the need to continue the course of justice shall prevail, so that the judiciary does not become hostage to the absconding or disrupting defendant. If trials *in absentia* proper are permitted in some exceptional circumstances (as they are in the US and the UK, for instance) without being hampered by the aforementioned reasons, because there is a prevalent necessity to let justice continue, why then may justice be obstructed by a person who absconds himself/herself to avoid personal notice and perhaps arrest? Since trials *in absentia* proper are exceptionally permitted, a non-ideological approach to the issue of proceedings in the absence of the accused would necessarily lead to the conclusion that trials by default could also be permitted in exceptional circumstances too.

What is, then, the fundamental legal objection against trials by default? Although it is not spelt out clearly by commentators, it seems mainly to revolve around the issue of the notification of the criminal charges and process. Whenever the accused has been notified in person of the charges and the criminal proceedings against him/her, there seems to be no theoretical difficulty in allowing trials in the absence of the accused, although subject to strict guarantees, and in exceptional circumstances, if the accused does not appear in court or disrupts the criminal proceedings. Under such a hypothesis, it can be said that either he/she has relinquished his/her right to **(p.238)** participate in the proceedings or that he/she abuses this right through his/her personal disruptive behaviour in court, and therefore the proceedings may continue. Since the right to be present at one's trial is a right, it can be waived or curtailed by the legal system under certain conditions. By contrast, in the case of trial by default, the fact that the proceedings are held against an accused who was never served in person might create uncertainty about whether the accused is actually informed of the charges against him and the impending trial. If we are unsure as to whether the accused was informed of the charges against him, we are not in a position to make a finding on whether he waived his right to be present. In other words, there can be doubts about whether he/she has attempted to escape justice and de facto waived his/her right to be present at his/her own trial by not appearing in court. This uncertainty can therefore be perceived as making the criminal proceedings flawed *ab origine* and at odds with the fundamental right of the accused to be able to effectively exercise his right to participate in his/her own trial.

This perception, however, is unwarranted. There are situations where proceedings held against an absent defendant who was never notified in person can be considered akin to

those held in the absence of an accused who absconded after notification in person. These are when the person was notified through means other than service in person and nonetheless decided not to appear in court without justification. Therefore, the rationale justifying the continuation of the criminal proceedings in this latter case can work as a foundation to the opening of criminal proceedings against an absent defendant who was never notified in person. As we shall see, this is at least the conclusion reached by some international human rights bodies when examining the conformity of trials by default with the right of an accused to participate in the criminal proceedings against him/her enshrined in the relevant human rights treaties.

12.3.1 The right to be present and trials by default under the international covenant on civil and political rights

The right of an accused to be present at his/her own trial is expressly guaranteed by article 14(3)(d) of the ICCPR, which reads: '[i]n the determination of any criminal charge against him, everyone shall be entitled…to be tried in his presence'. Although, as mentioned earlier, the UN Secretary-General's Report on the Establishment of the ICTY affirmed that this provision implies a ban on trials *in absentia*, this last statement can be contested.

First of all, if one examines the preparatory works to the ICCPR, one can note that the issue of whether the express inclusion of the right to be present might have hampered trials *in absentia* in general and by default in particular, was simply not discussed at all and was not even raised by countries whose legislation traditionally allowed those trials.[32] On the contrary, some of these countries went so far as to **(p.239)** state that the express inclusion of the right of the defendant to be tried in his/her presence was in full conformity with their criminal legislation.[33] In addition, only two states formulated reservations or declarations concerning the compatibility of the right to be present with trials by default, and a few others formulated reservations as regards trials *in absentia* proper, even though the legislation of a larger number of states allow trials *in absentia*, including trials by default.[34] At first sight, this attitude might appear striking, but it is not: it merely indicates that the States concerned never contemplated the possibility that the obligation to recognize a defendant's right to be present at his/her own trial would entail the incompatibility of trials by default with such a right in all circumstances.

(p.240) Secondly, and more importantly, the Human Rights Committee (the Committee) has stated that the right to be present at trial does not bar trials *in absentia* (including trials by default). This stand was implicitly taken in General Comment No 13, where the Committee explained that '[w]hen exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary'.[35] The Committee was subsequently more explicit in a case concerning trials by default allegedly held in violation of article 14(3)(d) ICCPR. Here it noted that the right to be present 'cannot be construed as invariably rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person's absence'.[36] Then, it noted that proceedings *in absentia* are 'in some circumstances…permissible in the interest of the proper administration of justice' but insisted on the necessity that 'steps should be taken

to inform the accused beforehand about the proceedings against him'.[37] In addition, however, it recognized 'that there must be certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused'.[38]

As is clear from this, in the Committee's view a trial by default would violate the right of the accused to be present only when steps were not taken to inform him about the impending trial. Although the Committee did not spell it out, this is because an accused cannot renounce the right to be present without knowing that a trial would commence against him. For the Committee, the steps that must be taken are not unlimited but, unfortunately in the case at hand, it felt it unnecessary to specify them since the respondent state had clearly not taken any steps at all.[39] Finally, as far as the specific remedy for the violation of the right to be present at trial is concerned, the Committee confined itself to referring to the obligation of the respondent state 'to provide the [victim] with effective remedies, including compensation for the violation [he] had suffered, and to take steps to ensure that similar violations do not occur in the future'.[40] However, in a subsequent case the Committee pointed out that 'the violation of the author's [of the Communication] right to be tried in his presence could have been remedied if he had been entitled to a retrial in his presence'.[41] As we shall see, this statement conforms with the stand taken also at the regional level by the European Court of Human Rights.

(p.241) 12.3.2 Trials by default in the case law of the European Court of Human Rights

The European Court of Human Rights ('ECtHR' or 'the Court') has developed a significant case law clarifying in which cases a trial by default violates the right of the accused to be present at his/her own trial.[42]

First of all, according to the Court, proceedings *in absentia* are not per se incompatible with this right, since '[n]either the letter nor the spirit of article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial'.[43] However, the Court also made clear that 'a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance'.[44] In a recent case, the Court clarified that the waiver of the right to be present does not necessarily have to follow the official notification in person of the charges. On the contrary, as the Court explained,

> in the absence of official notification, *certain established facts might provide an unequivocal indication* that the accused is aware of the existence of criminal proceedings against him and of the nature and the cause of the accusation and that he does not intend to take part in the trial or wishes to avoid prosecution.[45]

According to the Court,

> [t]his may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted

> arrest…, or *when materials are brought to the attention of the authorities which unequivocally show* that he is aware of the proceedings pending against him and of the charges he faces.[46]

In sum, the Court considered that

> [f]or a trial in absentia to be justified, what is decisive is whether *the facts of the case show unequivocally that the applicant was sufficiently aware* of the opportunity to exercise these **(p.242)** rights in the context of the specific proceedings instituted against him and *whether he might be considered to have waived his right to appear in court*. In the absence of *any* notification this right can neither be seen to have been clearly waived nor exercised effectively.[47]

Among these unequivocal facts, in the *Battisti* case, the Court included the appointment by the absent accused of a defence counsel of his/her own choosing as clearly demonstrating that the accused was informed of the charges and of the criminal proceedings against him and nonetheless failed to appear and remained absconded.[48]

According to the Court, however, whenever the state fails to prove *unequivocally* that the accused was sufficiently aware of the opportunity to exercise the right to be present, a conviction *in absentia* constitutes 'a denial of justice' if the convicted person 'is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact'.[49] For the Court, therefore, the right to retrial or to a fresh determination of the merits of the case would constitute the specific remedy to cure the violation by the State of the right of the convicted person to participate in his/her own trial. The proceedings held by default (or at least part of the hearings) and the ensuing conviction would be de facto invalidated by the initial failure to notify the accused and therefore cannot constitute *res judicata*.

12.4 Notification, Trials by Default, and Retrial at the STL

The question of the circumstances in which proceedings can start at the STL in the absence of an accused who has not been notified in person and the extent to which a retrial can be guaranteed before a non-permanent international criminal tribunal such as the STL have both raised concerns among commentators.[50]

In the 'Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision',[51] the STL Appeals Chamber tackled both questions. The decision was issued further to an appeal of the defence counsel appointed by the STL to represent four accused[52] against the refusal by the Trial Chamber to reconsider its decision of 1 February 2012 to hold trials *in absentia* against the accused.[53] While the Trial Chamber did not pronounce on any **(p.243)** of the claims of the defence based on the alleged incompatibility of trials *in absentia* with the rights of the accused,[54] the Appeals Chamber accepted as admissible on appeal only those arguments concerning the issue of notification and not all the other arguments concerning the right of the accused to a fair trial. Indeed, it contended that the right to retrial guaranteed to a person convicted *in absentia* by article 22(3) of the Statute of the STL would cure any prejudice 'that could

conceivably arise from the Trial Chamber decision to hold a trial *in absentia*'. This would be so since 'the Accused's appearance at the Tribunal would terminate the effect of that decision because as soon as they appear, the proceedings would begin anew, unless the Accused decides otherwise'.[55] By contrast, according to the Appeals Chamber, the prejudice caused to the accused by the violation of his/her right to be notified of the charges against him/her and to participate in the criminal proceedings 'could not be cured by a retrial' and this is the reason why the judges considered it necessary to proceed with considering part of the grounds of appeal.[56] In other words, the STL Appeals Chamber appears to consider that the lack of notification of the charges to the accused—which might automatically entail the accused's inability to effectively exercise their right to be present at trial—could not be cured by a future retrial.

This approach, however, is not convincing. As the human rights case law of both the Committee and the European Court of Human Rights have pointed out, the most appropriate remedy for the violation of the right to participate in the criminal proceedings ensuing from a lack of notification to the accused, is indeed the retrial, or at least a new determination of the merits of the case through some review mechanism of the judgment issued in the absence of the accused who was unaware of the charges against him. One fails therefore to understand why at the STL this **(p.244)** remedy would not be appropriate or insufficiently adequate.[57] In addition, the stand taken by the Appeals Chamber might lead one to believe that a retrial (fully guaranteed at the STL as an over-guarantee to the accused, as will be shown later) would not be available in the case of a violation of the right to be notified, which is contrary to the literal meaning of article 22(3) of the STL Statute. Finally, the finding that the violation of the right to be notified cannot be cured by a retrial, leaves the question open of which remedy—if any—would then be available if this right would appear to have been violated.

Be that as it may, the Appeals Chamber finally discussed at some length the question of notification to the accused through indirect means, to establish whether the Trial Chamber did commit an error when it refused to reconsider its decision to hold the trial *in absentia*. The Appeals Chamber recounted how the Tribunal had notified the charges according to Lebanese procedures,[58] but had then gone well beyond the strict requirements for notification under domestic law and applied the criteria dictated by human rights bodies to satisfy itself that notice of the charges had been otherwise given to the accused.[59] The Appeals Chamber's conclusion was that the Trial Chamber had not erred in refusing to reconsider its finding and therefore rejected the challenges of the defence. However, it dismissed the question of whether the right to a retrial can actually be guaranteed before a tribunal having a temporary nature with only a few short remarks in a footnote. This is striking, given the importance of the issue with respect to trials by default as enunciated in international human rights case law. Nonetheless, as we shall see later, there are good reasons to argue that the temporary nature of the STL does not actually affect the right of the person convicted in his/her absence to a retrial, especially if the steps by the Tribunal were insufficiently taken to inform him/her of the indictment and trial.

12.4.1 Notification through other means and trials by default

Article 22(2)(a) of the Statute of the STL provides:

> When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:
>
> (a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality.

(p.245) This provision has raised some controversy, particularly with respect to the hypothesis that notice has otherwise been given to the accused of indictment against him/her through publication in the media or communication to the State of residence or nationality. The concern raised by a commentator was that under such a formula the STL could have authorized trials by default by assuming knowledge of the indictment on the part of the accused, thereby violating the standards requested by human rights bodies such as the Human Rights Committee and the European Court of Human Rights.[60]

In the 2012 Reconsideration Decision, the Appeals Chamber correctly clarified that this was not the case. The Appeals Chamber noted that—contrary to a first-sight reading of the English wording of article 22(2) of the STL—the accused has the right to be notified of the charges against him/her 'in *all* circumstances described by the Statute'.[61] Therefore, the formula 'notice has otherwise been given' does not exempt the Tribunal from notifying the accused. The Appeals Chamber also asserted that notification, when not served in person, can be transmitted to the accused through other means, thereby implying that the formula 'notice has otherwise been given' simply refers to a notification through means other than service in person. It continued by noting that, since the STL has to apply the highest standards of international criminal procedure (article 28(2) of the Statute), the means used to notify the accused when he/she is not served in person 'must be shown to be effective' (as pointed out in the case law of the European Court). As a consequence, it found that

> in absentia trials [*rectius*: trials by default] are possible only where i) reasonable efforts have been taken to notify the accused personally; ii) the evidence as to notification satisfies the Trial Chamber that the accused actually knew of the proceedings against them; and that iii) it does so with such degree of specificity that the accused's absence means they must have elected not to attend the hearing and therefore have waived the right to be present.[62]

In sum, the Appeals Chamber stated that

> [t]here is no requirement under the Tribunal's Statute or Rules, or under international human rights law that the Trial Chamber must receive positive knowledge of the accused's knowledge, or that *notification* must be carried out officially and in person. Rather, the Trial Chamber must be satisfied that the three elements set out above are met on the basis of the available evidence before it…

> Given this requirement and the consequences that flow from a decision to proceed in absentia, this is necessarily a high evidentiary standard.[63]

The Appeals Chamber found that the Trial Chamber applied high evidentiary standards in deciding to hold trials *in absentia*, since it first found that the formal requirements to notify the accused under Lebanese law were met, including 'all reasonable attempts to serve the relevant documents personally and, exceptionally, **(p.246)** through advertisement in the Lebanese media'. As for the latter, the Appeals Chamber noted that the Trial Chamber 'referred to the "near saturation media coverage in Lebanon"' and 'found that "the evidence of the widespread publication of the indictment and the identifying information is overwhelming"'. In addition, the Trial Chamber 'also reviewed the evidence as to whether the Accused would have had knowledge of the procedural consequences that would result from failure to appear before the Tribunal' and 'reviewed in detail the steps taken by the Lebanese authorities to inform each accused'. In conclusion, the Appeals Chamber considered that there was 'no doubt as to the Trial Chamber's satisfaction that the Accused were properly notified in the specific circumstances of this case'.[64]

In this respect, the reasoning of the Appeals Chamber tended to demonstrate, although it did not expressly say so, that the four accused unequivocally knew about the charges against them and the consequences of their absconding, and therefore clearly waived their right to participate in the criminal proceedings. By doing so, it conformed its decision to the case law of the Human Rights Committee and the European Court of Human Rights.

12.4.2 The retrial as a primary right and a remedial right

The issue of whether the STL can guarantee the person convicted in his/her absence a retrial before the Tribunal itself, given its temporary nature, has equally raised concern among legal practitioners and commentators. Defence counsel at the STL in the *Ayyash et al* case set this forth forcefully as an argument to ground the claim of the incompatibility of trials by default at the STL with the right to a fair trial. Both the Trial Chamber and the Appeals Chamber, however, decided to devote just a few lines to the issue. Essentially, they considered that there was 'no reason to believe that [the right to retrial] guaranteed by the Statute will not be respected'.[65] In particular, the Appeals Chamber stated that there was no need at the current stage of the proceedings 'to consider how the right to retrial would play out in practice'.[66]

At first sight this stand might appear unsatisfactory. If the retrial is the most appropriate remedy for the violation of the right of a person convicted in his/her absence to attend his/her own trial, then the temporary nature of the STL and its foreseeable inability to guarantee a new trial in the presence of the accused is not a matter that can be dismissed easily. Nonetheless, a close perusal of the matter shows that the legal debate confuses two issues that need to be kept theoretically and practically distinct: i) the right of a person convicted in his/her absence to a retrial as enshrined in the STL Statute; and ii) the entitlement of a person convicted in his/her absence to a retrial, or at least to a fresh

determination of the merits of the case, **(p.247)** as a remedy for the violation of the right to be present at trial under international human rights law.

The right to a retrial in the presence of the accused before the STL is guaranteed by article 22(3) of the Tribunal's Statute to any person convicted in his/her absence provided two cumulative requirements are met: a) he or she had not designated a defence counsel of his or her choosing;[67] and b) he or she does not accept the judgment. The language of article 22(3) is mandatory ('the accused…*shall have* the right to be retried in his or her presence) and the retrial must take place before the STL,[68] ie the same jurisdiction that convicted the person in his/her own absence.

To have made the right to a retrial conditional upon the two requirements mentioned is not problematic from an international human rights perspective. As indicated by the case law of the European Court of Human Rights, the absent accused who had designated a defence counsel of his/her own choosing had clearly been informed of the indictment and trial and therefore had clearly waived his/her right to attend the trial in person. Therefore, in such circumstances he/she cannot claim to be retried in person just because of his/her absence at trial. As for the acceptance of the judgment by the convicted person, one faces again a situation where the retrial need not be available only because of the absence at trial.

Article 22(3), however, demands a retrial before the STL in all the remaining situations, ie in all other cases when the person was convicted *in absentia*, regardless of whether he/she was at the time notified with the indictment and process (either in person or through indirect means) and hence regardless of whether the right to participate in person in the criminal proceedings had been violated or waived by the accused. This wide scope of the right to a retrial is not required under any international human rights instrument, which instead consider the entitlement to a retrial just as a specific remedy to the violation of the right to participate in person in the criminal proceedings and not a primary right of a person convicted in his/her absence. The STL Statute, therefore, goes beyond the minimum guarantees required by human rights law in that it envisages a right to retrial both when the accused had no knowledge of the charges against him (and therefore could not exercise effectively his right to be present at trial) and when the accused voluntarily absconds from justice after having received notice of the impending trial.

It is precisely the wide scope of the right to a retrial before the STL that helps clarify its proper nature. Contrary to a first-sight reading of article 22(2), the scope of this article is *not* to align the procedure of trials by default with the requirements set forth in human rights case law. In other words, article 22(2) does not intend to accord to the person convicted *in absentia* the right to obtain the retrial before the STL as a remedy to the violation of the right to be present at his/her own trial **(p.248)** caused by the failure to take the necessary steps to inform him/her of the indictment and trial. Had this been the case, the retrial before the STL would have been conditional only on a failure to demonstrate that sufficient steps were taken to notify through indirect means the absent accused of the indictment and trial and not also on not having designated counsel.

Instead, article 22(2) goes much further and provides for the right to a retrial even in cases where the right of an accused to effectively decide whether to participate in the criminal proceedings was not violated at all. It follows from the foregoing that the right to a retrial before the STL is not of a remedial nature for a human rights violation, but can be seen as a primary right of the accused vis-à-vis the STL, and thus can be claimed before the STL once the necessary requirements are met.

Such wide scope of the right to a retrial for a person convicted *in absentia* is recognized in some domestic systems permitting trials by default, including apparently in Lebanon.[69] However, such a right to a full retrial in all instances is not mandated by international human rights case law, which (once proven that the relevant authorities took the necessary steps to notify him/her and he/she did not appear in court) does not consider trials by default as incompatible with the right of an accused to take part in person in the criminal proceedings. One might therefore wonder why the drafters of the STL Statute took this 'over-protective' stand with respect to the defendant's rights.[70] One explanation could be that this was seen as an expedient way to make the possibility of trials by default at the STL 'more acceptable' to those countries and lawyers who traditionally do not provide for this procedure. The drafters of the STL might have thought that the insertion in the statute of an international criminal tribunal of such an innovative procedure compared to other international criminal courts necessitated an additional guarantee to the accused tried and convicted in his/her absence.

Be that as it may, the relevant aspect is that the right to a retrial before the STL as set forth in article 22(2) of the Statute is an extra guarantee conferred upon the person convicted *in absentia* by the STL. This extra guarantee is independent of the violation of the right to be present at trial, if any, and therefore absorbs any issue concerning the retrial as remedy for the violation of this right under international human rights law. In other words, the right to a retrial under article 22(2) is a primary right guaranteed to the person convicted in his/her absence, which adds up to the minimum fair trial guarantees protected under the relevant international human rights treaty.

Plainly, the right to a retrial as a primary (and additional right) conferred on the accused before the STL can be claimed only before the latter, until and as long as the STL or any residual mechanism that will work as its successor exist. This is, however, not dramatic. The temporary nature of the STL is not different from the inherent temporary legal (and human) life of all natural persons. The consequence **(p.249)** is that if the bearer of an obligation becomes extinct and there is no 'successor' before whom the corresponding right could continue to be claimed, there is no possibility anymore to obtain the enjoyment of the right at issue. One might contend—as the STL Appeals Chamber and some commentators have done—that once the STL ceases to exist, it would be upon the Security Council to find a way to let the right to retrial be exercised before the STL or a residual mechanism. This is a reasonable inference, grounded upon the Security Council's ultimate authority and duty to guarantee a retrial to a person convicted *in absentia*. What is essential from the point of view of trials by default at the STL, however, is that the eventual impossibility to guarantee the right to a retrial under article 22(2)

because of the temporary nature of the Tribunal does not violate any fair trial standard under international human rights law and therefore does not make trials by default inherently flawed.

On the contrary, the case would be different if a person convicted *in absentia* by the STL who is arrested once the Tribunal ceases to exist claims that he/she was not informed of the charges and trial against him. In such a case, he would not have had the opportunity to waive his/her right to participate in the criminal proceedings, and the issue of the retrial (or a fresh determination of the merits of the case) would squarely arise as a way to cure the serious breach of the fundamental human right to be present at one's own trial. If his/her right to participate in person in the criminal proceedings was violated because the steps to notify him/her through direct and indirect means were insufficient, then this violation must be remedied regardless of whether the Tribunal has ceased to exist. On the one hand, the judgment of the STL could be considered as not final (ie as not having the standing of *res judicata*) because of the failure to notify the accused. On the other, under international human rights law, what matters is that the person convicted *in absentia* is not considered guilty and does not serve the penalty imposed at the end of a trial in which he/she did not participate for a failure to notify him/her. Therefore, the detaining authorities would be obliged, under international human rights law, not to recognize the legal effects of the STL conviction and sentence *in absentia* and/or, if requested, to surrender the person to the competent authorities for the purpose of a retrial. In such a case, 'competent authorities' would certainly include the Lebanese courts or any other institution, that (once the STL closes its doors) would exercise the jurisdiction presently exercised exclusively by the STL.

12.5 Trials by Default v Renditions

Some commentators have already put forward arguments to justify not only the legality, but also the legitimacy of trials by default to achieve the primary goals of a system of criminal justice, which are above all the necessity for the state to respond to crimes to achieve crime prevention and reduction and redress the imbalances created by those whose behaviour was detrimental to a peaceful society.[71] For **(p.250)** instance, it has been argued that in those countries where 'the notion of public order is an important legal concept that constitutes the mainstay of the criminal justice system', 'the defendant's absence from the trial cannot of itself halt the course of justice'. It is instead necessary that criminal justice 'move forward…in order to achieve its result (the restoration of the 'social peace' that was disturbed by the offence)'.[72] Given the involvement of Lebanon in the negotiations of the Statute of the STL and the possibility in that country to hold trials by default, it is therefore unsurprising that similar considerations guided the drafters of the Statute when they included the same procedure at the STL. The more so if one considers the specific jurisdiction *ratione materiae* of the Tribunal, ie the crime of terrorism, which is par excellence a crime against the public order of a society.

Other commenters have discussed whether holding trials in absentia 'would be in the best interests of the Tribunal and the project of international criminal justice as a

whole',[73] suggesting that the judges should apply 'Article 22 narrowly and pragmatically'.[74] This is a suggestion that the present author can certainly share.

As a final remark, it is worth adding that trials by default might have many shortcomings in the opinion of their detractors but they have at least one indisputable merit: they allow justice to make its course vis-à-vis an accused who is absconding or has found refuge in an uncooperative country, without tempting the competent authorities to have recourse to the odious practice of renditions. It is indeed not striking that this practice and the principle *male captus bene detentus* which justifies the commencement of proceedings against an accused who was abducted abroad, developed mainly in those countries where the trial could not start without the accused appearing in person in court.[75]

Illegal arrest in another country for the purpose of bringing the person before the court (thus allowing a trial to start) is not necessarily a better way to guarantee the rights of the accused, whatever the gravity of the crimes he/she has allegedly committed. It is indeed ironic that some of the legal systems which declare their opposition to trials by default in order to ostensibly protect their right to fair proceedings then condone kidnapping those very same people to force them to be present in the courtroom. It would seem that under both approaches, the need to bring accused people to justice despite their being beyond the reach of the courts is deemed paramount: the real issue is whether human rights law suggests one course of action over the other. The Special Tribunal for Lebanon might assist in providing the answer, if it shows that trials even without the presence of the accused can be fair and lead to concrete results.

Notes:

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([1]) Attachment to SC Res 1757, UN Doc S/RES/1757 (2007) [Statute of the Special Tribunal for Lebanon], art 22 reads:

> (1.) The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:
>
> ((a)) Has expressly and in writing waived his or her right to be present;
>
> ((b)) Has not been handed over to the Tribunal by the State authorities concerned;
>
> ((c)) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.
>
> (2.) When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:
>
> ((a)) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in

> the media or communication to the State of residence or nationality;
> ((b)) The accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;
> ((c)) Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.
>
> (3.) In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement.

([2]) Cécile Aptel, 'Some Innovations in the Statute of the Special Tribunal for Lebanon' (2007) 5 JICJ 1107, 1121.

([3]) Chris Jenks, 'Notice Otherwise Given: Will In Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?' (2009) 33 Fordham Int'l LJ 57. See also Björn Elberling, 'The Next Step in History-Writing Through Criminal Law: Exactly How Tailor-Made Is the Special Tribunal for Lebanon?' (2008) 21 LJIL 529.

([4]) Case No STL-11-01/I/AC, Appeals Chamber, 16 February 2011.

([5]) Maggie Gardner, 'Reconsidering Trials *In Absentia* at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence' (2011) 43 Geo Wash Int'l L Rev 91.

([6]) On this distinction, see eg Stan Starygin and Johanna Selth, 'Cambodia and the Right to be Present: Trials *In Absentia* in the Draft Criminal Procedure Code' (2005) Sing JLS 170.

([7]) In particular, the legal systems inspired by the French tradition, such as for instance Lebanon.

([8]) Charles H Whitebread and Christopher Slobogin, *Criminal Procedure: An Analysis of Cases and Concept*, (3rd edn, New York: The Foundation Press 1993) 718–28.

([9]) See Magistrates' Courts Act 1980, ss 11(3) and (3A):

> ((3)) In proceedings to which this subsection applies, the court shall not in a person's absence sentence him to imprisonment or detention in a detention centre or make a detention and training order or an order under paragraph 8(2)(a) or (b) of Schedule 12 to the Criminal Justice Act 2003 that a suspended sentence passed on him shall take effect.
> ((3A)) But where a sentence or order of a kind mentioned in subsection (3) is imposed or given in the absence of the offender, the offender must be brought before the court before being taken to a prison or other institution to begin

> serving his sentence (and the sentence or order is not to be regarded as taking effect until he is brought before the court).

([10]) Charter of the International Military Tribunal (London, 8 August 1945, 82 UNTS 279) art 12: 'The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.' On the trial of Martin Bormann, see William Schabas, 'In Absentia Proceedings before International Criminal Courts' in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May 2009) 335, 336–42.

([11]) (Rome, 17 July 1998, 2187 UNTS 90) art 60(1): 'Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under the Statute, including the right to apply for interim release pending trial.'

([12]) ICC Statute (n11) art 63:

> (1.) The accused shall be present during the trial.
> (2.) If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Importantly, however, while ICC Statute art 61 provides that the confirmation of the charges before the trial shall be held in the presence of the person concerned, it also provides for the possibility that the confirmation hearing may be held in his or her absence when the person has: 'a) waived his or her right to be present; or b) fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court to inform the person of the charges and that a hearing to confirm those charges will be held'. Other exceptions are provided for in art 72(7), which allows for 'national security evidence' to be produced also in the absence of one of the parties to the proceedings and r 88 of the ICC Rules of Procedure and Evidence (ICC RPE), authorizing *ex parte* hearings to decide on special measures to facilitate the testimony of specific victims or witnesses. Another exception seems to be contemplated by art 76(4) on the pronouncement of the sentence, which requires the presence of the accused 'wherever possible'. See also for the preparatory works of art 63, Schabas 'In Absentia Proceedings before International Criminal Courts' (n10) 369–76.

([13]) ICC, Public Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, *Prosecutor v Ruto and Sang*, Case No ICC-01/09-01/11, Trial Chamber, 18 June 2013, para 49.

([14]) ICC, Decision on Request for Excusal from Continuous Presence at Trial, *Prosecutor v Ruto and Sang*, para 46.

([15]) ICC, Decision on Request for Excusal from Continuous Presence at Trial, *Prosecutor v Ruto and Sang*, paras 42, 49, 72–74 (taking into account the issue of perception of the Court); para 77 (rejecting challenges that the absence of the accused would encroach on the integrity of the proceedings).

([16]) See ICC RPE r 60, which provides that an accused 'may be not tried in his absence' unless '(i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses to do so; or (ii) the accused, having made his initial appearance, is at large and refuses to appear in court'.

([17]) For the SPSC, see United Nations Transitional Administration in East Timor, Regulation 2000/30 on Transitional Rules of Criminal Procedure (25 September 2000):

> (5.1) No trial of a person shall be held in absentia, except in the circumstances defined in the present regulation. The accused must be present at the hearing conducted pursuant to Section 29.2 of the present regulation, unless the accused is removed from the court under the provisions of Section 48.2 of the present regulation.
> (5.2) If at any stage following the hearing provided in Section 29.2 of the present regulation the accused flees or is otherwise voluntarily absent, the proceedings may continue until their conclusion.
> (5.3) If at any stage the accused is removed from the court under the provisions of Section 48.2 of the present regulation, the proceedings may continue until their conclusion unless the court finds for good cause shown that the provisions of Section 48.2 of the present regulation no longer apply.

For the ECCC, see Internal Rules of the ECCC (3 August 2011) r 81. This provision, while providing that the accused shall be tried in his/her presence, set forth a few exceptions based on the principle *semel praesens semper praesens*.

([18]) See United Nations Interim Administration Mission in Kosovo, Regulation 2001/1 (12 January 2001) expressly prohibits trials *in absentia*, apparently providing no express exception to the prohibition: 'No person may be tried in absentia for serious violations of international humanitarian law, as defined in Chapter XVI of the applicable Yugoslav Criminal Code or in the Rome Statute of the International Criminal Court (17 July 1998).'

([19]) See Statute of the ICTY (25 May 1993, 32 ILM 1159 (1993)) art 21(4)(d); Statute of the ICTR (8 November 1994, 33 ILM 1598 (1994)) art 20(4)(d).

([20]) Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704 (3 May 1993) para 101. In the French version, the expression: 'There is a widespread perception' reads '[d]'aucuns estiment que' (which corresponds in English to 'some hold the view that'), thereby indicating that the

view on the possibility holding trials *in absentia* was subject to disagreement. This statement has raised concerns among some commentators, who have correctly pointed out that this interpretation is wrong, including in the light of the interpretation put forward by the UN Human Rights Committee (on the latter, see s12.4.1 of the chapter). See eg Herman Schwartz, 'Trials in Absentia' (1996) 4 Human Rights Brief 12. See also Alain Pellet, 'Le Tribunal Criminel International pour l'ex-Yougoslavie: Poudre aux Yeux ou Avancée Décisive?' (1998) 98 RGDIP 48–49: '[c]et argument—que le Secrétaire général se garde bien de représenter à son compte—est absurde: le droit, indiscutable, de l'accusé d'être présent à son procès, ne saurait entraîner la paralyse du Tribunal. Il importe qu'il soit prévenu des charges retenues contre lui et mis même d'y répondre; mais là s'arrêtent les exigences d'une justice équitable: il ne peut empêcher le déroulement du procès simplement en refusant de s'y présenter, pas davantage que l'Etat sur le territoire duquel il se trouve ne le pourrait en refusant de le remettre au Tribunal.' See also Ralph Zacklin, 'Some Major Problems in the Drafting of the ICTY Statute' (2004) 2 JICJ 361, 364–5: '[f]rom a strictly legal point of view, while it could be argued that international law did not prohibit trials *in absentia*, the trends in international human rights law and the spirit of that law clearly moved in the direction of no *in absentia* proceedings, absent very specific and narrow grounds'. Therefore, '[i]t would have been invidious for the Secretary-General…to ignore such an important element of human rights'. Moreover, he explains, 'the political arguments added to the weight of legal arguments', and it was decided that '[t]he public condemnation of the accused [that was considered to be one of the positive aspects of *in absentia* proceedings] could be achieved by the process of the indictment just as well as by *in absentia* proceedings and without the many negative connotations attaching to them'.

([21]) Antonio Cassese, Personal Notes on Debates at the Second Session of the ICTY Plenary, The Hague, The Netherlands, 17 January–11 February 1994, IT/25, 21 January 1994 (on file with author).

([22]) Cassese, Personal Notes on Debates at the Second Session of the ICTY Plenary (n21).

([23]) ICTY RPE, r 61(C) and (D).

([24]) See fax from Louis Joinet to Antonio Cassesse (25 November 1993) (on file with author). Mr Joinet expressly declared himself to be giving his personal opinion in the matter. He suggested that, had the possibility of holding trials by default been disregarded, the Rules could have remedied this by providing the following measures:

Dès lors que l'organe de poursuite et d'instruction aurait réuni des charges telles qu'elles entraîneraient, en droit compare, l'équivalent d'une inculpation: a) le Procurer Général solliciterait du Président l'autorisation d'inscrire l'affaire au rôle du Tribunal. b) Il lancerait un appel solennel invitant la personne à se présenter. c) Passé un certain délai, le Tribunal, siégeant en audience publique apprécierait les charges et après en avoir délibéré déciderait:—soit qu'il n'y a pas suffisamment de charges contre la personne mise en cause;—soit qu'il y a des charges suffisantes; dans ce cas il ordonnerait sa mise en

accusation et, s'il estime nécessaire à la recherche de la vérité, il pourrait lancer un mandat d'arrêt international diffusé par Interpol. d) Le caractère politique ne pouvant être opposé, Interpol ne pourrait que procéder à la diffusion. Ce dernier point est capital. En effet, l'intérêt de la procédure par défaut est d'abord de permettre, en cas de condamnation, la délivrance d'un mandat international. En effet, l'intéressé étant alors recherché dans le monde, il est «transformé» en hors-la-loi et ainsi condamné à:—soit ne plus sortir de son pays (s'il n'extrade pas ses nationaux ou n'en pas (encore) la volonté politique);—soit à vivre à l'extérieur en clandestinité (fausse identité, faux document, chirurgie esthétique…). La procédure de mandat de recherche proposée—compatible avec le système juridique anglo-saxon—permet donc d'aboutir au même résultat.

([25]) See eg ICTY, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v Karadžić and Mladić,* Case No IT-95-5-R61, Trial Chamber, 11 July 1996.

([26]) See Louise Arbour, 'The Crucial Years' (2004) 2 JICJ 396, 399, wherein she notes that the 'deleterious effects' of rule 61 proceedings were: i) to expose publicly large parts of the evidence against the accused, increasing the danger of witnesses' intimidation and of fabrication of convenient evidentiary responses; ii) the monopolization of important and scarce resources of the Office of the Prosecutor; and iii) the false sense of security and confidence in the quality of the Prosecution case, given the *ex parte* nature of the hearings ('evidence always looks better when it is unopposed and unchallenged'). Cf Patricia Wald, 'Book Review' (2005) 99 AJIL 720, 723, referring to the rule 61 procedure as 'a stop-gap technique […] offered ostensibly to authorize global arrest warrants but realistically also to publicize the Tribunal's work' and 'justified as preserving a historical record of the worst misdeeds of perpetrators still at large'. Wald also notes that Louise Arbour quickly dropped rule 61 proceedings, which represented, in her view, 'a pathology of failure'.

([27]) ICTY, Judgment on the Request of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v Blaškić*, Case No IT-95-14, Appeals Chamber, 29 October 1997, para 59:

in absentia proceedings may be exceptionally warranted in cases involving contempt of the International Tribunal, where the person charged fails to appear in court, thus obstructing the administration of justice. These cases fall within the ancillary or incidental jurisdiction of the International Tribunal. If such *in absentia* proceedings were to be instituted, all the fundamental rights pertaining to a fair trial would need to be safeguarded. Among other things, although the individual's absence would have to be regarded, under certain conditions, as a waiver of his "right to be tried in his presence", he should be offered the choice of counsel. The Appeals Chamber holds the view that, in addition, other guarantees provided for in the context of the European Convention on Human Rights should also be respected.

([28]) See Schabas, 'In Absentia Proceedings before International Criminal Courts' (n10). This view is also confirmed by ICTR case law. See eg ICTR, Judgment, *Prosecutor v*

Nahimana, Case No ICTR-99-52, Appeals Chamber, 28 November 2007, para 107, in which the Appeals Chamber noted that the right of an accused to be present at trial 'is clearly aimed at protecting the accused from any outside interference which would prevent him from effectively participating in his own trial; it cannot be violated when the accused has voluntary chosen to waive it'.

([29]) The rule was applied in the case of *Prosecutor v Barayagwiza*, Case No ICTR-97-19, who chose not to participate in person in his trial.

([30]) Apparently, failing an express and written renunciation of the right of the accused to participate to his trial, proceedings *in absentia* cannot be carried out, unless art 22(1)(b) or (c) applies.

([31]) This solution finds support in r 106 of the Rules of Procedure of the Tribunal (STL RPE), according to which: 'Where the accused is not present on account of the failure or refusal of the relevant State to hand him over, before deciding to conduct proceedings *in absentia*, the Trial Chamber shall: (i) consult with the President and ensure that all necessary steps have been taken with a view to ensuring that the accused may, in the most appropriate way, participate in the proceedings; and (ii) ensure that the requirements of Article 22 (2) of the Statute have been met.' It has been contended that, in the hypothesis of an accused willing to participate in the trial but prevented by his state from doing so, the STL Statute 'does seem to allow a trial *in absentia*…even though the defendant's absence would be due to reasons beyond her control' (Elberling, 'The Next Step in History-Writing Through Criminal Law' (n3) 537). On the basis of r 106, this stand seems to be incorrect, not to mention that in domestic legal systems where trials by default are warranted, the trial can commence only if the absence of the accused is not justified (see eg New Code of Criminal Procedure (Lebanon), Act No 328 of 7 August 2001, art 166; Code of Criminal Procedure (France), Law No 2000-516 of 15 June 2000, art 389–2). In any case, it may be contended that the accused willing to participate in the criminal proceedings but prevented from doing so by a requested state must inform the STL of the impediments encountered to appear in court. A case where the accused could be tried *in absentia* when the competent authorities refused to hand him/her over to the STL concerns the appointment of a defence counsel by the accused (see Niccolò Pons, 'Some Remarks on *In Absentia* Proceedings before the Special Tribunal for Lebanon in Case of a State's Failure or Refusal To Hand Over the Accused' (2010) 8 JICJ 1307, 1312–14).

([32]) The proposal to set out clearly in art 14 that an accused enjoys the right to be present at his own trial was put forward by Israel (see Revised Amendments by Israel to Article 14 (2) [3], (c) [(d)], UN Doc A/C.3/L.795/Rev. 1) and adopted by 43 votes to 11, with 15 abstentions (GAOR, Fourteenth Session, UN Doc A/C.3/SR.967 (1959) 287). See also, GAOR, Fourteenth Session, UN Doc A/C.3/SR.961 (1959) 260, para 13, where it was contended that '[a]lthough Paragraph 2(c) of the Commission's text implied that the defendant was entitled to be present at the trial,…the principle should be stated explicitly, as it was essential to a fair trial'.

([33]) See eg Statement by the Socialist Federal Republic of Yugoslavia, GAOR, Fourteenth Session, UN Doc A/C.3/SR.962 (1959) 265, para 23; Statement by Romania, GAOR, Fourteenth Session, UN Doc A/C.3/SR.964 (1959) 271, para 7; Statement by France, GAOR, Fourteenth Session, UN Doc A/C.3/SR.964 (1959) 273 para 22; Statement by Italy, GAOR, Fourteenth Session, UN Doc A/C.3/SR.964 (1959) 276, para 10. The declaration of the Italian delegate is emblematic in this regard, since (although the Italian legislation provided for the possibility of holding criminal proceedings by default and *in absentia* proper) he stated: 'The proposal to include the words "To be tried in his presence and…" at the beginning of Article 14, paragraph 2(c) [now paragraph 3(d)], [is] an excellent one, and [is] *in full conformity* with Italian law' (emphasis added). On the occasion of the deposit of its ratification of the ICCPR, Italy again took this position and declared that 'Article 14(3)(d) is considered to be in conformity with the current Italian legislation concerning the presence of the defendant at his trial…', see Italian Minister of Foreign Affairs, Press Release, *Gazzetta Ufficiale* (Rome, 23 November 1978) 328, unofficial translation by author. The original text reads: '[L]e disposizioni della lettera d) del paragrafo 3 dell'art. 14 sono considerate compatibili con le vigenti disposizioni italiane che disciplinano la presenza dell'imputato al processo…'. As some commentators have pointed out, this declaration did not intend to refer to criminal proceedings by default or *in absentia* proper (see eg Giulio Ubertis, *Dibattimento Senza Imputato e Tutela del Diritto di Difesa* (Giuffré 1984) 127–8) and in addition its literal meaning seems to refer only to the compatibility of art 14(3)(d) with the proceedings carried out in the presence of the accused (see Daniela di Vigoni, *Giudizio Senza Imputato e Cooperazione Internazionale* (Cedam 1992) 4 n9. However, in the case *Maleki v Italy*, Italy contended that the declaration referred to above 'is a reservation that precludes the Committee examining the author's [of the communication before the Human Rights Committee] argument that his trial *in absentia* was not fair' (see (Communication No 699/1996), UN Doc CCPR/C/66/D/699/1996, para 9.2). In the case at hand, the Committee however examined the complaint under art 14(1) of the ICCPR and found that Italy had violated it by not summoning the accused in a timely manner and by not informing him of the proceedings against him.

([34]) Austria declared: '[P]aragraph 3, sub-paragraph (d) is not in conflict with legal regulations which stipulate that an accused person who disturbs the orderly conduct of the trial or whose presence would impede the questioning of another accused person, of a witness or of an expert can be excluded from participation in the trial'. See also, Reservation of the Kingdom of the Netherlands to art 14(3)(d) ICCPR: 'The Kingdom of the Netherlands reserves the statutory option of removing a person charged with a criminal offence from the court room in the interests of the proper conduct of the proceedings.' Both in Austria and in the Netherlands trials *in absentia* are allowed. See also, Reservation of the Federal Republic of Germany to art 14(3)(d) ICCPR: 'Article 14(3)(d) of the Covenant shall be applied in such manner that it is for the court to decide whether an accused person held in custody has to appear in person at the hearing before the court of review (*Revisionsgericht*).'

([35]) Human Rights Committee, General Comment 13, art 14 (Twenty-first session 1984)

para 11.

([36]) Human Rights Committee, *Daniel Monguya Mbenge v Zaire* (Communication No 16/1977), UN Doc CCPR/C/18/D/16/1977, para 14.1.

([37]) Human Rights Committee, *Daniel Monguya Mbenge v Zaire* (n36).

([38]) Human Rights Committee, *Daniel Monguya Mbenge v Zaire* (n36).

([39]) Human Rights Committee, *Daniel Monguya Mbenge v Zaire* (n36) para 14.2. No attempt was made by the judicial authorities of the respondent state to transmit the summons to the accused, who lived in Belgium, before the commencement of the trial, although the judicial authorities apparently were in possession of his address. The applicant was sentenced twice to death and was informed about the conviction only through press reports issued after the proceedings had taken place.

([40]) Human Rights Committee, *Daniel Monguya Mbenge v Zaire* (n36) para 22.

([41]) *Maleki v Italy* (n33) para 9.5.

([42]) To be sure, the right of a defendant to participate in the criminal proceedings is not expressly enshrined in the European Convention on Human Rights (nor in any of the regional human rights treaties currently in force). It is, however, considered to be implicitly embedded in the different components of the right to fair trial, as the ECtHR cogently put forward in a string of cases. See eg *Sejdovic v Italy* (2006) ECHR 2006-II, para 81.

([43]) *Sejdovic v Italy* (n42) para 86.

([44]) *Sejdovic v Italy* (n42).

([45]) *Stoyanov v Bulgaria* App no 39206/07 (ECtHR, 31 January 2012) para 31.

([46]) *Stoyanov v Bulgaria* (n45) (emphasis added). The ECtHR adds that:

Such circumstances are to be distinguished from the outright fact of fleeing from the crime scene in fear of prosecution or a general expectation that criminal proceedings might be instituted, which are not sufficient to justify the assumption that the accused was aware of the proceedings for the determination of the charges against him and has waived his right to appear in court. An assumption of that kind would risk undermining the very concept of the right to a public hearing within the meaning of Article 6 § 1 of the Convention as well as the notion of an effective defence guaranteed under Article 6 § 3 of the Convention, which includes the right of the accused to be informed promptly of the nature and cause of the charges against him, to have adequate time and facilities for the preparation of the defence and to examine or have examined witnesses against him.

([47]) *Stoyanov v Bulgaria* (n45) (emphasis added).

([48]) *Battisti v France* (dec) App no 28796/05 (ECtHR, 12 December 2006).

([49]) *Sejdovic v Italy* (n42) para 82 (internal references omitted and emphasis added).

([50]) See eg Jenks 'Notice Otherwise Given' (n3); Elberling 'The Next Step in History-Writing Through Criminal Law' (n3) 535–8.

([51]) *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/AC/AR126.1, Appeals Chamber, 1 November 2012.

([52]) STL, Assignment of Counsel for the Proceedings Held *In Absentia* Pursuant to Rule 106 of the Rules, *Prosecutor v Ayyash et al*, Case No STL-11-01/I/PTJ, 2 February 2012.

([53]) The background is as follows. On 1 February 2012, once it established that the accused failed to appear before the Tribunal, the Trial Chamber issued STL, Decision on *Trial In* Absentia, *Prosecutor v Ayyash et al*, Case No STL-11-01/TC, Trial Chamber, 1 February 2012. Once appointed by the STL, defence counsel asked the Trial Chamber to reconsider its decision, see STL, Request of the Defence for Mr Badreddine for Reconsideration of the 'Decision To Hold Trial *In Absentia*' Rendered by the Trial Chamber on 1 February 2012, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Badreddine Defence, 22 May 2012; STL, Request by the Oneissi Defence for Reconsideration of the Decision to Hold Trial *In Absentia* of 1 February 2012, *Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Oneissi Defence, 24 May 2012; to stay its decision or, failing that, to clarify some points, see STL, Sabra Motion for Reconsideration of the Trial Chamber's Order To Hold a Trial *In Absentia, Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Sabra Defence, 23 May 2012, including on the ground that the decision to hold the trial *in absentia* was at odds with the fundamental human rights of the accused, see STL, Ayyash Motion Joining Sabra Motion for Reconsideration of the Trial Chamber's Order To Hold a Trial *In Absentia, Prosecutor v Ayyash et al,* Case No STL-11-01/PT/TC, Ayyash Defence, 24 May 2012. See also Badreddine Motion, paras 27–43 and 44–53; Sabra Motion, paras 29–47.

([54]) The Trial Chamber relied upon a strict interpretation of the conditions set forth in the STL RPE for reconsidering a decision and decided to pronounce only on the claims pointing to 'new facts, or new arguments showing an error of legal reasoning' or 'to a change of circumstances, necessitating it to reconsider its Decision to avoid an injustice'. The Trial Chamber, however, found that neither a new fact nor a new argument showing an error of legal reasoning was brought to its attention, and therefore rejected all the claims of the defence. The Trial Chamber also explained, '[s]peculative arguments or philosophical or in-principle disagreement with *in absentia* proceedings are irrelevant; and a mere disagreement with a decision or its reasoning cannot meet the test for reconsideration under Rule 140'. See STL, Decision on Reconsideration of the Trial In Absentia Decision, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Trial Chamber, 11 July 2012, paras 10–11.

([55]) 2012 Appeals Chamber Reconsideration Decision (n51) para 14.

([56]) 2012 Appeals Chamber Reconsideration Decision (n51).

([57]) The issue of remedy could also be discussed from another perspective: the right of counsel who are defending the accused in their absence (such as in the case of the four accused presently at the STL) to file an appeal in case of conviction of their 'clients'. The STL Statute and RPE say nothing explicit in this respect, although Article 26 of the Statute appears to limit appellate proceedings as only those being launched by the Prosecutor or by 'persons convicted'. The fact that the wording does not refer to 'accused' (as Article 16 on the rights of the accused does) might imply that a decision to appeal must be made by the convicted individual in person, and is not automatically delegated to counsel, especially in the absence of the accused.

([58]) 2012 Appeals Chamber Reconsideration Decision (n51) para 41.

([59]) 2012 Appeals Chamber Reconsideration Decision (n51) paras 41–45.

([60]) Jenks, 'Notice Otherwise Given' (n3) 81ff.

([61]) The Appeals Chamber mentioned in this regard both the French and Arabic versions of the Statute. See 2012 Appeals Chamber Reconsideration Decision (n51) para 25.

([62]) 2012 Appeals Chamber Reconsideration Decision (n51) para 31.

([63]) 2012 Appeals Chamber Reconsideration Decision (n51) paras 32–33.

([64]) 2012 Appeals Chamber Reconsideration Decision (n51) paras 34–46.

([65]) Trial Chamber Decision on Trial *In Absentia* (n53) para 27; 2012 Appeals Chamber Reconsideration Decision (n51) n36.

([66]) 2012 Appeals Chamber Reconsideration Decision (n51) n36.

([67]) See also STL RPE r 104, which clarifies that there is no trial *in absentia* in the sense of art 22 STL Statute if 'an accused…appears…in person, by video-conference, or by Counsel appointed or accepted by him'.

([68]) STL Statute (n1) art 22(3): 'In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her own choosing, shall have the right to be retried in his or her own presence before the Special Tribunal, unless he or she accepts the judgment.'

([69]) See Lebanese Code of Criminal Procedure (n31) art 292(1). See also Ralph Riachy, 'Trials in Absentia in the Lebanese Judicial System and the Special Tribunal for Lebanon. Challenges or Evolution?' (2010) 8 JICJ 1295, 1301–2.

([70]) See Gardner, 'Reconsidering Trials *In Absentia* at the STL' (n5) 131.

([71]) The goals of a system of criminal justice are broader than those traditionally

recognized for criminal punishment as such, ie retribution, deterrence, incapacitation, and rehabilitation.

([72]) Riachi, 'Trials in Absentia in the Lebanese Judicial System and the Special Tribunal for Lebanon (n69) 1297.

([73]) Gardner 'Reconsidering Trials *In Absentia* at the STL' (n5) 132ff.

([74]) Gardner 'Reconsidering Trials *In Absentia* at the STL' (n5) 135–6.

([75]) Eichmann, who was captured in Argentina and brought to Israel to stand trial is the most notable example. See also *United States v Alvarez-Machain*, 504 US 655 (1992). See also the case of the Muslim cleric Abu Omar, kidnapped by US CIA and Italian law enforcement agents, as discussed in Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting, *International Criminal Law—Cases and Commentary* (Oxford: Oxford University Press, 2011) 546ff.

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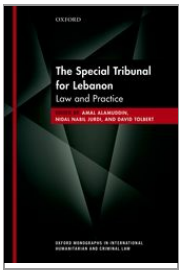

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Ethics Before the Special Tribunal for Lebanon

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[–] Abstract and Keywords

This chapter examines the ethics regime established by the Special Tribunal for Lebanon (STL). It first addresses the ethical rules that apply at the STL and the disciplinary proceedings that counsel may face when they breach their ethical obligations. Given that STL proceedings are still at an early stage, there is little practice or case law on ethical matters. However, there are detailed ethical rules that have been adopted by the STL and some instructive practice from the other international courts, which provides helpful guidance for the future conduct of counsel at the Tribunal.

Keywords: international criminal tribunal, Lebanon, legal ethics, disciplinary proceedings

13.1 Introduction

Professional ethics are the minimum standards of appropriate conduct within the legal profession. Criminal legal practice at the international level raises numerous potential ethical and other interesting dilemmas, some of which are unique to international criminal lawyers. For example, can prosecutors or defence lawyers meet with witnesses after the witnesses have provided statements to investigators and before they testify at trial? This practice is allowed (even *de rigueur*) in some common law jurisdictions, but is considered unethical, or even illegal, in some civil law jurisdictions. What happens when the civil lawyer appears before an international court?

And what sanctions should apply if 'international ethics codes' are violated? International practitioners come from a wide range of countries and legal systems and remain bound by their national codes when in practice at the international level. What happens when these rules conflict? Or when lawyers are subject to multiple disciplinary proceedings and sanctions by their national bar association as well as by the international judges before whom they appear?

Since different legal cultures view ethical issues differently, it is necessary to develop and implement clear professional standards for legal practitioners at the international level. And yet the rules on ethical conduct by lawyers in international courts are opaque, complex, and still not settled. As former Prosecutor at the International Criminal Tribunal for former Yugoslavia (ICTY), Louise Arbour has observed:

> the boundaries between [professional and unprofessional conduct] are particularly blurred in a criminal practice before an international court, if only because the backgrounds and **(p.252)** expectations of all involved are profoundly different and because the playing field is still insufficiently defined.[1]

No single ethical code or disciplinary mechanism applies at the international level to counsel, prosecutors, or other legal representatives.[2] The various codes or regulations that apply at the different courts have not been drafted by a single

international body, such as the International Bar Association (which does not have jurisdiction over individual lawyers in any event),[3] but rather by each tribunal,[4] and there are some differences between the various codes.[5]

Even *within* each international tribunal, the same rules do not necessarily apply to all counsel. The ICTY, the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) have different codes governing professional conduct for defence counsel versus prosecutors.[6] The International Criminal Court (ICC) initially followed a different approach and adopted a Code of Conduct for Counsel, which applies to all counsel appearing before the ICC including prosecution, defence, and legal representatives of victims.[7] However, The ICC Prosecutor has recently adopted a 'Code of Conduct for the Office of the Prosecutor'.[8]

The approach of the Special Tribunal for Lebanon ('STL' or 'the Tribunal') has been to establish a tailored set of ethical rules designed to address the specific ethical dilemmas that will be faced before the STL, including with regard to proceedings *in absentia* and the fact that the definition of crimes falling with the Tribunal's jurisdiction is primarily based on Lebanese law. This chapter examines the ethics regime that is in place, first by addressing the ethical rules that apply at the **(p.253)** STL and then the disciplinary proceedings that counsel may face when they breach their ethical obligations (section 13.2). As the STL proceedings are still at an early stage, there is little practice or case law on ethical matters so far. However, there are detailed ethical rules, which have been adopted by the STL and some instructive practice from the other international courts, which provides helpful guidance for the future conduct of counsel at the Tribunal.

13.2 Ethics Standards Before the STL

13.2.1 Sources of ethical rules before the STL

Ethical rules governing the conduct of counsel before the STL are defined by three different sources: (i) the STL's Statute,[9] Rules of Procedure and Evidence, and case law; (ii) the Code of Professional Conduct for Counsel Appearing Before the Tribunal (STL Code),[10] a code adopted by the Presidency of the Court which applies to all counsel appearing before the Tribunal as well as others working behind the scenes; and (iii) the Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims Appearing Before the Special Tribunal for Lebanon (Defence Code),[11] another code issued by the President of the Tribunal that applies specifically to defence counsel and to the legal representatives of victims who have been given permission to participate in the proceedings.

In theory, this multiplicity of sources may be confusing for counsel or lead to some conflicts or overlapping in the applicable ethical standards. However, the hierarchy between the various sources of ethical obligations is well established and assists counsel in determining which ethical set of rules should be applied on a case-by-case basis.

Article 4 of the Defence Code provides, for example, that in case of inconsistency, the Statute, the Rules, and the STL Code prevail over the Defence Code. Given that the STL Code has been adopted under the authority of Rule 60(C), it follows that it should prevail over the Defence Code. With regards to the Rules of Procedure and Evidence, given that they have been adopted under the authority of article 28 of the Statute, these Rules are hierarchically inferior to the Statute. The hierarchy of ethical rules can therefore be established in the following order: (i) the rules provided for in the Statute; (ii) the rules provided for in the Rules of Procedure and Evidence; (iii) the provisions of the STL Code; and (iv) the provisions of the Defence Code.

13.2.1.1 Statute and Rules

The Statute contains a requirement that defence counsel assigned to represent a defendant *in absentia* must ensure 'full representation of the interests and rights of **(p.254)** the accused'.[12] In addition, Rule 60 of the Rules of Procedure and Evidence provides a general framework for sanctioning counsel for 'misconduct'. Under this provision, counsel 'or anyone appearing in proceedings before the Tribunal' can be sanctioned if he or she is 'offensive, abusive or obstructing the proper conduct of the proceedings, or is negligent, or otherwise fails to meet the acceptable standards of professional competence and/or ethics in the performance of his duties'.[13] However, Rule 60 neither defines these terms further nor identifies what an acceptable standard of professional competence is.

13.2.1.2 STL Code

In addition to the framework put in place under Rule 60, the STL has also adopted its own 'tailor-made' code of conduct for counsel—the STL Code. The STL Code was adopted on 28 February 2011 by the President of the Tribunal after consultation with the Prosecutor, the Head of the Defence Office, and the Registrar. It regulates the full range of activities of counsel that relate to judicial proceedings before the Tribunal, including counsel's responsibility for the conduct of subordinate counsel, his cooperation and communications with other counsel, his conduct with witnesses, and his communications with the media. It also applies not only to counsel appearing in court but to '[c]ounsel whose work outside the courtroom directly supports their co-counsel's in-court representation' as well.[14] This is broader than Rule 60, which only refers to counsel and persons appearing in proceedings before the court.

13.2.1.3 Defence Code

Defence counsel and legal representatives for victims are specifically subject to an additional code, which does not apply to counsel for the prosecution. This Defence Code includes specific ethical rules with regards to the obligations of defence counsel in proceedings *in absentia*. This was necessary given that the STL—a court that applies Lebanese law with to define the crimes falling within its jurisdiction as well as its own set of procedural rules inspired by international law—is the only international

court since the Nuremberg and Tokyo International Military Tribunals, which has allowed proceedings *in absentia*.

13.2.2 Ethical standards at the STL

This section focuses on the most significant ethics provisions in the light of the ethical dilemmas that are most likely to arise during pre-trial and trial proceedings at the STL. These relate to (i) defence counsel's obligations in proceedings *in absentia*; (ii) competent representation; (iii) the scope of client-counsel privilege; (iv) confidentiality; and (v) conflicts of interest.

(p.255) 13.2.2.1 Defence counsel's ethical obligations in proceedings *in absentia*

The rules regulating a lawyer's relationship with his client at the STL is primarily defined in article 8 of the Defence Code with regards to defence counsel and legal representatives for victims. Under this provision, defence counsel who represent an accused tried in his presence are required not to advise or assist a client to engage in conduct which the lawyer knows is criminal or fraudulent. They may discuss the legal consequences of any proposed course of conduct with a client and may advise or assist a client, in good faith, to determine the validity, scope, or meaning of the applicable law. Moreover, defence counsel and legal representatives for victims are required to exercise professional judgment, give honest advice to their clients, to consult them to the extent possible, to faithfully express the views and concerns of all their clients, and to abide by the latter's fully informed decisions concerning the objectives of the representation.

However, since it is possible to hold proceedings *in absentia* before the STL—a unique feature of this tribunal that does not exist at other international criminal courts—the Defence Code also provides specific obligations to counsel assigned to accused tried *in absentia*. Four of the accused against whom an indictment has been confirmed have not been found to date and proceedings *in absentia* have been initiated.[15] More recently, an indictment has been confirmed against a fifth accused in respect of whom the Tribunal has issued a warrant of arrest.[16] It remains to be seen whether he will be located. These obligations are therefore of particular relevance.

Pursuant to the STL Statute, a trial may proceed in the absence of the accused when (i) the accused have expressly waived their right to be present; (ii) have not been handed over by a state; or (iii) have absconded or otherwise cannot be found.[17] If the Trial Chamber decides to initiate proceedings *in absentia*, the Defence Office will assign counsel to the accused. Pursuant to rule 108, if an '*in absentia*' accused appears before the close of trial, the Tribunal shall stop the proceedings and start the trial *de novo* unless the accused explicitly waives his right to trial *de novo*. Pursuant to rule 109, if the accused appears after a conviction rendered *in absentia*, he may either accept the judgment (and/or sentence) in writing or request a retrial and/or resentencing.

(p.256) The STL Statute provides that defence counsel representing an accused *in absentia* have to ensure 'full representation of the interests and rights of the accused'.[18] Full representation of an accused during proceedings *in absentia* will be a particular challenge for defence counsel, as they will not receive instructions from the accused.

Indeed, representing an accused without receiving instructions from him is virtually unprecedented at the international level. It may therefore be difficult for defence counsel to determine which ethical standards they should comply with. Their situation is different, for example, from the situation of an *amicus curiae* appointed in cases where the accused exercises his right to self-representation. An *amicus* is not 'legally competent' to act as counsel for the accused,[19] and is not entitled to conduct any factual investigations. As such, *amici* are appointed to merely assist the judges in determining whether the proceedings are fair 'in light of the evidence at trial and the applicable law'.[20] Therefore, international case law relating to the mandate of *amicus curiae* is most likely to provide little assistance to defence counsel when it comes to determining their ethical obligations vis-à-vis the absent accused. The practice of some civil law countries of allowing proceedings *in absentia* may also be short on answers. In Lebanon, for example, accused tried *in absentia* for felonies cannot be represented by counsel at trial.[21]

However, articles 8(C), (D), and (E) of the Defence Code defines the scope of representation for defence counsel in proceedings *in absentia*. Article 8(C) of the Defence Code provides that defence counsel assigned *in absentia* (i) shall not enter any plea on behalf of the accused; (ii) shall undertake all necessary investigations to prepare for the defence of the accused; and (iii) shall make any submissions on the law in the perceived best interest of the accused. Article 8(D) of this Code specifies further that defence counsel shall draw the attention of the Trial Chamber to any defence available upon the evidence as a matter of law in the relevant factual circumstances.

In the absence of the accused, the STL standard therefore requires defence counsel to enter any available defence with the sole potential limitation being that this must be in the 'best perceived interest of the accused'.[22] However, defence counsel may clearly struggle with the notion of the 'best perceived interest of the accused'. What does this provision mean in practice? One may argue that entering **(p.257)** any available defence on factual and legal issues may expose weaknesses in the prosecution case and, consequently, help the prosecution to 'fix' or improve its case in preparation for the 'retrial' if the accused is finally found. It may therefore be in the interest of the absent accused that his counsel simply says nothing and does not enter any defence. It is not clear whether a defence counsel who follows this strategy would be liable to disciplinary proceedings if the judges consider that it did not serve the 'best perceived interest of the accused'.

In any case, the Defence Code provides that a defence counsel assigned *in absentia* shall not have any contact with the accused.[23] This provision specifies that, if the defence counsel is contacted, directly or indirectly, by the absent accused,

> he shall, due to his awareness of the risk such contact may pose to the accused's right to a retrial, and without this act amounting to acceptance of Defence Counsel by the *in absentia* accused, (i) refuse to discuss any element of the case with the *in absentia* accused; and (ii) refer the accused to the Head of the Defence Office to receive independent legal advice.

But what is the risk posed by contact between the defence counsel and the *in absentia* accused? Rule 104 provides that proceedings shall not be deemed *in absentia* if the accused appears before the Tribunal in person, by videoconference, or through counsel appointed or *accepted* by him. It follows that if, in the course of *in absentia* proceedings, the accused accepts a counsel who has been assigned *in absentia*, this accused may be precluded from enjoying his right to a retrial. In the light of this, article 8(E) of the Defence Code would compel defence counsel to avoid any contact with the accused in order to ensure that any contact could not be interpreted as an uninformed acceptance to be represented by this counsel.

However, article 8 of the Defence Code does not indicate whether, if contacted by the absent accused, the defence counsel—or the Head of the Defence Office—would have the obligation to inform the Trial Chamber accordingly. Through such contact, for example, the defence counsel may be in a position to inform the Trial Chamber about the location of the accused who has absconded. What would be his ethical obligation if this situation arises? Moreover, the Defence Code does not specify whether similar obligations would apply to defence counsel if he is contacted by an individual purporting to be an intermediary between the counsel and the accused or pretending to speak on behalf of the accused.

Ultimately, the STL's governing provisions do not impose an explicit duty on either the defence counsel or the Head of the Defence Office to disclose information regarding the accused's location to the Tribunal. Article 1(f) of the STL Code, however, provides that all counsel shall 'further the Tribunal's efforts to achieve justice in accordance with the law, including *inter alia* by avoiding any conduct or representation that could mislead or deceive the Tribunal'. This provision suggests that there may be an obligation for defence counsel to report to the Tribunal the existence of contacts with an absent accused, or knowledge of his location, in order to further the Tribunal's efforts to achieve justice.

(p.258) 13.2.2.2 Competent representation

Article 9 of the Defence Code provides that a representation is 'ineffective where one or several acts or omissions of Counsel or of a member of the Legal Team materially compromise, or might irreparably compromise, the fundamental interests or rights of the Client'.

Before the ICTR and ICTY, some accused benefiting from legal assistance complained about the legal skills of their counsel. The ICTR Appeals Chamber held that defence counsel is 'presumed to be competent and such a presumption of competence can only be rebutted by evidence to the contrary'.[24] In *Tadić*, the ICTY Appeals Chamber held that '[u]nless gross negligence on the part of counsel can be established, due diligence will be presumed'.[25] It is not clear whether such a presumption will apply before the STL.

Ensuring competent representation can be a difficult task before international tribunals. Identifying and interpreting the applicable law may be more complicated in an international context than in a national criminal court, which benefits from a long established set of laws and practice. This challenge is especially great before the STL as counsel will not only need to familiarize themselves with international criminal law but also with Lebanese law, since the crimes falling within the jurisdiction of the STL are defined by reference to the Lebanese Criminal Code.

Moreover, the definition of 'competent' or 'effective' representation may be difficult to establish at the international level as counsel may be confronted with situations they are not familiar with in their domestic system of origin. For example, lawyers from civil law countries may not be familiar with the cross-examination of witnesses as it is practised before international tribunals, or it may be unusual for them to conduct investigations.[26] Before the STL, lawyers from common law countries may be unfamiliar with the flexible rules of evidence provided in, inter alia, STL Rules 149(C) and (D), which seem to derive from a civil law approach, or with proceedings *in absentia*, or the participation of victims in the proceedings. The appointment of co-counsel, legal representatives, or legal assistants should allow defence counsel or the legal representatives for victims to compose a competent team with experienced lawyers from various backgrounds. The obligation of the Defence Office to provide legal research and advice, as well as continuing professional training,[27] will also contribute to assisting defence counsel to provide effective representation.

The STL Rules provide a mechanism that empowers the organs of the Tribunal to assess the 'quality' of a counsel's representation. Rule 57(G) empowers the Head of the Defence Office to ensure that the representation of suspects and accused **(p.259)** meets internationally recognized standards of practice. To this end, subject to lawyer–client privilege and confidentiality, the Head of the Defence Office may monitor the performance and work of counsel and the persons assisting them. Rule 57(G) specifies that the Head of the Defence Office may request from the defence all necessary information in order to exercise his supervisory function. Pursuant to rule 57(H), the Head of the Defence Office may then *initiate* the disciplinary actions he deems necessary in case of incompetent representation. The fact that the Head of the Defence Office can only 'initiate' disciplinary proceedings suggests that only the judges may ultimately impose disciplinary sanctions in the case of a violation. The main role of the Head of the Defence Office would therefore be to seize the judges when he considers that the representation of an accused has been ineffective. The Head of Defence Office is, however, empowered to take temporary measures, such as withholding the payment of fees to defence counsel, until the judges deal with the matter.[28]

The Rules also provide that the Victims Participation Unit, which is under the Registrar's authority, may supervise the legal representatives for victims and that the Registrar has the same disciplinary powers in respect of the legal representatives for victims as the Head of Defence Office has for defence counsel.[29]

Article 33 of the Defence Code details further the scope of the monitoring powers of the Head of the Defence Office or the Registrar vis-à-vis defence counsel and legal representatives of victims, respectively. These powers are extremely broad and encompass, amongst other matters, the monitoring of (i) attendance at court and availability to work on a case on a full-time basis; (ii) motion practice; (iii) knowledge of law; (iv) knowledge of the case; (v) development of the theory of the case and implementation of strategy; (vi) conduct of investigation; (vii) conduct of witnesses' examinations; and (viii) management of staff and resources.

It is hoped that these broad monitoring powers can contribute to ensuring effective representation of the accused or the victims and reducing the situations where an ethical violation of a counsel's responsibilities may arise.

13.2.2.3 Counsel–client privilege

The counsel–client privilege, or legal professional privilege, is preliminarily defined in STL Rule 163. Its formulation is quite similar to the relevant rules which apply before the ICTY or ICTR,[30] which provide that no communications between lawyer and client are subject to disclosure at trial unless (i) the client consents to such disclosure; or (ii) the client has voluntarily disclosed the content of the communications to a third party, and the third party then gives evidence of that disclosure. STL rule 163 provides, however, a third ground for lifting the legal profession privilege, which is when the client intends to perpetrate a crime and the communications are in furtherance of that crime. This third ground is also present **(p.260)** in many, but hardly all, national ethical codes. Article 10 of the Defence Code provides further situations where the privilege may be lifted, including when this lifting is essential to establish a claim or defence on behalf of counsel in a dispute with his client.

13.2.2.4 Confidentiality of proceedings and relations with the public

Rule 60bis(A) prohibits counsel from disclosing confidential information relating to proceedings in knowing violation of a judicial order. Any violation of this obligation may lead to prosecution for contempt and obstruction of justice under the same Rule.[31] Article 53 of the Lebanese Code of Criminal Procedure also provides that anyone who breaches the confidentiality of the investigation is liable to a maximum penalty of twelve months' imprisonment. The possibility of prosecuting counsel who have breached the confidentiality of criminal proceedings is consistent with the well-known '*secret de l'instruction*'—applied in some civil law countries, including Lebanon and France—which requires confidentiality of investigation materials except for the direct participants in the case during pre-trial proceedings.

In addition to Rule 60bis, article 45 of the STL Code—which applies to all counsel, whether prosecution, defence, or victims' representatives—provides that counsel shall not make public, or assist in the publication or dissemination of any public statement incorporating information or material concerning STL proceedings which (i) is false; (ii) misrepresents the situation or position of another counsel, party to the proceedings, or STL organ; (iii) does not respect the presumption of innocence; or (iv) discloses any confidential information. The same provision of the STL Code compels counsel, in case of doubt, to consult the judges before making any statement related to a case before the STL. Violation of the Code may be sanctioned under the same provisions as misconduct of counsel pursuant to Rule 60–that is, the Chamber may (i) issue a formal warning; (ii) defer, suspend or refuse audience to counsel; or (iii) determine that they are no longer eligible to represent their client.[32] In addition, the Chamber may also communicate counsel's misconduct to his professional regulatory body in his home state.[33]

13.2.2.5 Conflicts of interest

Although defence counsel and the legal representatives for victims have already been appointed in the *Ayyash et al* case, no counsel has been appointed or assigned to the fifth accused, Hassan Merhi, and the *Merhi* case has not so far been joined to the *Ayyash at al* case. Moreover, the STL Prosecutor may file new indictments against other suspects in the same case or other cases that have been determined to be 'connected' to the assassination of Rafik Hariri and are therefore within the **(p.261)** jurisdiction of the court.[34] The question of the existence of a conflict of interest may therefore arise in future proceedings.

Article 4 of the STL Code provides that '[c]ounsel shall avoid conflicts of interest in advising and representing parties. When a conflict of interest arises or becomes known, Counsel must inform the affected parties and the Tribunal without delay.' Article 11 of the Defence Code details further the rules applying to conflicts of interest. Pursuant to that provision, '[c]ounsel owes a primary duty of loyalty to his Client and shall exercise all care to ensure that no potential or actual conflict of interest arises'.

The STL Code does not define the term 'conflict of interests'. Two other provisions of the STL Code assist in determining the scope of the obligation to avoid conflict of interests. Article 2 of the STL Code provides that '[c]ounsel shall pursue resolutely, diligently, expeditiously, and to the best of his or her abilities the interests of the represented party'. Article 5 then provides that '[c]ounsel shall preserve professional confidentiality of client communications and protect the confidentiality of evidence and proceedings identified as such by the Tribunal'. It results from these provisions that counsel shall avoid being in a position preventing him from fully representing the represented party and/or which may compromise his obligation to preserve the confidentiality of the proceedings.[35]

Pursuant to the STL Code, determining the existence of a conflict of interest is primarily a matter for counsel themselves, since

they have the obligation to inform the represented parties and the Tribunal of the existence of a potential conflict without delay. Counsel may only continue representation in the event of a conflict if he has received the express approval of the Chamber and has made full disclosure to the affected parties. This approach is consistent with article 16 of the ICC Code of Professional Conduct for Counsel, which provides that counsel have the obligation to withdraw from representation or to seek the full and informed consent of the accused to continue representation, suggesting that it is primarily for counsel to make this determination and that a potential conflict can in any event be 'cured' by client consent.

The lack of a specific definition of 'conflict of interest' may cast some uncertainty on the standard to be applied. For example, the STL Code does not specify whether a *risk* or an *appearance* of a conflict of interest should be avoided by counsel, as required in some domestic systems.[36] Article 11(A) of the Defence Code refers to 'potential' conflict, which is likely to cover the notion of 'risk', but not the 'appearance' of a conflict. However, the concept of appearance of conflict of **(p.262)** interests is introduced in article 18(F) of the Directive on Assignment of Counsel. It provides that in case of conflict of interest or *appearance* of conflict of interest, the Head of the Defence Office is entitled to take the appropriate steps.[37] Article 28 of the Directive on Victims' Legal Representation follows the same approach with regards to legal representatives of participating victims through a reference to a 'reasonable perception of a conflict of interest'.[38] These two Directives therefore complement counsel's obligations in terms of conflict of interests under the STL Code and the Defence Code.

13.2.3 Interaction between STL ethical rules and the domestic rules applicable to counsel

Counsel appearing before the STL are bound by the STL's set of ethical rules but also remain bound by their national ethical obligations. Article 4(B) of the Defence Code provides that, to the extent that there is no inconsistency, the provisions of this code should be interpreted in a manner consonant with, *inter alia*, the 'other codes of practice or ethics by which Counsel may be bound'. But what happens if there is a conflict between their national and international obligations?

An incident during the *Barayagwiza* case before the ICTR provided a vivid illustration of such a potential conflict. The accused instructed his two defence counsel not to appear before the Trial Chamber. The defence counsel expressed the **(p.263)** view that 'they have to abide [by] their client's decision' given that '[t]o do otherwise would be in breach of their respective [domestic] codes of ethics' in Canada and the United States.[39] But this position conflicted with ICTR rule 45(I), which requires defence counsel to represent the accused and to 'conduct the case to finality'. The Trial Chamber decided that this ICTR rule compelled the two counsel to appear before it, notwithstanding the counsel's domestic obligations. The ICTR Trial Chamber noted that '[e]ven if the national codes of ethics of the two lawyers defending Mr Barayagwiza should lead to a different result, this is not decisive. Before this Tribunal, its provisions prevail.'[40]

The STL ethical rules seem to follow the same approach as the ICTR. Article 4(A)(ii) of the Defence Code provides that the STL Statute, Rules, and Codes prevail in case of inconsistency over 'any other codes of practice and ethics binding Defence Counsel'.[41] This provision also applies to legal representatives for victims. It is, however, unclear whether it also applies to counsel for the prosecution, as the Defence Code does not apply to them.[42]

This may lead to a 'catch 22' dilemma for counsel. Like Socrates, who had to choose between drinking the hemlock and exile, a counsel would have to choose the set of rules he would not comply with, given that, in either case scenario, it would render him liable to disciplinary actions before the STL or before his national bar. However, given that the STL judges retain the discretion to determine whether a sanction is appropriate, they may—and should—take into account the existence of a conflict between the STL ethical rules and a counsel's domestic obligations on a case-by-case basis in determining whether a penalty should be imposed.

13.3 Disciplinary Mechanisms

Professional ethics are a 'floor' not a 'ceiling'—they define what should not be done. But the existence of an ethics code does not necessarily imply that all that is not expressly forbidden is permitted: the rest is determined by the lawyer himself.[43] Where a rule of ethics is violated, disciplinary action may follow. And if the ethical violation also constitutes an illegal act, there may also be civil or criminal penalties.

(p.264) The disciplinary mechanisms at the STL are set out in Rule 60 of the Tribunal's Rules. Under this provision, any complainant alleging the occurrence of misconduct may apply to the relevant judge,[44] given that it is primarily for the judges to decide on the proceedings and sanctions to be implemented, if any. Judges must give the relevant counsel or legal representative, the Prosecutor or the head of the Defence Office the opportunity to be heard.[45] Rule 60bis also provides for contempt proceedings against counsel.

The available sanctions for violations under Rule 60 range from a formal warning to, at the other end of the spectrum, the ineligibility of counsel to appear before the Tribunal (or, in the case of defence counsel, to represent the accused).[46] With the approval of the STL President, the Judges may also communicate any misconduct to the 'professional body regulating the conduct of counsel in the counsel's national jurisdiction'.[47] As such, STL Rule 60 is very similar to the ICTY/ICTR regime established under Rule 46 of their respective Rules of Procedure and Evidence. In case of contempt or obstruction of justice, counsel may be liable to a maximum penalty of 7 years' imprisonment and a fine of 100,000€ pursuant to Rule 60bis.

The Rules of Procedure of Evidence contain other provisions which allow the judges to impose sanctions on counsel in specific circumstances. For example, Rule 126(G) authorizes a chamber to order the Registrar to withhold payment of 'fees' associated

with a motion that is deemed to be frivolous or an abuse of process. The Appeals Chamber recently ordered the Registrar to take such measures against two Defence teams that had challenged the re-composition of the Trial Chamber following the resignation of its presiding judge.[48] These two Defence teams obtained leave from the presiding judge of the Appeals Chamber for reconsideration of this decision on the ground that, *inter alia*, this provision would be discriminatory.[49] The Defence's position is that Rule 126(G) would only apply to defence counsel appointed through the legal aid system—as they are the only counsel remunerated through 'fees'—in breach of the principle of equality between the parties.[50] The Prosecution responded that Rule 126(G) does not result in any discrimination as any counsel, including counsel for the Prosecution, who files frivolous motions may be sanctioned through the application of other rules, including Rule 60(A).[51] The request for reconsideration is pending.

(p.265) With regard to defence counsel and legal representatives for victims, the Defence Code provides for an additional specific disciplinary regime led by a Disciplinary Board whose members are appointed by the STL President, the Head of the Defence Office, and the Registrar.[52]

This means that if, for example defence counsel is found to have intimidated a witness, he or she may have sanctions imposed (i) under the disciplinary mechanisms directly managed by the judges under Rule 60(A) and the STL Code; and/or (ii) by the Trial Chamber following contempt proceedings triggered pursuant to Rule 60bis; and/or (iii) by the Disciplinary Board instituted pursuant to the Defence Code; and/or (iv) by the professional body regulating their conduct in the counsel's national jurisdiction upon communication of the matter by the STL judges pursuant to Rule 60(C).

The rules clarify that if an ethical violation arises under both the Defence Code and the STL Code '[n]o Counsel shall be subject to disciplinary proceedings and sanctions under [the two Codes] more than once for the same act and/or omission or the same series of acts and/or omissions'.[53] However, article 31(D) of the Defence Code does not specify whether the disciplinary mechanisms under these two Codes may be applied along with other disciplinary mechanisms available under the STL regime, such as the mechanisms provided for under Rules 60 and 60bis.

Indeed, article 54 of the STL Code suggests that it is possible to apply more than one disciplinary mechanism for the same conduct within the STL system. This provision provides that a complainant alleging a violation of this Code may lodge a confidential written complaint with the pre-trial judge of a chamber. Following a preliminary assessment of the complaint, the pre-trial judge or chamber may: (i) dismiss the complaint; (ii) refer it to the relevant Head of Organ; (iii) sanction the conduct at issue pursuant to Rule 60; *and/or* (iv) take any other action deemed necessary, such as establishing an investigation panel or prosecuting offences under Rule 60bis for contempt and obstruction of justice. The 'and/or' clearly suggests that the judge may choose one procedural avenue or apply them together. This means that, in theory at least, it is not precluded that disciplinary proceedings under Rule 60, contempt proceedings under Rule 60bis and disciplinary proceedings under the STL Code or the Defence Code may lead to cumulative sanctions if the judges decide to do so.

There is also a risk inherent in the interplay between the domestic and STL disciplinary regimes. Counsel may ultimately face disciplinary proceedings before their domestic disciplinary boards *and* the STL competent authorities for the same conduct. This might be complementary, contradictory, or duplicative. For instance, a defence counsel in the *Tadić* case before the ICTY was held in contempt for serious misconduct, including putting forward information and evidence before the court, which was known by counsel to be false and for bribing potential **(p.266)** witnesses.[54] The counsel committed these acts during interviews of witnesses, which took place in the territory of the former Yugoslavia. As a consequence, the counsel was removed from the list of counsel entitled to appear before the ICTY and sentenced to pay a fine. But the Serbian Bar was also seized of the matter by the ICTY, paving the way for the imposition of separate sanctions by that domestic body for the same conduct.[55]

The STL can, however, refer counsel's misconduct to its national competent authorities pursuant to Rule 60(B) without triggering any separate STL disciplinary proceedings. In addition, article 31 of the Defence Code provides that when a complaint is filed against counsel, the competent national authorities shall be informed and if they intend to or do initiate procedures against this counsel, the procedure before the STL is suspended pending the final decision by the national authorities. The STL can reopen the case if the national authorities' final decision does not adequately address the complaint. However, it is not clear whether the same procedure would apply to complaints filed under Rule 60, Rule 60bis or the STL Code. Nor is it clear what happens in the case of any disciplinary action initiated against prosecutors.

The ECCC has deferred disciplinary action to the national authorities on at least one occasion. In that case, the co-investigative judges determined that the public disclosure of confidential information by an Alaskan defence counsel in the *Ieng Sary* case constituted ethical misconduct. It seems that neither disciplinary proceedings nor sanction was sought or imposed before the ECCC but the misconduct was referred to the Alaskan Bar Association. The Alaskan Bar subsequently informed the ECCC of the appropriate sanctions to be imposed (in their view, none were warranted).[56]

The ICC Code of Conduct also allows the ICC to refer an allegation of misconduct to national disciplinary authorities. When a national authority acts first in initiating proceedings against a counsel who appeared before the ICC, the proceedings before the ICC Disciplinary Board are suspended.[57] This approach constitutes good practice because it prevents the unnecessary duplication of sanctions at the domestic and international level. It also ensures that the international competent body may subsequently deal with the matter if the domestic competent authorities failed to do so.

(p.267) 13.4 Conclusion

It remains desirable to establish a common approach at the international level for the identification of ethical standards for proceedings before international tribunals. At the same time, it was necessary at the STL to develop an ethical framework that took into account some procedural specificities of this tribunal, particularly with regards to proceedings *in absentia* and victims' participation in the proceedings. The detailed description of ethical rules contained in the court's founding documents and the clear hierarchy between them should ensure that the line between professional and unprofessional conduct is at least slightly less blurred than it was in the past for counsel. But in future, more detailed guidance could usefully be provided to counsel about what their international ethical obligations are, how this fits with their national obligations, and what the consequences of violating those obligations are likely to be.

Notes:

* Legal Officer, Office of the Prosecutor of the Special Tribunal for Lebanon.

** Registrar, Special Tribunal for Lebanon.

The views expressed herein are those of the authors and do not necessarily reflect the views of the Special Tribunal for Lebanon.

([1]) Louise Arbour, 'Lawyers in the World Criminal Court' (Ontario Justice Education Network's Second Colloquium on the Legal Profession, 5 March 2004) <http://www.lsuc.on.ca/media/justice_louise_arbour_professionalism_march0504.pdf> accessed 13 October 2013.

([2]) For an overview of the codes adopted at the international level, see Laurel S Terry, 'Codes of Conduct for International Tribunals and Arbitration' (2009) <http://www.personal.psu.edu/faculty/l/s/lst3/presentations%20for%20webpage/ASIL_Terry_Codes_International_Tribunals.pdf> accessed 13 October 2013.

([3]) See Jarinde Temminck Tuinstra, *Defence Counsel in International Criminal Law* (The Hague: TMC Asser Press 2009) 196–7. There have been efforts to propose common ethical standards for all international tribunals. For example, the International Law Association Study Group has developed 'The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals', reproduced in Philippe Sands, 'The ILA Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals' (2011) 10(1) LPICT 1. However, these efforts have resulted in non-binding recommendations, although they may constitute a source of inspiration for the international tribunals. At least one scholar has argued that the Hague Principles have had a significant influence on the drafting of the STL Code of Conduct for Counsel, see Arman Sarvarian, 'Ethical Standards for Prosecution and Defence Counsel before International Courts—The Legacy of Nuremberg' (2012) 10 JICJ 423, 424.

([4]) The Registrar or the President of each tribunal is generally the drafter of the code or rules regulating ethical questions. However, it is worth noting that the ICC Registry had to consult independent bodies of counsel and legal associations in the drafting process of the ICC Code. See ICC Rules of Procedure and Evidence r 20(3).

([5]) See further Amal Alamuddin and Stephen Kay, *The Impact of the Hybrid Nature of International Proceedings on Counsel* ([International Bar Association, forthcoming).

([6]) See ICTY and ICTR, Prosecutor's Regulation No 2 (New York, 14 September 1999) [Standards of Professional Conduct for Prosecution Counsel].

([7]) ICC, Code of Professional Conduct for Counsel (2005).

([8]) ICC, Code of Professional Conduct for the Office of Prosecutor, 5 September 2013.

([9]) Attachment to SC Res 1757, UN Doc S/RES/1757 (2007) [Statute of the Special Tribunal for Lebanon].

([10]) STL Code, 28 February 2011.

([11]) Defence Code, 14 December 2012.

([12]) STL Statute (n9) art 22(2)(C).

([13]) STL RPE r 60(A).

([14]) Preamble to STL Code (n10).

([15]) STL, Decision to Hold Trial *In Absentia Prosecutor v Ayyash et al*, Case No STL-11-01/TC Trial Chamber, 1 February 2012; STL, Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *in Absentia* Decision, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/AC/AR126.1, Appeals Chamber 1 November 2012.

([16]) The Prosecutor issued an indictment against Hassan Habib Merhi on 5 June 2013 and this indictment was confirmed by the Pre-Trial Judge on 31 July 2013. On 10 October 2013, the Pre-Trial Judge issued an order under r 76(E) of the Rules to effect service of the arrest warrant in an alternative way as attempts at personal service by the Lebanese authorities had failed. See STL, Public Redacted Indictment, *Prosecutor v Merhi,* Case No STL-13-04/I/PTJ, Prosecutor, 5 June 2013; STL, Order Pursuant to Rule 76(E), *Prosecutor v Merhi*, Case No STL-13-04/I/PTJ, Pre-Trial Judge, 10 October 2013.

([17]) STL Statute (n9) art 22.

([18]) STL Statute (n9) art 22(2)(C).

([19]) ICTY, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, *Prosecutor v Milošević*, Separate Opinion of Judge Shahabuddeen, 20 January 2004, para 11.

([20]) ICTY, Decision on Motion of *Amicus Curiae* regarding Appellate Ground of Ineffective Assistance of Counsel, *Prosecutor v Krajišnik*, Appeals Chamber, 20 July 2007, para 8.

([21]) See New Code of Criminal Procedure (Lebanon), Act No 328 of 7 August 2001, art 285: 'A fugitive accused may not be represented by counsel at court proceedings conducted *in absentia*. However, a person appointed by him may present an excuse on his behalf after providing evidence of his having been appointed to represent him. If the Court accepts the excuse, after verifying its validity, it shall defer the proceedings until a later date. If the accused does not surrender to the Court twenty-four hours before the new date set, the trial *in absentia* shall proceed.'

([22]) STL Code (n10) art 8.

([23]) STL Code (n10) art 8(E).

([24]) ICTR, Judgment, *Prosecutor v Akayesu,* Case No ICTR-96-4-A, Appeals Chamber, 1 June 2001, para 78.

([25]) ICTY, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, *Prosecutor v Tadić,* Case No IT-94-1, Appeals Chamber, 15 October 1998, para 65.

([26]) See further Temminck Tuinstra, *Defence Counsel in International Criminal Law* (n3) 42.

([27]) See STL RPE r 57(E).

([28]) See STL RPE r 57(H)(i).

([29]) See STL r 51.

([30]) It is worth noting that the ICC approach is more comprehensive and includes 'communications made in the context of a class of professional or other confidential relationships'. See ICC RPE r 73(2).

([31]) STL RPE r 60bis(J) provides that the maximum penalty for contempt of court is seven years' imprisonment, or a fine of 100,000€, or both.

([32]) STL Code (n10) art 54(c).

([33]) STL RPE r 60(C).

([34]) STL, Decision on the Prosecutor's Connected Case Submission of 30 June 2011, Case No STL-11-02/CCS/PTJ, Pre-Trial Judge, 5 August 2011. The decision remains confidential at the request of the Prosecutor.

([35]) This is consistent with the definition of 'conflict of interests' applied in France. Pursuant to *Règlement Intérieur National de la Profession d'Avocat* (France) art 4.1, counsel cannot accept a new client if the secrecy of the information provided by a former client may be violated or if the knowledge of the former client's case may favour the interests of the new client.

([36]) *Règlement Intérieur National de la Profession d'Avocat* (France) art 4.1. The article also provides that counsel cannot represent multiple clients in the same case if there is a conflict between the interests of these clients, or a risk of conflict.

([37]) STL, Directive on the Appointment and Assignment of Defence Counsel (20 March 2009) art 18(F):

Where, at any time after the assignment or appointment of counsel, counsel has a conflict of interest or there is the appearance of a conflict of interest, the Head of the Defence Office shall immediately take appropriate steps, which may include:

> ((i)) appearing before the Pre-Trial Judge or a Chamber in relation to the conflict;
> ((ii)) where appropriate, in consultation with counsel involved, suggesting an alternative resolution of the conflict of interest;

((iii)) appointing an independent counsel to determine whether a conflict of interest exists, and, if so, whether the counsel can continue to represent the accused; or
((iv)) referring the matter to the competent body envisaged in the Code of Professional Conduct and act in accordance with Article 34(B).

([38]) Directive on Victims' Legal Representation (4 May 2012) art 28:

((A)) In the event that a designated lead legal representative or co-legal representative becomes aware of facts potentially giving rise to a conflict of interest as defined by the Code of Conduct for Victims' Legal Representatives, in relation to himself or to any member of the victims' legal team, he shall immediately inform the VPU.
((B)) Where, at any time after the designation of a legal representative, the Registrar considers that the legal representative has a conflict of interest or that there is a reasonable perception of a conflict of interest, the Registrar shall immediately take appropriate steps in relation to the legal representative's designation, which may include one or more of the following:
((i)) where appropriate, in consultation with the legal representative involved, agreeing on measures to resolve the conflict of interest;
((ii)) engaging an independent legal representative to determine whether a conflict of interest exists and, if so, whether it is appropriate for the legal representative to continue to represent the victims participating in proceedings;
((iii)) suspending the designation of the legal representative in accordance with Article 39; or
((iv)) withdrawing the designation of the legal representative in accordance with Article 40.

([39]) See ICTR, Decision on Defence Counsel Motion to Withdraw, *Prosecutor v Barayagwiza*, Case No ICTR-97-19, Trial Chamber, 2 November 2000, paras 19–22.

([40]) See ICTR, Decision on Defence Counsel Motion to Withdraw, *Prosecutor v Barayagwiza* (n39).

([41]) It is unclear why this provision makes reference to defence counsel without mentioning legal representatives of victims.

([42]) Article 5(10) of the ICC Code of Conduct for the Office of the Prosecutor provides that it prevails over any other code of ethics which staff members of the Office are bound to honour outside the applicable legal regime established at the ICC.

([43]) As explained in the Preface of the Canadian Code of Professional Conduct, '[t]he essence of professional responsibility is that the lawyer must act at all times *uberrimae fidei*, with utmost good faith to the court, to the client, to other lawyers, and to members of the public….The extent to which each lawyer's conduct should rise above the minimum standards set by the Code is a matter of personal decision.' Canadian Bar Association, Code of Professional Conduct (2009) viii (emphasis added).

([44]) STL Code (n10) art 54.

([45]) STL Code (n10) art 54.

([46]) STL Code (n10) art 54.

([47]) STL RPE r 60(B).

([48]) STL, Decision on Application by Counsel for Messrs Badreddine and Oneissi Against President's Order on Composition of the Trial Chamber of 10 September 2013, *Prosecutor v Ayyash*, Case No STL-11-01/PT/AC, 24 October 2013.

([49]) STL, Decision on Request by Defence for Messrs Badreddine and Oneissi for Authorization to Seek Reconsideration of the Appeals Chamber's Decision of 25 October 2013, *Prosecutor v Ayyash*, Case No STL-11-01/PT/AC, 13 November 2013.

([50]) STL, Requête en réexamen de la Décision de la Chambre d'appel du 25 octobre 2013, *Prosecutor v Ayyash*, Case No STL-11-01/PT/AC, 18 November 2013.

([51]) STL, Prosecution Response to 'Requête en réexamen de la Décision de la Chambre d'appel du 25 octobre 2013', *Prosecutor v Ayyash*, Case No STL-11-01/PT/AC, 25 November 2013, paras 4 *et seq*.

([52]) Defence Code (n11) art 20.

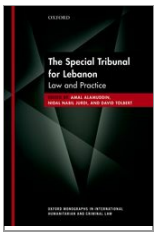
([53]) STL Code (n10) art 31(D).

([54]) See ICTY, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, *Prosecutor v Tadić,* Case No IT-94-1-A-R77, Trial Chamber, 31 January 2000; ICTY, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, *Prosecutor v Tadić,* Case No IT-94-1-A-R77, Appeals Chamber, 27 February 2001.

([55]) ICTY, Judgment on Allegations of Contempt Against Prior Counsel, *Prosecutor v Tadić* (n54).

([56]) See ECCC, Decision on 'Appeal Against the Co-Investigating Judges' Order on Breach of Confidentiality of the Judicial Investigation, *Prosecutor v Ieng et al*, Case No 002, Co-Investigative Judges, 13 July 2009; Letter from Alaska Bar Association to the ECCC, 24 June 2009.

([57]) See ICC Code of Conduct art 38.



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The Legacy of the Special Tribunal for Lebanon

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[–] Abstract and Keywords

This chapter discusses the long-term contributions and drawbacks of the Special Tribunal for Lebanon (STL). It considers whether the STL will contribute to the development of Lebanese criminal law, looking particularly at the infusion of international law concepts into Lebanese domestic law in the decisions of the STL Appeals Chamber. It addresses the question of selective justice and the mandate of the STL, demonstrating that the limited nature of the STL's mandate puts the Tribunal in a category separate from other international courts and tribunals. It argues that by drawing on the historical context in Lebanon surrounding the Hariri assassination, the prosecutors could try to partially address the pervasive criticism regarding selective justice.

Keywords: international criminal tribunal, Lebanese criminal law, terrorism, international law, selective justice

14.1 Introduction

Writing and pondering on the legacy of a tribunal that has only recently started to issue substantial decisions and that has not tried any person whatsoever is by definition a hazardous affair. Not being a prophet by profession or vocation, and not being an expert on Middle Eastern history and politics either, I am rather reluctant to embark on such a venture. Nonetheless, it is tempting to reflect on some scenarios that may materialize in view of the particular features of the Special Tribunal for Lebanon ('STL' or 'the Tribunal') and the legal and political setting in which it is operating.

This chapter distinguishes between the technical legal inspiration that the Lebanese judiciary may draw from the workings of the Tribunal and the norm demonstrative influence that the Tribunal may exercise over wider Lebanese society by emphasizing the importance of accountability and the rule of law.[1] The identification of precisely these aspects of the legacy project is inspired by two conspicuous features of the Tribunal, which have been abundantly addressed in the previous chapters. First of all, the Tribunal is expected to apply only domestic Lebanese law.[2] In this respect, the STL is rather singular amongst internationalized **(p.269)** criminal courts, as some of them are entitled to apply domestic law but usually in combination with international law.[3] Nonetheless, the STL Appeals Chamber ingeniously infused customary international law into the veins of the Lebanese legal system, both when crafting the legal definition of terrorism and construing individual criminal responsibility under the STL Statute.[4] The pertinent question is, of course, whether the Lebanese criminal court will follow suit and adopt the (re)interpretations of Lebanese criminal law. Or, in other words, what will be the (lasting) contribution of the STL to the development of Lebanese criminal law?

The second aspect bears upon the curiously limited scope of the STL's jurisdiction. The Tribunal is only authorized to address the terrorist attack of 14 February 2005, which caused the death of Prime Minister Rafiq Hariri and possibly related offences.[5] Both the Security Council and the Tribunal have been censured for dispensing selective justice and displaying callous short-sightedness in view of the reigning impunity for atrocities committed during the civil strife and armed conflicts which have racked Lebanon for so many years.[6] Is it not an affront to all the victims of those human rights violations to spend so much energy on the prosecution and trial of a limited number of incidents, while the perpetrators of massive violations are left in peace? The implicit message of such questions is, of course, that the proceedings conducted by the Tribunal will not bolster the demand for accountability and the rule of law but rather increase a sense of fatalism and cynicism within Lebanese society.

The pertinent question is how one can gauge the possible influence of the Tribunal in the realm of legal developments and the public's sense of justice. This chapter's contribution to this fascinating issue can only be very modest and just offer some general observations. In respect of the first topic (impact on legal development), section 14.2 explores the extent to which the customary international law definition of the crime of terrorism, as proposed by the Tribunal, corresponds to the **(p.270)** concept of terrorism in Lebanese domestic criminal law. The underlying assumption of this investigation is that a relatively slight deviation will probably encourage the Lebanese judiciary to adopt the Tribunal's definition, whereas more substantial legal differences may deter the Lebanese courts from copying the definition 'lock, stock, and barrel'.

Section 14.3 tackles the second topic. First, the (presumed) selective justice of the STL is be put into the broader perspective of the predicament facing all international criminal tribunals, namely that they have to make choices in view of limited budgets and political constraints. Next, the factors that prompted the Security Council and the Lebanese government to limit the Tribunal's jurisdictional ambit to the terrorist assault and (an unknown number of) related events is examined. And finally, the argument that the STL should pay attention in its decisions to the recent violent past, which engendered the terrorist assaults, in order to do justice to the many nameless victims of the civil war is put forward. It is submitted that only in that case can a limited project, like the Tribunal's assignment, serve a useful purpose by being emblematic of a general reinforcement of the rule of law.

Section 14.4 ponders the question whether criminal courts should engage in giving historical accounts or delivering a contextual background to their judgments. Section 14.5 then rounds up with some conclusions.

14.2 On Definitions of Terrorism

Article 314 of the Lebanese Criminal Code which, as may be recalled, the Tribunal is expected to apply, defines terrorist acts as follows: 'terrorist acts are all acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents'.[7]

The Appeals Chamber dissected the provision and identified three elements: '(i) an act, whether constituting an offence under other provisions of the Lebanese Criminal Code or not; which is (ii) intended 'to cause a state of terror'; and (iii) the use of a means 'liable to create a public danger (*un danger commun*)'.[8]

The first two elements are rather uncontroversial—in spite of the tautological phrasing of the second one—but the 'means' element could find no favour in the eyes of the Appeals Chamber, especially in view of the chamber's observation that Lebanese courts tended to give it a narrow interpretation: failing the employment of one of the enumerated means or similar means which would equally have the effect of creating a public danger, an offence could not qualify as terrorism.[9] The Appeals **(p.271)** Chamber proceeded by substituting its own notion of terrorism for the Lebanese courts' interpretation, which it derived from customary international law. The Appeals Chamber explained why it had to resort to customary international law, trumping the narrow interpretation of Lebanese criminal law by the domestic courts. It observed that international law contained no restrictions as to the means for carrying out terrorist acts (in contrast to the way in which Lebanese courts had restrictively interpreted article 314 of the Lebanese Criminal Code) and emphasized 'the need to interpret national legislation as much as possible in such a manner as to bring it into line with binding relevant international law'.[10]

The Appeals Chamber's manoeuvring raises a number of questions. First of all, one wonders what authority supported the Chamber's re-interpretation of domestic Lebanese law in the light of customary international law.[11] Secondly, what is the place and position of customary international law within the Lebanese legal order? And finally, how could the broadening of the concept of terrorism, which was the inevitable outcome—and perhaps even the purpose—of the infusion of the domestic definition by international law, be reconciled with the *nullum crimen* principle? To all three topics the Appeals Chamber dedicated reflections worthy of consideration.

As to the first issue, the Appeals Chamber stressed the tension between the Tribunal's assignment to apply domestic law and its international character:

> Thus we have a tribunal that must apply the substantive criminal law of a particular country, yet it is nonetheless an international tribunal in provenance, composition, and regulation, it must abide by 'the highest international standards of criminal standards of criminal justice', and its statute incorporates certain aspects of international criminal law. It is this tension, best exemplified by the contrast between Articles 2 and 3 of the Statute, that animates many of the questions posed by the Pre-Trial Judge: when and whether international law, based on the international nature and mandate of this Tribunal, should inform the Tribunal's application of Lebanese criminal law.[12]

Next, the Appeals Chamber clarified more specifically what legal consequences were to emanate from the Tribunals' contribution to the development of Lebanese law. It observed that 'international law binding upon Lebanon is part of the legal context in which its legislation is construed'. It added that 'the application of national law by an international court is subject to some limitations by international law' and concluded that 'when Lebanese courts take different or conflicting views of the relevant legislation, the Tribunal may place on that legislation the interpretation which it deems to be more appropriate and consistent with international legal standards'.[13]

The Appeals Chamber thus displayed an overtly sympathetic attitude to (the application of) international law, something which anybody would expect an **(p.272)** international tribunal to do. The pertinent question, however, is whether the Lebanese legal order allows the courts to directly apply (customary) international law, even defeating national legislation. After all, Lebanese courts would only be inclined to follow the Tribunal's bold interpretations if the system in which they operated would license them to harbour a similarly receptive approach to international law. After scrutinizing Lebanese case law, the Appeals Chamber concluded that customary international law was indeed part and parcel of the Lebanese legal order but that this body of international law could not be applied in penal matters absent a piece of national legislation incorporating international rules into Lebanese criminal provisions.[14] That is a correct view because application of customary international law in criminal trials, lacking precision and predictability, works against the *nullum crimen* principle. This circumstance, however, did not preclude the Tribunal from taking international law into account when construing the relevant provisions of Lebanese law. In order to bolster this opinion, the Tribunal pointed at the particularly grave nature of the acts of terrorism under consideration 'with international implications', which had prompted the Security Council to outsource the prosecution and trial to an international tribunal:

> [F]aced with this criminal conduct and the Security Council's response to it, the Tribunal, while fully respecting Lebanese jurisprudence relating to cases of terrorism brought before Lebanese courts, cannot but take into account the unique gravity and transnational dimension of the facts at issue, which by no coincidence have been brought before an international court. The Tribunal therefore holds that it is justified in interpreting and applying Lebanese law on terrorism in light of international legal standards on terrorism, given that these standards specifically address international terrorism and are also binding in Lebanon.[15]

The effect of the assessment of Lebanese criminal law in the light of (customary) international law was a broadening of the relevant criminal provision on terrorism, at least when compared with the previous—narrow—interpretation of this provision by Lebanese courts. The bone of contention, as earlier indicated, was the proper reading of the term 'means liable to create a public danger'. Although the use of the expression 'such as' preceding illustrative examples (explosive devices, inflammable materials, etc) suggested that the list was not exhaustive, the investigation of case law revealed that the Lebanese court had opted for a cautious interpretation, restricting the definition of terrorist means to

'those means which *as such* are likely to create a public danger, namely a danger to the general population'.[16] In other words, weapons and devices which by their nature would easily cause 'collateral damage' would be covered by the Lebanese provision as interpreted by the domestic courts, while rifles and guns which could be used with more precision, targeting specific victims, would be excluded from the ambit of the provision.[17] The Appeals Chamber, however, argued that this was not the only, nor the most **(p.273)** persuasive, interpretation of article 314 of the Lebanese Criminal Code. The Appeals Chamber emphasized that the provision alluded to the *potential* of the means to create public danger and found that 'this may even occur when a terrorist shoots at a person in a public road, thereby imperilling a large number of other persons simply because they are present at the same location'.[18] The Appeals Chamber was prepared to carry the interpretation of the provision even further, where it held that

> a 'public danger' may also occur when a prominent political or military leader is killed or wounded. Even if this occurs in a house or in any other closed places with no other persons present. In such cases, the danger may consist in other leaders belonging to that same faction or group being assassinated or in causing a violent reaction by other factions.[19]

The repercussion of the final dauntless expansion was that the concept of 'means' was actually redundant, a consequence which the Chamber was indeed prepared to take.[20]

The Appeals Chamber acknowledged that its interpretation broadened one of the objective elements of the crime as it had been applied in prior Lebanese cases. It had therefore to consider 'whether this is permissible under the principle of legality (*nullum crimen sine lege*)'.[21] The Chamber advanced several arguments to sustain its opinion that the interpretation of Lebanese criminal law in the light of (customary) international law did not put the *nullum crimen* principle at peril. First, it pointed at the wording of article 15 of the International Covenant on Civil and Political Rights [22] requiring the act to be criminal under national or international law to escape a violation of the *nullum crimen* principle. This implied that someone could be punished by domestic courts for conduct predating the adoption of national legislation, provided that the national legislation reflected and was in line with international law.[23] Secondly, the Chamber found that the *nullum crimen* principle did not preclude the 'progressive development of the law by the court' as such 'progressive development' was simply inevitable in view of the continuously changing social circumstances. The acid test was whether the application of the law, subject to development as social conditions change, was foreseeable by the perpetrator.[24] The Chamber concluded that 'it was foreseeable for a Lebanese national or for anybody living in Lebanon that any act designed to spread terror would be punishable, regardless of the kind of instrumentalities used as long as such instrumentalities were likely to cause a public danger'.[25] The Chamber reasoned that neither the Arab Convention for the Suppression of Terrorism[26] nor customary international law contained restrictions as to the means which can be used to **(p.274)** commit terrorism and that both of these sources were binding on Lebanon. Treaties that qualified domestic (criminal) law were accessible to Lebanese citizens, in view of the procedures of ratification and accession by Parliament.[27] Finally—and by way of knock-out argument—the Appeals Chamber noticed that Lebanon was not familiar with the formal doctrine of binding precedent (*stare decisis*). This implied that individuals could not rely on precedent in order to repel a newer and further-reaching interpretation of the law.[28]

It is not the intention of this chapter to assess all aspects of this layered decision in detail. A lot has been written about it and it is not desirable to rehash all these interesting arguments.[29] On a general note, the Tribunal may have made a huge contribution to the definition of terrorism under international law, and has perhaps succeeded in partially ending the exasperating stalemate which has resulted from quibbling states following their own political agendas and remaining unable to reach some kind of satisfactory consensus. As suggested earlier, it is reasonable for an international tribunal to infuse its interpretations with (customary) international law, especially if it is called upon to adjudicate on a particularly grave incident of terrorism with international ramifications. It is the opinion of this author that, if the international community, through the Security Council, authorizes an international tribunal to apply and interpret national criminal law, one should not complain if the tribunal vigorously executes such an assignment. The Tribunal has some leeway in this respect and its hands are not tied by previous findings of national courts whose interpretations have arguably indeed been rather cautious and conservative.

The question that is interesting in view of the topic of this chapter is: What are the prospects that the Lebanese courts will adopt the interpretation of terrorism as advanced by the STL? After all, the non-recognition of *stare decisis* works both ways. The STL has no superior authority over Lebanese courts and the latter are therefore not bound by any interpretation as advanced by the Tribunal. To its credit, the Appeals Chamber frankly acknowledges the situation: 'This interpretation is not binding per se on courts other than the Special Tribunal for Lebanon, although it may of course be used as an interpretation of the applicable legal provisions in other cases where terrorism is charged'.[30]

To be sure, one cannot be overly confident that domestic Lebanese courts will follow the interpretation by the Tribunal, at least not entirely. Although much of the analysis of the concept of terrorism can be agreed with, there is at least one point where the Tribunal pushes the concept too far. As indicated earlier,[31] the Tribunal **(p.275)** seeks to extend terrorism to include political killings on private premises, beyond the public eye. The Tribunal speculates that such killings, especially through broad media coverage, may cause 'public danger' as they may perpetuate the cycle of political assassinations. This interpretation distorts the gist of terrorism, to wit the ignition of fear amongst the public and the concomitant paralysis of society. Even worse, it adds fuel to the inflation of the concept of terrorism. Although one may utterly disagree with an assassination as a tool to settle political scores, it is an entirely different issue to qualify this as a terrorist offence if the general public is not endangered. It is sincerely doubted whether Lebanese courts will be inclined to adopt such a broad interpretation, which not only deviates from the 'local brand' but also appears to be an expansion of the current understanding of terrorism under international law.

14.3 The Tip of the Iceberg?

What kind of legacy is a tribunal likely to bequeath, which intends to prosecute and try the suspects of only a limited number of terrorist assaults but leave the preceding host of atrocities untouched? Will it not incur the justified reproach that it disdains the suffering of the Lebanese people at large?

By now, problems of selectivity are common to all international criminal tribunals. In view of limited resources and the highly expensive and time consuming trials, prosecutors are hard pressed to make painful choices focusing on certain incidents and 'those bearing the greatest responsibility', leaving other crimes and perpetrators to the uncertain meanderings of domestic criminal justice or even allowing them to pass into oblivion. The Special Tribunal for Lebanon, however, stands apart, as it has been instructed from the outset to concentrate its attention on the terrorist attack that claimed the life of Rafiq Hariri and on related assaults, while not being seized with jurisdiction over war crimes and atrocities which, though separated in time and scope from those assaults, are inextricably connected to them. In order to put the quandary of the STL in proper perspective, a short survey of the experiences of other international criminal tribunals and the International Criminal Court (ICC) follows (Section 14.3.1). The next question to be addressed is why the STL, against the backdrop of the overarching violence of the civil

war, has been equipped with such a limited mandate (Section 14.3.2). And finally, there follows an investigation into how the terrorist attacks and the violence of the late seventies and eighties are interrelated (Section 14.3.3). The hypothesis, to be discussed in this section, as well, is that the STL will only succeed in contributing to the reinforcement of the rule of law and find resonance in the hearts and minds of the Lebanese people if it unfolds the broader picture and it includes the general conflict as the root cause of the terrorist attacks in its factual and normative findings.

(p.276) 14.3.1 Selective justice

The International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the ICC: none of them has escaped the moral opprobrium that they have been (politically) biased in the selection and prosecution of suspects of international crimes. The ICTY has even succeeded in antagonizing both sides. Well-known are the Serbian complaints that they were exclusively targeted to bear the brunt of the atrocities, while Croats and Bosnians have conversely asserted that they have been scapegoated for publicity reasons. The ICTY had to demonstrate to the world that it would mete out fair-handed justice. It is not easy to assess the veracity of such accusations.[32] It is even doubtful whether the Prosecutor's policy displays a consistent pattern over the years. De Vlaming shows that, while Goldstone, Arbour, and Del Ponte all emphasized the need for impartiality and even-handedness, Arbour at the end of the day only prosecuted Serbs for crimes committed in Kosovo.[33] Del Ponte officially announced her resolve to prosecute those bearing the greatest responsibility for the international crimes, begging the question who those people actually are.[34]

The Prosecutor of the ICTR has been criticized for largely ignoring the crimes allegedly committed by the current power-holding Rwandan Patriotic Front in the aftermath of their victory over the Hutus. Such crimes, though not amounting to genocide, have been credibly attested in reports of NGO's, especially Human Rights Watch.[35] William Schabas has taken a nuanced approach, suggesting that Prosecutor Jallow's reluctance 'may well reflect a genuine and sincere belief that the mission of the Tribunal is to address the 1994 genocide' and adding that 'Prosecutor Jallow may feel that the pressure to prosecute the Tutsi military leaders is itself driven by a political constituency rather than some well-meant and altruistic vision of a court that deals with all sides of the conflict'.[36]

(p.277) Finally, the ICC Prosecutor has not been spared from accusations of bias and selectivity either. In effect, he has been censured at two different levels. First, the ICC has been derided as an 'all African Court' in view of its exclusive focus on African situations. Furthermore, the Prosecutor has been attacked for solely focusing on crimes committed by rebel forces, while simultaneously paying no heed to the crimes of representatives of the governments.

Former Prosecutor, Moreno Ocampo, has attempted to account for his prosecutorial policy and counter his critics by invoking and elaborating on the principle of 'gravity'.[37] In defence of his decision not to pursue investigations into communications, which revealed the commission of war crimes by British soldiers in Iraq, the Prosecutor referred to the three situations at that time under investigation by the Office of the Prosecutor (Northern Uganda, Democratic Republic of Congo, and Darfur) and added:

> Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds of thousands of such crimes. Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute.[38]

A similar appeal to the gravity principle sustained the Prosecutor's decision to issue arrest warrants against the five suspects of the Ugandan rebel forces of the Lord's Resistance Army (LRA):

> The criteria for selection of the first case was gravity. We analysed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF (governments forces, addition HvdW). We therefore started with an investigation of the LRA.[39]

Schabas has observed that the ICC Prosecutor has been juggling with the distinct concepts of 'cases' and 'situations' in order to reach an outcome, which suited his preconceived opinions.[40] To be sure, he has a point. In the Iraq situation, the Prosecutor compared the crimes (that is, the *case*) of the British soldiers with the *situations* in the African countries under criminal scrutiny of the ICC, conveniently forgetting that the *situation* was of comparable gravity. In the case of Lubanga, who was, as is well known, indicted for the recruitment and conscription of child soldiers, the gravity of the crime (the case) seemed to be of limited importance. **(p.278)** The investigation and prosecution apparently was inspired by the wider context (the situation), in spite of the fact that both articles 17 and 53 explicitly refer to the gravity of the individual case.[41]

For the sake of completeness, mention should be made of the Special Court for Sierra Leone (SCSL), which probably has the best record in meting out even-handed justice, as it has prosecuted and tried representatives of both sides in the civil war. That may not be considered particularly meritorious, however, because, as Schabas wryly remarks, 'it was easy to be even-handed in Sierra Leone because all parties to the conflict behaved so badly'.[42] The choice of cases and suspects has moreover been facilitated by article 1 of the Statute of the Special Court for Sierra Leone, which explicitly stipulates that the Court shall restrict its jurisdictional attention to those people bearing the greatest responsibility.[43]

It has often been observed that international prosecutors are inclined to choose easy targets out of fear of exasperating powerful stakeholders whose cooperation they need. Indeed, it cannot be denied that international criminal tribunals are utterly dependent upon the assistance of states. The problem is aggravated by the focus on the prosecution of political and military leaders bearing the greatest responsibility. From a purely legalistic and even moral point of view, one may indignantly denounce such policy but it is a real dilemma that cannot easily be resolved.

14.3.2 Choice between justice and amnesty

The position of the STL's Prosecutor differs in a number of conspicuous ways from that of his colleagues at the other international criminal tribunals, as sketchily indicated in the previous paragraph. For one thing—and mentioned several times before—the Prosecutor is not expected to select cases and situations because the choice has been made for him by agreement between the Security Council and the Lebanese government. In this respect, the STL resembles the Lockerbie court, which was instructed to prosecute and try the suspects of one single incident, the bombing of the Pan American airliner in Scotland on 21 December 1988.[44] Secondly, the decision to restrict the jurisdiction of the STL to a limited number **(p.279)** of criminal incidents has not—at least not primarily—been inspired by the concern not to antagonize powerful states whose assistance the STL would require in the (near) future. Any criminal investigation and prosecution of atrocities committed during the period 1975–90 was effectively thwarted by a general amnesty law promulgated on 26 August 1991, which granted a general amnesty for crimes committed before 28 March 1991. However, the law made a remarkable exception, allowing for the prosecution of 'assassinations or the

attempted assassinations of religious clerics, political leaders and Arab or foreign diplomats'.[45] The amnesty law gave an anticipatory blessing to the restricted jurisdiction of the STL and made a rather awkward distinction between two categories of victims: 'the political or religious elite whose assassination is considered "unpardonable", and a second-rate category that comprises the "ordinary" people, victims of massacres, expulsions and forced disappearances'.[46]

In theory, an amnesty law would not impede the prosecution of serious human rights violations by the STL. It is increasingly accepted that power holders cannot simply perpetuate their own immunity for international crimes they have committed by issuing amnesties.[47] Much has been written about the precarious relationship between amnesties and justice and it is not intended to rehash all the arguments.[48] It should merely be observed that the Lebanese amnesty is frequently presented as the price the Lebanese people had to pay to escape from the eternal spiral of violence. The STL, which is already enmeshed in the political turmoil, would be extremely ill advised to reopen the wounds. The real challenge for the STL is how to incorporate references to Lebanon's violent past as a cause of current problems, without being entitled to pass judgment on those who are responsible for the atrocities. That is the topic of the next section.

14.3.3 Selectivity: is there a problem?

The Secretary-General has explicitly recognized the risk of selectivity when he addressed the scope of the jurisdiction of the Special Tribunal for Lebanon: 'In **(p.280)** the present circumstances, singling out for prosecution the assassination of Rafiq Hariri, while disregarding a score of other connected attacks could cast a serious doubt on the objectivity and impartiality of the tribunal and lead to the perception of selective justice.'[49]

In order to pre-empt criticism in this respect, the Security Council decided to extend the mandate of the STL to cover related terrorist attacks and assassinations, committed during the timeframe mentioned in article 1 of the Statute.[50] This response reveals a rather timid interpretation of the selectivity issue. Others have taken a somewhat broader approach. A Middle East Report of the International Crisis Group mentions critics of the STL referring to 'the long list of political assassinations in Lebanon that have taken the lives of countless prominent figures and for which there has been no investigation—let alone accountability—in order to question the premise of a non-political instrument designed to end the era of impunity'.[51] That is indeed a step forward, although the critics remain within the confines of the assassinations category.

It is curious to learn that the civil war—or, for that matter, the general political/historical background—hardly features in the official documents of the UN investigative bodies. In the report of the UN International Independent Investigation Commission ('UNIIIC' or 'the Commission') the civil war is only briefly mentioned in the context of the presence of Syrian troops on Lebanese territory from 1976 until 2005.[52] The report wholly centred on the minute details of the terrorist attack on Hariri and concluded, rather prematurely, that Syria was to blame for Hariri's assassination. The Commission predicated this conclusion on the pervasive presence of Syrian military intelligence in Lebanon, implying that the preparation of the terrorist attack could not possibly have evaded their attention.[53] Meanwhile, the suspicion has seemingly shifted from Damascus to Hizbollah.[54] The STL Prosecutor has issued indictments against Salim Jamil Ayyash and four others who are allegedly affiliated to Hizbollah, and the pre-trial judge confirmed four **(p.281)** of these indictments on 28 June 2011.[55] In view of the adamant refusal of Hizbollah leadership to surrender its own people and the unsuccessful efforts of the Lebanese authorities to discover the whereabouts of the accused, the trial in the case of *Ayyash et al* will probably be held in the absence of the accused.[56]

If credible evidence leaves no reasonable doubt as to the involvement and guilt of Ayyash and his co-accused, they should of course be convicted. However, members of Hizbollah (or Syrians) are not the only ones who killed their political adversaries. The tragically long list of assassinated leaders include representatives of disparate political leanings, such as Kamal Jumblatt (deceased 1977), national Druze leader and father of Walid, Bachir Gemayel (deceased 1982), president-elect and leader of the Phalange party, Hassan Khaled (deceased 1989), Mufti of the Republic and Dany Chamoun (deceased 1990), son of former president Camille Chamoun. These terrorist attacks were rarely properly investigated and if so, the prosecutions were inspired rather by vengeance than by the quest for truth and justice.[57] In effect, the manifold assassinations epitomize—albeit on a far smaller scale—the vicious cycle of revenge and retaliation which was the hallmark of the civil war. As is well known, Lebanon was plagued from 1975 until 1990 by internecine warfare between sectarian factions, vying for political power.[58] The conflict was triggered by the arrival of the Palestinian Liberation Organization (PLO), expelled from Jordan by King Hussein in 1975, whose presence and militarization aggravated the innate political tensions and sparked an arms race between the political factions. Interventions by foreign powers—Israel, which regularly invaded and occupied Lebanon to fight the PLO (1978, 1982), Hizbollah (2006), which employed Lebanese territory as an operative basis for their (missile) attacks, Syria, and (more indirectly) Iran and the United States—exacerbated the situation. Multinational forces composed of US marines, Italians, French, and British soldiers, were impotent to turn the tide of violence.[59]

Probably one of the most striking and dismal characteristics of the Lebanese civil war were the massacres of civilians which were often immediately reciprocated in kind.[60] On 18 January 1976, Phalange troops killed approximately 1000 people in **(p.282)** the Karantina massacre. Palestinian militias retaliated at once by attacking Damour. Armed members of the Progressive Socialist Party, led by the Druze Jumblatt family, were accused of causing several massacres of Christian civilians in the Mountain War in 1983. In turn, Christian Phalangist troops committed one of the worst massacres in the Palestinian refugee camps of Sabra and Shatila, a bloodshed which was at least condoned by Israeli troops. The well-known Kahan Commission, which was charged by the Israeli government with identifying the guilty, concluded that Defence Minister Ariel Sharon incurred personal responsibility for ignoring the danger of bloodshed and revenge and not taking appropriate measures to prevent bloodshed. The Kahan Commission was not a criminal court. Had Sharon stood trial before a criminal court applying the standards of the Commission, presumably he would have been found guilty on the basis of the doctrine of command responsibility. The Taif agreement of 1989 [61] negotiated a fragile peace, and in the ensuing years the militia were gradually disbanded, although incidental terrorist bombings, usually targeting political leaders, still occurred. Those assaults revealed the same 'eye for an eye, tooth for a tooth' mentality as the massacres during the civil war, although they generally caused, even in the case of 'collateral damage', far fewer victims. The assassination of a political leader often led to retaliation by a similar assault, effected by the deceased's vengeful followers.

The STL is well advised to take this historical background into account. As indicated in the previous paragraph, it is—logistically and legally—nearly impossible to open criminal investigations in respect of the atrocities committed during the civil war. Moreover, it would probably be politically counter-productive. That does not imply, however, that the STL should not pay attention to the historical context. At the very least, it could point out the remarkable analogy between the massacres and the terrorist assaults, both being exercises in vengefulness. Such portrayal of the broader context would serve a number of purposes. First of all, it would do at least some justice to the numerous nameless victims who never had the satisfaction of having their foes and tormentors exposed and held responsible in criminal trials. Next, it would at least partially assuage the understandable indignation of those standing trial—and the broader political factions they belong to—that they are being scapegoated for collective violence attributable to broader segments of Lebanese society and beyond. Such a broad-minded and courageous

stance would improve the image of the Tribunal amongst the Lebanese population and therefore impact positively on its legacy.

14.4 Some Reflections on History and Justice

The previous section has suggested that the legacy of the STL will improve in quality if the Tribunal takes its didactic function seriously. This aim can be achieved by putting the assassination of Rafiq Hariri and similar terrorist assaults **(p.283)** into a wider social and historical context. Now the presumed didactic functions of criminal courts are by no means uncontroversial. Well known are Hannah Arendt's warnings against courts indulging in all kinds of extra-legal—pedagogic or historic—activities:

> The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes—"the making of a record of the Hitler regime which would withstand the test of history", as Robert G Storey, executive trial counsel at Nuremberg, formulated the supposed higher aims of the Nuremberg Trial—can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.[62]

Arendt's most important concern was that the contamination of the judicial process by extra-legal factors would distort the assessment of the suspect's individual responsibility and would affect the fairness of the trial. On a slightly different, although related, level scholars have argued that the criminal trial is simply unsuitable for rendering larger historical narratives.[63] Any attempt to do so is bound to fail the rigid standards of adversarial procedure, strictly circumscribing the admissibility of hearsay evidence. One of the most disconcerting examples of the mismatch between history and 'law in practice' are the denial trials of Ernst Zundel, who stood trial before Canadian courts for having published and disseminated Harwood's pamphlet 'Did Six Million Really Die?'.[64] The prominent historians, Raul Hilberg and Christopher Browning, acting as expert witnesses, were grilled in cross-examination by defence counsel, who constantly inquired whether they had personally 'seen' the remnants of the gas chambers, suggesting that their second-hand historical construction had no greater claim to truth than the one propounded by his client. To a certain extent, such efforts to discredit historians (and history) as fabricators are quixotic because they ignore the fact that law and history do not share a common language and epistemology. But for the very same reason they are revealing as to the limits of criminal law and courts to engage in history writing. To put it bluntly: the Holocaust is too big for the courtroom.

Other scholars have come to question and challenge the conventional Arendt-thesis. In his brilliant and highly nuanced book on the topic, Lawrence Douglas asserts that, while the efforts to clarify history in the *Zundel* case were disastrous, 'the Eichmann trial painted a detailed portrait of the Holocaust', adding that 'the Eichmann trial and aspects of Nuremberg possessed greatness…that fully justified their historic undertaking'.[65] Robert Donia, who served the ICTY as an expert **(p.284)** witness, has contended that the ICTY 'have produced histories that are not only credible and readable, but indispensable to understand the origins and course of the 1990s conflicts in the former Yugoslavia'.[66] Richard Ashby Wilson has praised the ICTY for its detached and qualitatively superior historical accounts, adding that this 'approach to historical interpretation forces a reconsideration of the long-standing view that the pursuit of justice and the writing of history are inherently irreconcilable'.[67]

A further discussion of this highly intriguing topic would extend beyond the scope of this chapter. Merely two observations should be made, one more generally and one in respect of the specific position of the STL vis-à-vis the assassinations in their broader context. For one thing, Richard Ashby Wilson has argued that the very acknowledgment of system criminality as a singular topic for adjudication by international criminal courts forces those courts to engage in a broader historical discourse.[68] Indeed, if the gist of the criminal responsibility of the accused is his alleged involvement in genocide or crimes against humanity, it is inevitable for the court to assess the presence of that larger crime pattern, which involves organization and a plurality of crimes and perpetrators. In a similar vein, the Canadian courts felt obliged to present the historical truth of the Holocaust because the defiance of that truth was the essence of the charge against Zundel. Ashby Wilson's sober and correct comment does not make the task any easier, however. Courts are caught in a choice between two evils. Either they must account, for instance, genocide under the heading of 'judicial notice', which may deprive the accused of his possibility or right to challenge a crucial factor bearing upon his culpability, or they must engage in the laborious task of reconstructing a large-scale social phenomenon, a task they are notoriously ill equipped to perform.[69]

The second observation relates to the Tribunal and its assessment of the terrorist attacks against a broader historical backdrop. It should be pointed out that, different from systemic crimes and Holocaust denials, the portrayal of the wider historical context in Lebanon does not determine the (scope of) the criminal responsibility of those standing trial. It merely serves to draw the socio-political scenery for the purpose of a better understanding of the terrorist assaults. This difference has important consequences for the evidentiary standards governing the gathering of historical information. If the historical research is not conducted for the purpose of assessing a contextual element, defining the individual responsibility **(p.285)** of the accused, it need not be subject to the austere rules of evidence characteristic of adversarial criminal trials in particular.[70] It gives more space to open historical narratives presented by historians who increasingly find their way as expert witnesses to the courtrooms.[71] In view of the strict technical meaning of the concept of 'criminal evidence' it is probably not entirely correct to submit that they provide 'expert evidence'. Rather, these historians assist the court in its quest for a better understanding of the historical background of the international crimes it is called upon to adjudicate and they can therefore be better qualified as *amici curiae* (although they are usually not formally appointed as such). Historians can render oral testimony, which will enable the court (and the other participants in the proceedings) to put questions in order to further elucidate certain issues. However, if the research into the historical context does not serve to divulge contextual elements, impinging upon the individual responsibility of the accused, the court is allowed to derive its information from a broader array of sources, including written ones. All major judgments of the international criminal tribunals and the ICC nowadays start with a rather extensive survey of the historical background of the armed conflicts, propelling the commission of international crimes.[72] In view of the previously mentioned need to put system criminality in context, this is commendable. Being lay people in the discipline, judges cannot properly assess the veracity of historical discourses. But the 'battle of the experts', reminiscent of the 'clash of opinions' in adversarial criminal law systems, is a tested method of at least approaching historical truths.

The incorporation of historical accounts in final judgments of international criminal tribunals implies a juxtaposition of historical and legal truths, which can often not be easily reconciled. After all, criminal trials by their very nature aim at closure and to fix events and corresponding responsibilities, while history scholarship allows for more fluid, plastic, and provisional narratives.[73] In the specific context of Lebanon and the STL, that need not be a serious problem as long as the Tribunal makes perfectly clear that its final verdict concerns the facts as charged in the indictment and the criminal responsibility of the accused. It does not wield similar truth-claiming authority over the broader historical context, which is subject to changing perceptions and interpretations.[74]

(p.286) 14.5 Conclusion

The previous sections have endeavoured to assess the potential legacy of the STL through the lens of its most conspicuous features: the

commitment to the application of domestic Lebanese criminal law and the restricted mandate to prosecute and try the suspects of the assassination of Rafiq Hariri and connected terrorist offences. On the one hand, it has been concluded that the expansive interpretation of terrorism by the Appeals Chamber may find a lukewarm, if not hostile, reception in the Lebanese legal community. On the other hand, it is necessary for the Tribunal to put the terrorist attacks in the broader historical context of endemic violence and armed conflict, in order to do justice to the many nameless victims whose suffering is not (directly) addressed in the indictments.

One cannot fail to notice a certain tension between those aims. After all, it appears that the rather broad interpretation of the concept of terrorist acts has at least partially been inspired by the well-meant concern to shield the Lebanese population against the resurgence of violence. Some formulations in the decision of the Appeals Chamber contain barely veiled references to the vicious cycle of retaliation when, for instance, the Appeals Chamber observes that a 'public danger'—a requisite element of a terrorist offence—'may consist in other leaders belonging to that same faction or group being assassinated or in causing a violent reaction by other factions'.[75] An even more overt reference to the potentially escalating effects of terrorist offences, resulting in widespread violence—and an obvious allusion to Lebanon's violent past!—surfaces in the observation that 'a terrorist act may create a public danger by spreading terror, for instance by killing a political leader and thereby alarming a portion of the population that will foreseeably response with violent protests, riots, or retaliations against opposing factions—all of which, especially in the context of political instability, may create a public danger.[76]

Such paradoxes in a legacy are probably inevitable. They stem from the fact that the STL is basically expected to accomplish a 'mission impossible'. It must mete out even-handed justice and, if possible, contribute to the reconciliation of arch-enemies—which presupposes an impartial and detached stance—while it is simultaneously asked to respect and take into account the Lebanese legal and political idiosyncrasies. It makes us aware that the legacy of the STL is under the tutelage of the political negotiations which preceded its establishment.

On a more general note, one may observe that the STL faces huge challenges in its efforts to reach the Lebanese people. Over the past two years, assassinations have recurred: witness the killing of Wissam Alhassan, the head of the Information Branch of the Internal Security forces on 23 October 2012, and the attempts on the **(p.287)** life of MP Boutros Harb. In all these cases, Hizbollah, in tandem with Syria, are under heavy suspicion. Such events put the deterrent capacity of the STL into question. Terrorist attacks in Lebanon have also increased after the Syrian crisis. While it would probably be an overstretching of the mandate of the STL to suggest that the perpetrators could stand trial before the Tribunal, it demonstrates that the Lebanese criminal law system has not benefited from the existence of the STL. The protracted proceedings are another reason why the STL is losing momentum. After eight years of preliminary investigations, which costs the Lebanese treasury $50 million a year, the trial will probably start in February 2014 without any suspects in the dock and concentrating on only one assassination.[77]

In spite of all these drawbacks, the picture is not entirely bleak. The administration of (international) criminal justice is a very slow and complicated affair. International criminal tribunals have been overburdened by expectations over the past two decades. If they succeed in exposing some truths in fair and even-handed proceedings, they contribute to the reinforcement of the international rule of law. And that is at least a goal they can realistically be expected to accomplish.

Notes:

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([1]) cf Marieke Wierda, Habib Nassar, and Lynn Maalouf, 'Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon' (2007) 5 JICJ 1065, 1078. The authors similarly hold that 'the potential for legacy of the STL may be found in three specific areas: (1) legal developments; (2) bolstering Lebanese investigative and judicial capacities; and (3) the so-called 'demonstration effect' of the STL, in terms of being able to raise awareness on issues of accountability and rule of law.'

([2]) See Attachment to SC Res 1757, UN Doc S/RES/1757 (2007) [Statute of the Special Tribunal for Lebanon] art 2:

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

> ((a)) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and
> ((b)) Article 6 and 7 of the Lebanese law of 11 January 1957 on 'Increasing the penalties for sedition, civil war and interfaith struggle.

([3]) Not entirely unique, however, as the internationalized courts of Kosovo have to apply only the criminal law of Kosovo as well, see Bert Swart, 'Internationalized Courts and Substantive Criminal Law' in Cesare PR Romano, André Nollkaemper, and Jann K Kleffner, *Internationalized Criminal Courts* (Oxford: Oxford University Press 2004) 295.

([4]) STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No STL-11-01/I, Appeals Chamber, 16 February 2011. For a predominantly critical comment see Matthew Gillett and Matthias Schuster, 'Fast-Track Justice: The Special Tribunal for Lebanon Defines Terrorism' (2011) 9 JICJ 989.

([5]) STL Statute (n2) art 1:

The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks. The nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.

([6]) Wierda et al, 'Early Reflections on Local Perceptions' (n1) 1067–9. See also Nidal Nabil Jurdi, 'Falling Between the Cracks: The Special Tribunal for Lebanon's Jurisdictional Gaps as Obstacles to Achieving Justice and Public Legitimacy' (2011) 17(2) UC Davis J Int'l L & Pol'y 254. For an excellent eyewitness account of Lebanon's civil strife see Robert Fisk, *Pity the Nation: Lebanon at War* (3rd edn, Oxford: Oxford University Press 2001).

([7]) Criminal Code (Lebanon), Legislative Decree No 340 of 1 March 1943.

([8]) Interlocutory Decision on Applicable Law (n4) para 49.

([9]) Interlocutory Decision on Applicable Law (n4) paras 50–54. For an excellent analysis of the Appeals Chamber's findings, see Manuel J Ventura, 'Terrorism According to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?' (2011) 9 JICJ 1021, 1024–5.

([10]) Interlocutory Decision on Applicable Law (n4) para 129.

([11]) In a similar vein, see Ventura, 'Terrorism According to the STL's Interlocutory Decision on the Applicable Law' (n9) 1039: 'What right does the STL have to meddle with domestic Lebanese law?'.

([12]) Interlocutory Decision on Applicable Law (n4) para 16 (footnotes omitted).

([13]) Interlocutory Decision on Applicable Law (n4) para 41.

([14]) Interlocutory Decision on Applicable Law (n4) para 114.

([15]) Interlocutory Decision on Applicable Law (n4) para 124.

([16]) Interlocutory Decision on Applicable Law (n4) para 52.

([17]) Interlocutory Decision on Applicable Law (n4) para 54.

([18]) Interlocutory Decision on Applicable Law (n4) para 126.

([19]) Interlocutory Decision on Applicable Law (n4) para 127.

([20]) Interlocutory Decision on Applicable Law (n4) para 129

([21]) Interlocutory Decision on Applicable Law (n4) para 130.

([22]) (New York, 16 December 1966, 999 UNTS 171, League of Arab States).

([23]) Interlocutory Decision on Applicable Law (n4) para 134.

([24]) Interlocutory Decision on Applicable Law (n4) para 137.

([25]) Interlocutory Decision on Applicable Law (n4) para 138.

([26]) (Cairo, 22 April 1998).

([27]) Interlocutory Decision on Applicable Law (n4) paras 139–141.

([28]) Interlocutory Decision on Applicable Law (n4) para 142.

([29]) Apart from the contributions of Gillett and Schuster, and Ventura, mentioned in notes 4 and 9 respectively, see especially Kai Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?' (2011) 24 LJIL 655 and Ben Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 24 LJIL 677.

([30]) Interlocutory Decision on Applicable Law (n4) para 144.

([31]) See (n19) and accompanying text.

([32]) For a thorough inquiry into the politics of selecting suspects by the Office of the Prosecutor (OTP) at the ICTY, see Frederiek de Vlaming, *De aanklager: Het Joegoslavië-tribunaal en de selectie van verdachten* ('The Prosecutor: The International Criminal Tribunal for the former Yugoslavia and the Selection of Suspects') (Amsterdam: Boom Juridische Uitgevers 2010).

([33]) de Vlaming, *De aanklager* (n32) 174. It should be emphasized, however, that Del Ponte's efforts to get the Albanians convicted were of no avail as all the high commanders of the Kosovo Liberation Army were acquitted. Cf ICTY, Judgment, *Prosecutor v Haradinaj* et al, Case No IT-04-84-A/IT-04-84bis, Appeals Chamber, 29 December 2012 (acquittal after retrial) and ICTY, Judgment, *Prosecutor v Limaj* et al, Case No IT-03-66, Appeals Chamber, 27 September 2007 (acquittal).

([34]) In the OTP's Annual Report (2003), the aim is circumscribed as follows: 'A lasting and stable peace in the Balkans will not be achieved until the Tribunal brings to justice the high-level leaders who were responsible for the commission of crimes.' See de Vlaming *De aanklager* (n32) 153.

([35]) See eg Luc Reydams, 'The ICTR Ten Years On: Back to the Nuremberg Paradigm?' (2005) 3 JICJ 977. Prosecutor Jallow has attempted to outline and defend his position in Hassan B Jallow, 'Prosecutorial Discretion and International Criminal Justice' (2005) 3 JICJ 145.

([36]) William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press 2012) 79. It is worth noting, however, that Carla del Ponte was fired after she announced that she had ample evidence of involvement by President Kagame and the RPF in war crimes and she refused to drop the charges. See Florence Hartmann, *Paix et châtiment. Les guerres secrètes de la politique et de la justice internationale* (Paris: Flammarion 2007) 261–72.

([37]) Rome Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90) art 17(1)(d) provides that the 'gravity' threshold is relevant to the determination of the question of whether a case is admissible.

([38]) ICC, OTP Response to Communications Received Concerning Iraq, Office of the Prosecutor, 9 February 2006, 8.

([39]) ICC, Statement by the Chief Prosecutor on the Uganda Arrest Warrants, Prosecutor, 14 October 2005, 2.

([40]) Schabas, *Unimaginable Atrocities* (n36) 85; William Schabas, 'Prosecutorial Discretion and Gravity' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden/Boston: Brill 2009) 229.

([41]) In the same vein, see Kevin Jon Heller, 'Situational Gravity Under the Rome Statute' in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (The Hague: TMC Asser Press 2009) 229.

([42]) Schabas *Unimaginable Atrocities* (n36) 78.

([43]) Annex to Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002, 2178 UNTS 138) art 1(1): 'The Special Court shall, except as provided in subparagraph (2), have the power to prosecute who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of an implementation of the peace process in Sierra Leone.'

([44]) On this ill-fated trial see André Klip and Mark Mackarel, 'The Lockerbie Trial: A Scottish Court in the Netherlands' (1999) 70 RIDP 777. One should be careful not to take this analogy too far as the Lockerbie trial was conducted by a purely domestic court sitting in another country, rather than a mixed one.

([45]) General Amnesty Law No 84/91 (Lebanon) (26 August 1991) art 3(3). This information is derived from Wierda et al, 'Early Reflections on Local Perceptions (n1).

([46]) Wierda et al, 'Early Reflections on Local Perceptions (n1) 1071.

([47]) See *Simón and Others v Office of the Public Prosecutor*, CSJN, sala II, ILDC 579 (AR 2005), 14 June 2005; Inter-American Court of Human Rights, Sentence, *Barrios Altos v Peru*, 14 March 2001; SCSL, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, *Prosecutor v Kallon and Kamara*, Case Nos SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Appeals Chamber, 13 March 2004, para 88: 'Whatever effect the amnesty granted in the Lomé Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 in the national courts of Sierra Leone, it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction.'

([48]) See eg Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court (2003) 14 EJIL 481. For an interesting philosophical contribution on the Lebanese amnesty, see Jonathan Hall, 'Displacing Evil: The 1991 Lebanese Amnesty, the City and the Possibility of Justice' <http://www.inter-disciplinary.net/wp-content/uploads/2009/02/hall-paper.pdf> accessed 12 October 2013.

([49]) Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, UN Doc S/2006/893 (2006) para 18.

([50]) cf (n5).

([51]) International Crisis Group, 'Trial By Fire: The Politics of the Special Tribunal for Lebanon' (Middle East Report No 100, 2010) <http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Iraq%20Syria%20Lebanon/Lebanon/100%20Trial%20by%20Fire%20--%20The%20Politics%20of%20the%20Special%20Tribunal%20for%20Lebanon.ashx> accessed 12 October 2013.

([52]) Annex to Letter Dated 20 October 2005 from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2005/662 (2005) [Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005)] para 23.

([53]) Annex to Letter Dated 20 October 2005 from the Secretary-General to the President of the Security Council (n52) para 216: 'Given the infiltration of Lebanese institutions and society by the Syrian and Lebanese intelligence services working in tandem, it would be difficult to envisage a scenario whereby such a complex assassination plot could have been carried out without their knowledge.'

([54]) ICG Middle East Report (n51) 11. Saad Hariri, Rafiq's son and current Prime Minister, himself has asserted that earlier charges against Syria had been 'errors' and 'political accusations'. On the other hand, one may wonder whether Syria is really beyond suspicion, in view of the lasting close relations between Hizbollah and that country.

([55]) The indictment and accompanying arrest warrants were transmitted to the Lebanese authorities on 30 June 2011. Mustafa Badredinne is the most senior amongst the indicted and he is alleged to be the head of operations in the organization. The last indictment was issued against Hassan Habib Merhi on 5 June 2013 and this indictment was confirmed by the pre-trial judge on 31 July 2013.

([56]) The Trial Chamber has indeed decided that the trial will be held *in absentia*, see STL, Decision to Hold Trial *in Absentia*, *Prosecutor v Ayyash* et al, Case No STL-11-01/I/TC, Trial Chamber, 1 February 2012.

([57]) Jurdi, 'Falling Between the Cracks' (n6) 258–9.

([58]) Throughout her seminal book, Elizabeth Picard qualifies political communitarianism and clientism and the concomitant weakness of the state as one of the salient features and major problems of Lebanese society. See Elizabeth Picard, *Lebanon: A Shattered Country* (New York: Holmes & Meier 1996) 49–61, 147–56.

([59]) The complete and tragic fiasco of the multinational force which entered Lebanon in 1982 to oversee the peaceful evacuation of the Fedayeen is briefly documented by Picard *Lebanon: A Shattered Country* (n58) 126 and much more elaborately by Fisk, *Pity the Nation* (n6).

([60]) Picard *Lebanon: A Shattered Country* (n58) 121 mentions 'the chain reaction of confrontations between and within communities in the wake

of the Israeli army'.

([61]) (Ta'if, 22 October 1989).

([62]) Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking 1963) 233.

([63]) cf Ian Buruma, *The Wages of Guilt; Memories of War in Germany and Japan* (London: Atlantic Books 2009) 152–3: 'A trial can only be concerned with individual crimes…. The terrible acts of individuals are lifted from their historical context. History is reduced to criminal pathology and legal argument.'

([64]) The trials are marvellously recounted and analysed by Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press 2001) 212–57.

([65]) Douglas, *The Memory of Judgment* (n64) 260–1.

([66]) Robert Donia, 'Encountering the Past: History at the Yugoslav War Crimes Tribunal' (2004) 11 J Int'l Institute 2.

([67]) Richard Ashby Wilson, 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia' (2005) 27 Hum Rts Q 908, 922.

([68]) Referring to Dworkin's 'narrative theories of law', Ashby Wilson comments that 'there is significant evidence to support this theory, since even a cursory examination of judgments reveals that courts, *especially when dealing with human rights violations committed on a massive scale*, cannot escape interpreting history'. See Ashby Wilson, 'Judging History' (n67) 918 (emphasis added).

([69]) On the topic of genocide and judicial notice, see the interesting contribution of Göran Sluiter and Koen Vriend, 'Defining the "Undefendable"? Taking Judicial Notice of Genocide' in Harmen van der Wilt, Jeroen Verviliet, Goran Sluiter, and Johannes Houwink ten Cate (eds), *The Genocide Convention: the Legacy of 60 Years* (Leiden/ Boston: Martinus Nijhoff 2012) 81–93.

([70]) The author is grateful to Mr Coen Vriend of the University of Amsterdam, who is preparing a PhD on this topic and who drew his attention to this point.

([71]) cf Ashby Wilson 'Judging History' (n67) 927–8.

([72]) cf ICTY, Opinion and Judgment, *Prosecutor v Tadić*, Case No IT-94-1-T, Trial Chamber, 7 May 1997, paras 55–126; ICTR, Judgment, *Prosecutor v Akayesu*, Case No ICTR-96-4-T, Trial Chamber, 2 September 1998, paras 78–129; SCSL, Judgment, *Prosecutor v Taylor*, Case No SCSL-03-01-T, Trial Chamber, 18 May 2012, paras 18–70; ICC, Judgment, *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Trial Chamber, 14 March 2012, paras 67–91.

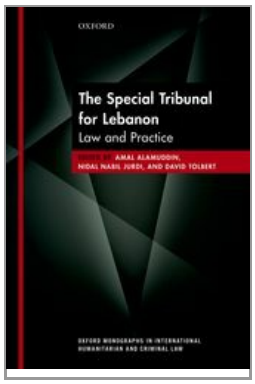
([73]) Eric Ketelaar, 'Truths, Memories and Histories in the Archives of the International Criminal Tribunal for the Former Yugoslavia' in van der Wilt, *The Genocide Convention* (n69) 215.

([74]) Ketelaar, 'Truths, Memories and Histories in the Archives of the ICTY' (n73), quoting Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick, NJ: Transaction Publishers 1999) 217: 'On the other hand, there "is no such expectation of relative fixity in the realm of historical understanding, or of the collective memory to which such understanding contributes". Subsequent events, new interpretations, new sources—they will inevitably change the view, and open the case. The court's verdict is final, but its reading of the historical event is not. Courts records have, therefore, not more value than any other records.'

([75]) Interlocutory Decision on Applicable Law (n4) para 127.

([76]) Interlocutory Decision on Applicable Law (n4) para 128.

([77]) The author is indebted to Mr Nidal Jurdi for drawing his attention to these latest developments.



The Special Tribunal for Lebanon: Law and Practice
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1. Memorandum from the Future Parliamentary Bloc to the Representatives of the International Community

The Lebanese people with all their communities and sects, await the report which will be presented to the United Nations Security Council by the International Investigation Commission into the assassination of martyr Prime Minister Rafiq Hariri and MP Basil Fuleihan and their companions. This terrorist crime is still at the center of attention and condemnation by the Lebanese, Arab and international public opinion 240 days after it was committed.

On behalf of the Future Parliamentary Bloc and its president MP Saad Hariri we issue this memorandum to pay a tribute to the efforts of the international community for its efforts in fighting terrorism and strengthening stability in this region of the world. This step by the Future bloc is in line with our commitment to finding the whole truth about those who planned, incited, and executed this terrorist crime. Our effort to find the truth is an expression of the will of the Lebanese people who went out to the streets of our cities especially the streets of our capital Beirut on March 14 as they never did before in their history.

The assassination of Prime Minister Hariri is the most dangerous link in a chain of a terrorist plot that has been hitting Lebanon since the assassination attempt against MP

Marwan Hamadeh, the assassination of journalist and thinker martyr Samir Kassir, political activist martyr George Hawi, the assassination attempt against deputy prime minister, minister of defense Elias El- Murr, and the assassination attempt against prominent journalist May Chidiac. This is in addition to the terrorist bombings which claimed the lives of innocent people and caused huge physical and financial damage in several Lebanese areas.

The Future Parliamentary Bloc which was headed by Martyr Rafiq Hariri and to which Martyr MP Bassil Fuleihan belonged, and which represent a third of the members of the Lebanese parliament of all confessions, calls upon all the Arab countries as well as on all the friends of Lebanon at these critical days in our history to show their support for Lebanon through standing by Lebanon and protecting it by supporting the following:

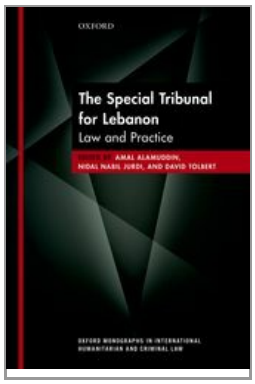
Support the Lebanese government's request to the United Nations Secretary General to extend the mandate of the International Investigation Commission in accordance with UN Security Council resolution 1595, to uncover the whole truth about the assassination of Martyr Prime Minister Rafiq Hariri and his companions. We have full confidence in the work of the International Investigation Commission and we accept its results whatever they may be.

We ask for your support in putting an end to the terrorist campaign against Lebanon. This campaign is threatening the Lebanese people, their lives and livelihood as well as their future. We call upon the international community to use all its resources and support to prevent dragging this small country which suffered the consequences of several wars on its land, into new rounds of violence. The attempts to submerge Lebanon again in violence are made by those who are hurt by Lebanon's renewed sovereignty and stability and by the Lebanese people regaining their pioneering role in establishing true democracy in the region.

(p.290) Responding to Lebanon's insistence on international trial for those implicated in the assassination of Prime Minister Hariri. This trial will be the catalyst for ending the chain of terrorist crimes that befell Lebanon and its people as well as many countries in the region.

The Future Bloc is confident that you will respond positively to the aspirations of the Lebanese people in seeing that justice is served.

We believe that finding the truth and trying and punishing the perpetrators in the crime of the assassination of Prime Minister Rafiq Hariri and his companions is an important pillar in establishing democracy and respecting human rights and renouncing violence and terrorism in all its forms. It is also a clear message to the international community in rejecting the barbaric practices in the region and the world.



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(p.291) 2. Documents Pertaining to the Establishment of the STL

A. Security Council Resolution 1757 (2007)

United Nations Security Council

30 May 2007

Resolution 1757 (2007)

Adopted by the Security Council at its 5685th meeting,

on 30 May 2007

The Security Council,

Recalling all its previous relevant resolutions, in particular resolutions 1595 (2005) of 7 April 2005, 1636 (2005) of 31 October 2005, 1644 (2005) of 15 December 2005, 1664 (2006) of 29 March 2006 and 1748 (2007) of 27 March 2007, *Reaffirming* its strongest condemnation of the 14 February 2005 terrorist bombings as well as other attacks in Lebanon since October 2004, *Reiterating* its call for the strict respect of the sovereignty, territorial integrity, unity and political independence of Lebanon under the sole and exclusive authority of the Government of Lebanon,

Recalling the letter of the Prime Minister of Lebanon to the Secretary-General of 13 December 2005 (S/2005/783) requesting inter alia the establishment of a tribunal of an international character to try all those who are found responsible for this terrorist crime, and the request by this Council for the Secretary-General to negotiate an agreement with the Government of Lebanon aimed at establishing such a Tribunal based on the highest international standards of criminal justice,

Recalling further the report of the Secretary-General on the establishment of a special tribunal for Lebanon on 15 November 2006 (S/2006/893) reporting on the conclusion of negotiations and consultations that took place between January 2006 and September 2006 at United Nations Headquarters in New York, the Hague, and Beirut between the Legal Counsel of the United Nations and authorized representatives of the Government of Lebanon, and the letter of its President to the Secretary-General of 21 November 2006 (S/2006/911) reporting that the Members of the Security Council welcomed the conclusion of the negotiations and that they were satisfied with the Agreement annexed to the Report,

Recalling that, as set out in its letter of 21 November 2006, should voluntary contributions be insufficient for the Tribunal to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Tribunal,

Recalling also that the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon was signed by the Government of Lebanon and the United Nations respectively on 23 January and 6 February 2007,

(p.292) *Referring* to the letter of the Prime Minister of Lebanon to the Secretary-General of the United Nations (S/2007/281), which recalled that the parliamentary majority has expressed its support for the Tribunal, and asked that his request that the Special Tribunal be put into effect be presented to the Council as a matter of urgency,

Mindful of the demand of the Lebanese people that all those responsible for the terrorist bombing that killed former Lebanese Prime Minister Rafiq Hariri and others be identified and brought to justice,

Commending the Secretary-General for his continuing efforts to proceed, together with the Government of Lebanon, with the final steps for the conclusion of the Agreement as requested in the letter of its President dated 21 November 2006 and referring in this regard to the briefing by the Legal Counsel on 2 May 2007, in which he noted that the establishment of the Tribunal through the Constitutional process is facing serious obstacles, but noting also that all parties concerned reaffirmed their agreement in principle to the establishment of the Tribunal,

Commending also the recent efforts of parties in the region to overcome these obstacles,

Willing to continue to assist Lebanon in the search for the truth and in holding all those

involved in the terrorist attack accountable and reaffirming its determination to support Lebanon in its efforts to bring to justice perpetrators, organizers and sponsors of this and other assassinations,

Reaffirming its determination that this terrorist act and its implications constitute a threat to international peace and security,

1. *Decides*, acting under Chapter VII of the Charter of the United Nations, that:
   (a) The provisions of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19 (1) of the annexed document before that date;
   (b) If the Secretary-General reports that the Headquarters Agreement has not been concluded as envisioned under Article 8 of the annexed document, the location of the seat of the Tribunal shall be determined in consultation with the Government of Lebanon and be subject to the conclusion of a Headquarters Agreement between the United Nations and the State that hosts the Tribunal;
   (c) If the Secretary-General reports that contributions from the Government of Lebanon are not sufficient to bear the expenses described in Article 5 (b) of the annexed document, he may accept or use voluntary contributions from States to cover any shortfall;

2. *Notes* that, pursuant to Article 19 (2) of the annexed document, the Special Tribunal shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government of Lebanon, taking into account the progress of the work of the International Independent Investigation Commission;
3. *Requests* the Secretary-General, in coordination, when appropriate, with the Government of Lebanon, to undertake the steps and measures necessary to establish the Special Tribunal in a timely manner and to report to the Council within 90 days and thereafter periodically on the implementation of this resolution;
4. *Decides* to remain actively seized of the matter.

(p.293) B. Annex to Security Council Resolution 1757 (2007) [Agreement between the UN and the Lebanese Republic]

Agreement between the United Nations and the Lebanese

Republic on the establishment of a Special Tribunal for Lebanon

Whereas the Security Council, in its resolution 1664 (2006) of 29 March 2006, which responded to the request of the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others, recalled all its

previous resolutions, in particular resolutions 1595 (2005) of 7 April 2005, 1636 (2005) of 31 October 2005 and 1644 (2005) of 15 December 2005,

Whereas the Security Council has requested the Secretary-General of the United Nations (hereinafter 'the Secretary-General') 'to negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice', taking into account the recommendations of the Secretary-General's report of 21 March 2006 (S/2006/176) and the views that have been expressed by Council members,

Whereas the Secretary-General and the Government of the Lebanese Republic (hereinafter 'the Government') have conducted negotiations for the establishment of a Special Tribunal for Lebanon (hereinafter 'the Special Tribunal' or 'the Tribunal'),

Now therefore the United Nations and the Lebanese Republic (hereinafter referred to jointly as the 'Parties') have agreed as follows:

C. Attachment to Security Council Resolution 1757 (2007) [Statute of the STL]

Article 1 Establishment of the Special Tribunal

1. There is hereby established a Special Tribunal for Lebanon to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.
2. The Special Tribunal shall function in accordance with the Statute of the Special Tribunal for Lebanon. The Statute is attached to this Agreement and forms an integral part thereof.

Article 2 Composition of the Special Tribunal and appointment of judges

1. The Special Tribunal shall consist of the following organs: the Chambers, the Prosecutor, the Registry and the Defence Office.
(p.294) 2. The Chambers shall be composed of a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber, with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Tribunal, the Secretary-General or the President of the Special Tribunal so requests.

3. The Chambers shall be composed of no fewer than eleven independent judges and no more than fourteen such judges, who shall serve as follows:

(a) A single international judge shall serve as a Pre-Trial Judge;

(b) Three judges shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;

(c) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (b) above;

(d) Five judges shall serve in the Appeals Chamber, of whom two shall be Lebanese judges and three shall be international judges; and

(e) Two alternate judges, of whom one shall be a Lebanese judge and one shall be an international judge.

4. The judges of the Tribunal shall be persons of high moral character, impartiality and integrity, with extensive judicial experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

5. (a) Lebanese judges shall be appointed by the Secretary-General to serve in the Trial Chamber or the Appeals Chamber or as an alternate judge from a list of twelve persons presented by the Government upon the proposal of the Lebanese Supreme Council of the Judiciary;

(b) International judges shall be appointed by the Secretary-General to serve as Pre-Trial Judge, a Trial Chamber Judge, an Appeals Chamber Judge or an alternate judge, upon nominations forwarded by States at the invitation of the Secretary-General, as well as by competent persons;

(c) The Government and the Secretary-General shall consult on the appointment of judges;

(d) The Secretary-General shall appoint judges, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General.

6. At the request of the presiding judge of a Trial Chamber, the President of the Special Tribunal may, in the interest of justice, assign alternate judges to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

7. Judges shall be appointed for a three-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

8. Lebanese judges appointed to serve in the Special Tribunal shall be given full credit for their period of service with the Tribunal on their return to the Lebanese national judiciaries from which they were released and shall be reintegrated at a level at least comparable to that of their former position.

(p.295) Article 3 Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government, shall appoint a Prosecutor for a three-year term. The Prosecutor may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.
2. The Secretary-General shall appoint the Prosecutor, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General.
3. The Government, in consultation with the Secretary-General and the Prosecutor, shall appoint a Lebanese Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.
4. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.
5. The Prosecutor shall be assisted by such Lebanese and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4 Appointment of a Registrar

1. The Secretary-General shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Tribunal.
2. The Registrar shall be a staff member of the United Nations. He or she shall serve a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

Article 5 Financing of the Special Tribunal

1. The expenses of the Special Tribunal shall be borne in the following manner:
   (a) Fifty-one per cent of the expenses of the Tribunal shall be borne by voluntary contributions from States;
   (b) Forty-nine per cent of the expenses of the Tribunal shall be borne by the Government of Lebanon.

2. It is understood that the Secretary-General will commence the process of establishing the Tribunal when he has sufficient contributions in hand to finance the establishment of the Tribunal and twelve months of its operations plus pledges

equal to the anticipated expenses of the following 24 months of the Tribunal's operation. Should voluntary contributions be insufficient for the Tribunal to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Tribunal.

(p.296) Article 6 Management Committee

The parties shall consult concerning the establishment of a Management Committee.

Article 7 Juridical capacity

The Special Tribunal shall possess the juridical capacity necessary:

(a) To contract;
(b) To acquire and dispose of movable and immovable property;
(c) To institute legal proceedings;
(d) To enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Tribunal.

Article 8 Seat of the Special Tribunal

1. The Special Tribunal shall have its seat outside Lebanon. The location of the seat shall be determined having due regard to considerations of justice and fairness as well as security and administrative efficiency, including the rights of victims and access to witnesses, and subject to the conclusion of a headquarters agreement between the United Nations, the Government and the State that hosts the Tribunal.
2. The Special Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions.
3. An Office of the Special Tribunal for the conduct of investigations shall be established in Lebanon subject to the conclusion of appropriate arrangements with the Government.

Article 9 Inviolability of premises, archives and all other documents

1. The Office of the Special Tribunal in Lebanon shall be inviolable. The competent authorities shall take appropriate action that may be necessary to ensure that the Tribunal shall not be dispossessed of all or any part of the premises of the Tribunal without its express consent.
2. The property, funds and assets of the Office of the Special Tribunal in Lebanon, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.
3. The archives of the Office of the Special Tribunal in Lebanon, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 10 Funds, assets and other property

The Office of the Special Tribunal, its funds, assets and other property in Lebanon, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Tribunal has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

(p.297) Article 11 Privileges and immunities of the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office

1. The judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office, while in Lebanon, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the Vienna Convention on Diplomatic Relations of 1961.
2. Privileges and immunities are accorded to the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office in the interest of the Special Tribunal and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity in any case where it can be waived without prejudice to the purposes for which it is accorded shall lie with the Secretary-General, in consultation with the President of the Tribunal.

Article 12 Privileges and immunities of international and Lebanese personnel

1. Lebanese and international personnel of the Office of the Special Tribunal, while in Lebanon, shall be accorded:
   (a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Office of the Special Tribunal;
   (b) Exemption from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:
   (a) Immunity from immigration restriction;
   (b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Lebanon.

3. The privileges and immunities are granted to the officials of the Office of the Special Tribunal in the interest of the Tribunal and not for their personal benefit. The right and the duty to waive the immunity in any case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Tribunal.

Article 13 Defence counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Tribunal shall not be subjected, while in

Lebanon, to any measure that may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused;

(d) Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Tribunal and back.

(p.298) Article 14 Security, safety and protection of persons referred to in this Agreement

The Government shall take effective and adequate measures to ensure the appropriate security, safety and protection of personnel of the Office of the Special Tribunal and other persons referred to in this Agreement, while in Lebanon. It shall take all appropriate steps, within its capabilities, to protect the equipment and premises of the Office of the Special Tribunal from attack or any action that prevents the Tribunal from discharging its mandate.

Article 15 Cooperation with the Special Tribunal

1. The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall facilitate access of the Prosecutor and defence counsel to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Tribunal.

Article 16 Amnesty

The Government undertakes not to grant amnesty to any person for any crime falling within the jurisdiction of the Special Tribunal. An amnesty already granted in respect of any such persons and crimes shall not be a bar to prosecution.

Article 17 Practical arrangements

With a view to achieving efficiency and cost-effectiveness in the operation of the Special Tribunal:

(a) Appropriate arrangements shall be made to ensure that there is a coordinated transition from the activities of the International Independent Investigation Commission, established by the Security Council in its resolution 1595 (2005), to the activities of the Office of the Prosecutor;
(b) Judges of the Trial Chamber and the Appeals Chamber shall take office on a date to be determined by the Secretary-General in consultation with the President of the Special Tribunal. Pending such a determination, judges of both Chambers shall be convened on an ad hoc basis to deal with organizational matters and serving, when required, to perform their duties.

(p.299) Article 18 Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation or by any other mutually agreed upon mode of settlement.

Article 19 Entry into force and commencement of the functioning of the Special Tribunal

1. This Agreement shall enter into force on the day after the Government has notified the United Nations in writing that the legal requirements for entry into force have been complied with.
2. The Special Tribunal shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government, taking into account the progress of the work of the International Independent Investigation Commission.

Article 20 Amendment

This Agreement may be amended by written agreement between the Parties.

Article 21 Duration of the Agreement

1. This Agreement shall remain in force for a period of three years from the date of the commencement of the functioning of the Special Tribunal.
2. Three years after the commencement of the functioning of the Special Tribunal the Parties shall, in consultation with the Security Council, review the progress of the work of the Special Tribunal. If at the end of this period of three years the activities of the Tribunal have not been completed, the Agreement shall be extended to allow the Tribunal to complete its work, for a further period(s) to be determined by the Secretary-General in consultation with the Government and the Security Council.
3. The provisions relating to the inviolability of the funds, assets, archives and documents of the Office of the Special Tribunal in Lebanon, the privileges and immunities of those referred to in this Agreement, as well as provisions relating to defence counsel and the protection of victims and witnesses, shall survive termination of this Agreement.

In witness whereof, the following duly authorized representatives of the United Nations and of the Lebanese Republic have signed this Agreement.

Done at _____ on _____ 2006, in three originals in the Arabic, French and English languages, all texts being equally authentic.
For the United Nations: For the Lebanese Republic:

_____ _____

Statute of the Special Tribunal for Lebanon

Having been established by an Agreement between the United Nations and the Lebanese Republic (hereinafter 'the Agreement') pursuant to Security Council resolution 1664 (2006) of 29 March 2006, which responded to the request of the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible **(p.300)** for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others, the Special Tribunal for Lebanon (hereinafter 'the Special Tribunal') shall function in accordance with the provisions of this Statute.

Section I Jurisdiction and applicable law

Article 1 Jurisdiction of the Special Tribunal

The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.

Article 2 Applicable criminal law

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

(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and
(b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith struggle'.

Article 3 Individual criminal responsibility

1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:
(a) Committed, participated as accomplice, organized or directed others

to commit the crime set forth in article 2 of this Statute; or
(b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.

2. With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
(p.301)
(a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;
(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

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

Article 4 Concurrent jurisdiction

1. The Special Tribunal and the national courts of Lebanon shall have concurrent jurisdiction. Within its jurisdiction, the Tribunal shall have primacy over the national courts of Lebanon.
2. Upon the assumption of office of the Prosecutor, as determined by the Secretary-General, and no later than two months thereafter, the Special Tribunal shall request the national judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer to its competence. The Lebanese judicial authority shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal.
3.
(a) At the request of the Special Tribunal, the national judicial authority seized with any of the other crimes committed between 1 October 2004 and 12 December 2005, or a later date decided pursuant to article 1, shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, for review by the Prosecutor;

(b) At the further request of the Tribunal, the national authority in question shall defer to the competence of the Tribunal. It shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, and persons detained in connection with any such case shall be transferred to the custody of the Tribunal;
(c) The national judicial authorities shall regularly inform the Tribunal of the progress of their investigation. At any stage of the proceedings, the Tribunal may formally request a national judicial authority to defer to its competence.

Article 5 Non bis in idem

1. No person shall be tried before a national court of Lebanon for acts for which he or she has already been tried by the Special Tribunal.
2. A person who has been tried by a national court may be subsequently tried by the Special Tribunal if the national court proceedings were not impartial or independent, were designed to shield the accused from criminal responsibility for crimes within the jurisdiction of the Tribunal or the case was not diligently prosecuted.
(p.302) 3. In considering the penalty to be imposed on a person convicted of a crime under this Statute, the Special Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 6 Amnesty

An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution.

Section II Organization of the Special Tribunal

Article 7 Organs of the Special Tribunal

The Special Tribunal shall consist of the following organs:

(a) The Chambers, comprising a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber;
(b) The Prosecutor;
(c) The Registry; and
(d) The Defence Office.

Article 8 Composition of the Chambers

1. The Chambers shall be composed as follows:
(a) One international Pre-Trial Judge;
(b) Three judges who shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;
(c) Five judges who shall serve in the Appeals Chamber, of whom two

shall be Lebanese judges and three shall be international judges;
(d) Two alternate judges, one of whom shall be a Lebanese judge and one shall be an international judge.

2. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Tribunal.
3. At the request of the presiding judge of the Trial Chamber, the President of the Special Tribunal may, in the interest of justice, assign the alternate judges to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 9 Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity, with extensive judicial experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.
(p.303) 2. In the overall composition of the Chambers, due account shall be taken of the established competence of the judges in criminal law and procedure and international law.
3. The judges shall be appointed by the Secretary-General, as set forth in article 2 of the Agreement, for a three-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

Article 10 Powers of the President of the Special Tribunal

1. The President of the Special Tribunal, in addition to his or her judicial functions, shall represent the Tribunal and be responsible for its effective functioning and the good administration of justice.
2. The President of the Special Tribunal shall submit an annual report on the operation and activities of the Tribunal to the Secretary-General and to the Government of Lebanon.

Article 11 The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for the crimes falling within the jurisdiction of the Special Tribunal. In the interest of proper administration of justice, he or she may decide to charge jointly persons accused of the same or different crimes committed in the course of the same transaction.
2. The Prosecutor shall act independently as a separate organ of the Special Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Prosecutor shall be appointed, as set forth in article 3 of the Agreement, by the Secretary-General for a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.
4. The Prosecutor shall be assisted by a Lebanese Deputy Prosecutor and by such other Lebanese and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.
5. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Lebanese authorities concerned.

Article 12 The Registry

1. Under the authority of the President of the Special Tribunal, the Registry shall be responsible for the administration and servicing of the Tribunal.
2. The Registry shall consist of a Registrar and such other staff as may be required.
(p.304) 3. The Registrar shall be appointed by the Secretary-General and shall be a staff member of the United Nations. He or she shall serve for a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.
4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, and such other appropriate assistance for witnesses who appear before the Special Tribunal and others who are at risk on account of testimony given by such witnesses.

Article 13 The Defence Office

1. The Secretary-General, in consultation with the President of the Special Tribunal, shall appoint an independent Head of the Defence Office, who shall be responsible for the appointment of the Office staff and the drawing up of a list of defence counsel.
2. The Defence Office, which may also include one or more public defenders, shall protect the rights of the defence, provide support and assistance to defence counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice, and appearing before the Pre-Trial Judge or a Chamber in respect of specific issues.

Article 14 Official and working languages

The official languages of the Special Tribunal shall be Arabic, French and English. In any

given case proceedings, the Pre-Trial Judge or a Chamber may decide that one or two of the languages may be used as working languages as appropriate.

Section III Rights of defendants and victims

Article 15 Rights of suspects during investigation

A suspect who is to be questioned by the Prosecutor shall not be compelled to incriminate himself or herself or to confess guilt. He or she shall have the following rights of which he or she shall be informed by the Prosecutor prior to questioning, in a language he or she speaks and understands:

(a) The right to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Special Tribunal;
(b) The right to remain silent, without such silence being considered in the determination of guilt or innocence, and to be cautioned that any statement he or she makes shall be recorded and may be used in evidence;
(c) The right to have legal assistance of his or her own choosing, including the right to have legal assistance provided by the Defence Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it;
(d) The right to have the free assistance of an interpreter if he or she cannot understand or speak the language used for questioning;
(p.305) (e) The right to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 16 Rights of the accused

1. All accused shall be equal before the Special Tribunal.
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Tribunal for the protection of victims and witnesses.
3.
   (a) The accused shall be presumed innocent until proved guilty according to the provisions of this Statute;
   (b) The onus is on the Prosecutor to prove the guilt of the accused;
   (c) In order to convict the accused, the relevant Chamber must be convinced of the guilt of the accused beyond reasonable doubt.

4. In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
   (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
   (b) To have adequate time and facilities for the preparation of his or her defence and to communicate without hindrance with counsel of his or her own choosing;
   (c) To be tried without undue delay;

(d) Subject to the provisions of article 22, to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
(f) To examine all evidence to be used against him or her during the trial in accordance with the Rules of Procedure and Evidence of the Special Tribunal;
(g) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Tribunal;
(h) Not to be compelled to testify against himself or herself or to confess guilt.

5. The accused may make statements in court at any stage of the proceedings, provided such statements are relevant to the case at issue. The Chambers shall decide on the probative value, if any, of such statements.

Article 17 Rights of victims

Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Pre-Trial Judge or the Chamber considers it appropriate.

(p.306) Section IV Conduct of proceedings

Article 18 Pre-Trial proceedings

1. The Pre-Trial Judge shall review the indictment. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If he or she is not so satisfied, the indictment shall be dismissed.
2. The Pre-Trial Judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest or transfer of persons, and any other orders as may be required for the conduct of the investigation and for the preparation of a fair and expeditious trial.

Article 19 Evidence collected prior to the establishment of the Special Tribunal

Evidence collected with regard to cases subject to the consideration of the Special Tribunal, prior to the establishment of the Tribunal, by the national authorities of Lebanon

or by the International Independent Investigation Commission in accordance with its mandate as set out in Security Council resolution 1595 (2005) and subsequent resolutions, shall be received by the Tribunal. Its admissibility shall be decided by the Chambers pursuant to international standards on collection of evidence. The weight to be given to any such evidence shall be determined by the Chambers.

Article 20 Commencement and conduct of trial proceedings

1. The Trial Chamber shall read the indictment to the accused, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment and instruct the accused to enter a plea.
2. Unless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence.
3. Upon request or *proprio motu*, the Trial Chamber may at any stage of the trial decide to call additional witnesses and/or order the production of additional evidence.
4. The hearings shall be public unless the Trial Chamber decides to hold the proceedings in camera in accordance with the Rules of Procedure and Evidence.

Article 21 Powers of the Chambers

1. The Special Tribunal shall confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively. It shall take strict measures to prevent any action that may cause unreasonable delay.
2. A Chamber may admit any relevant evidence that it deems to have probative value and exclude such evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
3. A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.
(p.307) 4. In cases not otherwise provided for in the Rules of Procedure and Evidence, a Chamber shall apply rules of evidence that will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

Article 22 Trials in absentia

1. The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:
   (a) Has expressly and in writing waived his or her right to be present;
   (b) Has not been handed over to the Tribunal by the State authorities concerned;
   (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and

to inform him or her of the charges confirmed by the Pre-Trial Judge.

2. When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:

(a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality;
(b) The accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;
(c) Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.

3. In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement.

Article 23 Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which any separate or dissenting opinions shall be appended.

Article 24 Penalties

1. The Trial Chamber shall impose upon a convicted person imprisonment for life or for a specified number of years. In determining the terms of imprisonment for the crimes provided for in this Statute, the Trial Chamber shall, as appropriate, have recourse to international practice regarding prison sentences and to the practice of the national courts of Lebanon.
2. In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

Article 25 Compensation to victims

1. The Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal.
(p.308) 2. The Registrar shall transmit to the competent authorities of the State concerned the judgement finding the accused guilty of a crime that has caused harm to a victim.
3. Based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not

such victim had been identified as such by the Tribunal under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation.
4. For the purposes of a claim made under paragraph 3 of this article, the judgement of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person.

Article 26 Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:
(a) An error on a question of law invalidating the decision;
(b) An error of fact that has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

Article 27 Review proceedings

1. Where a new fact has been discovered that was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and that could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.
2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:
(a) Reconvene the Trial Chamber;
(b) Retain jurisdiction over the matter.

Article 28 Rules of Procedure and Evidence

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

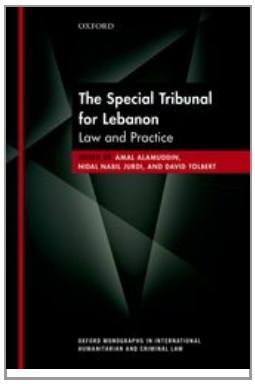
Article 29 Enforcement of sentences

1. Imprisonment shall be served in a State designated by the President of the Special Tribunal from a list of States that have indicated their willingness to accept persons convicted by the Tribunal.
(p.309) 2. Conditions of imprisonment shall be governed by the law of the State

of enforcement subject to the supervision of the Special Tribunal. The State of enforcement shall be bound by the duration of the sentence, subject to article 30 of this Statute.

Article 30 Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Tribunal accordingly. There shall only be pardon or commutation of sentence if the President of the Tribunal, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.



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