

Analysis: The Special Tribunal for Lebanon: A Unique Institution

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This article will discuss the history, mandate and most important jurisprudence of the Special Tribunal for Lebanon.

Introduction

When this journal last year provided an overview of international institutions established for the pursuit of justice for international crimes,[1] the Special Tribunal for Lebanon (STL) was not mentioned. The reason for not including this tribunal was that its subject matter does not relate to the international crimes of genocide, war crimes or crimes against humanity as is the case with the other institutions. However, the STL, in terms of its structure, can be characterized as a hybrid tribunal, like the Sierra Leone Special Court,[2] in that it was established as a result of an agreement between the United Nations and the domestic government, in this case Lebanon, and because it has a mixed membership of local and international personnel, including the judges.[3]

The mandate of the STL is "to hold trials for the people accused of carrying out the attack of 14 February 2005 which killed 22 people, including the former prime minister of Lebanon, Rafik Hariri, and injured many others."[4] This attack occurred in Beirut, Lebanon. The Tribunal also has jurisdiction over persons responsible for attacks between 1 October 2004 and 12 December 2005 if these attacks

are connected to the Hariri attack; the STL has determined that three terrorist attacks against Lebanese politicians Marwan Hamadeh, George Hawi and Elias El-Murr fit this description and these cases are currently under investigation.[5]

From a legal perspective, the mandate of the STL has been implemented by giving the Tribunal jurisdiction in its Statute to apply "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".[6] In addition to holding persons who have committed these offences directly, the Statute has also extended the circle of liability to perpetrators who "committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or 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"[7] as well those with command or superior responsibility.[8]

The Tribunal has one case on its docket dealing with the substantive crimes in its Statute, namely the *Ayyash et al. case*, involving five accused, which started in 2011[9] and which is nearing completion in that the prosecutor has finalized its case.[10]

The legal issues in *Ayyash*, which will be explored below, are the parameters of the crime of terrorism; the application of the principle of trial *in absentia*; the notion of corporate liability; and the concept of criminal association.[11]

The Crime of Terrorism

The contours of the crime of terrorism was discussed by the Appeals Chamber of the STL in early 2011.[12] The methodology applied by the Chamber is thorough by canvassing not only, in detail, Lebanese criminal law[13] but also international treaties[14], other domestic criminal legislations[15] and national jurisprudence,[16] the latter three being used to determine the definition of terrorism under customary international law.[17] Based on this methodology, the Chamber came to the conclusion that there is a rule under customary international law, with the following elements:

(i) to impose on any State (as well as other international subjects such as rebels and other non-State entities participating in international dealings) the obligation to refrain from engaging through their officials and agents in acts of terrorism, as defined in the rule;

(ii) to impose on any State (and other international subjects and entities endowed with the necessary structures and judicial machinery) the obligation to prevent and repress terrorism, and in particular to prosecute and try persons on its territory or in territory under its control who are allegedly involved in terrorism, as defined in the rule;

(iii) to confer on any State (and other international subjects endowed with the necessary structures and judicial machinery) the right to prosecute and repress the crime of terrorism.[18]

However, the judgment went further and concluded that, in addition to the above state obligations in relation to terrorism, terrorism is also a crime under international law both in times of peace and war, for which individuals can be punished.[19]The elements of this international crime comprise the following:

-the subjective element of the crime is twofold, (i) the intent or *dolus* of the underlying crime and (ii) the special intent (*dolus specialis*) to spread fear or coerce an authority.

-the objective element is the commission of an act that is criminalised by other norms (murder, causing grievous bodily harm, hostage taking, etc.). The crime of terrorism at international law of course requires as well that (ii) the terrorist act be transnational.[20]

While the judgment has been criticized both for its methodology and its conclusion,[21] it remains the best reasoned opinion with respect to the crime of terrorism at the international level. It also mirrors the essence of the provision in the Canadian *Criminal Code*.[22]

Trials *in Absentia*

Article 22 of the Statute authorizes the STL to conduct complete trials *in absentia*, which is unusual for international criminal institutions.[23] The article states:

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.[24]

Article 22(1)(c) was the most relevant for the *Ayyesh* case and has been discussed in its jurisprudence. The notion of reasonable steps to inform the accused in the present trial was the subject of interpretation by both the Trial and Appeal Chamber. The Trial Chamber attempted to give meaning to the words “reasonable steps” by canvassing international human rights instruments, international criminal law and Lebanese law[25] but came to the conclusion that while there are certain indicators to provide some clarification to this notion, a “definition of ‘all reasonable steps’ cannot exist in customary international law; it must be determined according to the circumstances particular to each individual situation, meaning that the question can be determined, not in the abstract, but rather by examining the totality of the prevailing circumstances.”[26]

The Chamber was of the view that the measures taken to inform the accused, such as trying to contact them in person at various placed of likely residence, combined with the massive media coverage of the indictment and of the accused themselves in a relatively geographically compact country with very active and independent media would make it inconceivable that the accused were not aware that they had been indicted.[27] On that basis, the trial *in absentia* was allowed to proceed.[28]

The Appeals Chamber upheld the judgment of the Trial Chamber and came to the conclusion, primarily relying on the jurisprudence of the European Court of Human Rights,[29] that *in absentia* trials 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;

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 their right to be present.[30]

It held that the Trial Chamber had applied this test accurately on the facts of the case.[31]

Corporate Liability

On 31 January 2014, two individuals and two media companies were charged with contempt and obstruction of justice before the STL in relation to media reports containing information about alleged confidential STL witnesses. The first individual in question, Karma Mohamed Tahsin Al Khayat was originally sentenced to pay a 10,000 Euro fine but was acquitted on appeal, while the second individual, Ibrahim Mohamed Ali Al Amin, was sentenced to a fine of 20,000 Euros, which was not appealed. The first company, Al Jadeed S.A.L./New TV S.A.L, was eventually acquitted while the

second company, Ahkbar Beirut S.A.L. was sentenced to a fine of 6,000 Euros.[32]

The decisions involving the two companies involved the concept of corporate liability, which had not been utilized by international institutions so far.[33] In the first corporate case, the contempt judge was of the view that the Tribunal lacked jurisdiction over legal persons because the contempt power in the Statute refers to a "person"[34] only in general terms and does not specify that this would apply to legal persons, while international criminal law does not include such jurisdiction, and there is no clear trend in domestic criminal systems in favour of such a proposition.[35]

The majority of the Appeals Chamber disagreed with the reasoning and conclusion of the contempt judge. It was of the view that since the word "person" in the Statute is neutral, it is incumbent upon the Tribunal to determine whether customary international law would allow for an interpretation that both natural and legal persons are included in this word. After a detailed examination of international human rights law,[36] domestic criminal law,[37] international criminal law[38] and Lebanese law[39], it concluded that contempt judge had been in error in holding that only natural persons fell under the jurisdiction of the STL.[40]

Having established that corporations can be held liable for contempt charges, the next step was to establish what law should be applied to determine the corporate liability and what the parameters of that notion are. With respect to the first question, the contempt judge was of the view that since there was no relevant international convention, international custom or general principles of law with respect to the elements of corporate liability, nor a universal model or a consensus across national systems, it was necessary to apply Lebanese law in this regard, as the corporation in question is domiciled in and substantially operates in Lebanon.[41]

The applicable provision of Lebanese law is Article 210 of the Lebanese Criminal Code has the following elements:

i) establish the criminal responsibility of a specific natural person; but a conviction of the natural person is not required;

ii) demonstrate that, at the relevant time, such natural person was a director, member of the administration, representative (which means someone authorized by the legal person to act in its name) or an employee who has been provided by the legal body with explicit authorization to act in its name;

iii) prove that the natural person's criminal conduct was done either (a) on behalf of or (b) using the means of the corporate Accused.[42]

This approach was used twice, first in the *Al Jadeed* case, where the corporation was acquitted as no contempt had occurred[43] and second in the *Akhbar Beirut S.A.L* case, where the corporation was found guilty[44] and fined 6000 Euros.[45]

Criminal Association

The concept of criminal association in the Lebanese Criminal Code, for which the STL has jurisdiction pursuant to article 2(a) of its Statute,[46] but which has no equivalent in other international criminal institutions,[47] was examined by the Appeals Chamber on 18 October 2017[48] as a result of a reference by the Pre-Trial Judge in the *Ayyesh* case.

The judges came to the conclusion that a criminal association is committed upon the conclusion of an agreement to act collectively for the purpose of committing particular underlying offence and that it is not necessary to identify all participants in a criminal association. In the words of the judges; “The specific form of the agreement, whether written or oral, explicit or implicit, is not material to its formation; a meeting of the minds of the parties to the agreement is all that is required. The commission of material acts is not an element of criminal association, although the existence of an agreement may be inferred from evidence of such acts. Similarly, while it is not necessary for the means of achieving the criminal purpose to be identified, such means may be critical to proof of the crime. An individual may be liable whether he or she takes part in the creation of the criminal association or joins a previously established association.”[49]

They distinguished criminal association from conspiracy under Lebanese law as follows: first, criminal association involves an agreement to commit felonies against persons or property, or to undermine the authority of the State, its prestige or its civil, military, financial or economic institutions, while conspiracy is restricted to those felonies against the security of the State that are expressly mentioned in the Lebanese Criminal Code as possible aims of a conspiracy. Secondly, conspiracy additionally requires an agreement on the means to commit the criminal purpose.[50]

Conclusion

The STL occupies a unique position in the area of international criminal justice in that it is the first, and so far, only international institution with a mandate to adjudicate a transnational crime[51] (namely terrorism[52]). In addition, it has also provided guidance in legal issues, which has transcended its modest and specific mandate, and which will be very useful, not only for domestic courts but also the international institutions operating in the sphere of international criminal law because of the stature of its judiciary and because its judgments have always employed a comparative analysis based on various sources of international and domestic law.

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References

1. See Joseph Rikhof, "Analysis: A History and Typology of International Criminal Institutions" (2017) 1 PKI Global Just. J. 15.
2. *Idem*, under the heading "The Third Generation".
3. See the Annex of Security Council Resolution 1757 at https://www.stl-tsl.org/en/documents/un-documents/un-security-council-resolutions/225-security-council-resolution-1757.
4. See website of the STL: https://www.stl-tsl.org/en/about-the-stl.
5. See https://www.stl-tsl.org/en/the-cases/stl-11-02.
6. Statute of the STL, article 2(a), see https://www.stl-tsl.org/en/documents/statute-of-the-tribunal/223-statute-of-the-special-tribunal-for-lebanon.
7. *Idem*, article 3.1. This language is virtually identical to the provisions dealing with extended liability in the most recent international treaties related to the suppression of terrorism, namely the 1997 International Convention for the Suppression of Terrorist Bombings (article 2(3), of which article 2.3(c) dealing with common purpose inspired article 25.3(d) of the Rome Statute), the 1999 International Convention for the Suppression of the Financing of Terrorism (article 2(5)) and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (article 2(2), 2(3) and 2(4)).
8. *Idem*, article 3.2.
9. For a background of the case, see https://www.stl-tsl.org/en/the-cases/stl-11-01.
10. See Special Tribunal for Lebanon, Ninth Annual Report (2017-2018), https://www.stl-tsl.org/en/documents/president-s-reports-and-memoranda/6249-ninth-annual-report-2017-2018, page 8.
11. There was another important decision recently regarding the issue of bias on the part of judges, and, while reliance was placed on the jurisprudence of the ICTY, ICTR and ICC, no further development in this area of the law occurred, see Special Tribunal for Lebanon, The Panel Designated under Rule 25(C), *Decision on Oneissi Defence Rule 25 Motion for the Disqualification and Withdrawal of Presiding Judge David Re, Judge Janet Nosworthy, and Judge Micheline Baridy*, STL-11-1/T/OTH/R25, 4 May 2018, https://www.stl-tsl.org/crs/assets/Uploads/20180504-F3645-PUBLIC-R25D-PD-R25-Mot-Disqualif-Withd-Filed-EN-Web.pdf, paragraph 48.

12. Special Tribunal for Lebanon, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-II-OI/I/AC/RI76bis, 16 February 2011, https://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/appeals-chamber/534-f0936. As the title of the decision indicates, other issues were decided as well, of which the discussion of perpetration is of interest as it compared Lebanese law with international criminal law in the areas of co-perpetration, common purpose and aiding and abetting, but ultimately comes to the conclusion that where Lebanese law is more favourable to the accused it should prevail over international criminal law. As such it is of lesser interest for this article.
13. *Idem*, paragraphs 47-60.
14. *Idem*, paragraphs 88-91.
15. *Idem*, paragraphs 91-98 while canvassing over 50 countries; in this context, see James Hendry, "The Reach of South Africa's Anti-Terrorism Law" (2018) 2 PKI Global Just J 8.
16. *Idem*, paragraphs 99-101.
17. *Idem*, paragraphs 83-87.
18. *Idem*, paragraph 102.
19. *Idem*, paragraphs 104-110.
20. *Idem*, paragraph 111.
21. See for instance, Ben Saul, "Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism", *Leiden Journal of International Law*, 2011, Volume 24(4), pages 677-700.
22. Section 83.01(1)(b). There are two differences however; first of all, the Canadian definition contains a limiting clause in that the act amounting to terrorism has to be committed for a political, religious or ideological purpose, objective or cause (which element was rejected by the STL in that it was not generally incorporated in international instruments or national legislations (see paragraph 106); second, the Canadian definition does not contain the transnational aspect as the Canadian definition was designed for domestic purposes.
23. The STL is the only institution which explicitly allows trials in the complete absence of the accused. The ICTY, ICTR, SCSL and the ECCC have allowed partial trials under exceptional circumstances while the ICC Rules of Procedure and Evidence were changed in 2013 which allow for the accused not to be present during part of his trial. For more detail see Alexander Schwarz, "The Legacy of the *Kenyatta* Case: Trials *in Absentia* at the International Criminal Court and their compatibility with Human Rights", *African Human Rights Journal*, 2016, Volume 16(1), http://www.ahrlj.up.ac.za/schwarz-a.
24. Note 5.

25. Special Tribunal for Lebanon, Trial Chamber, *The Prosecutor v. Aalim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra, Decision to Hold Trial in Absentia*, Case No. STL-II-0-III1TC, 1 February 2012, http://www.worldcourts.com/stl/eng/decisions/2012.02.01_Prosecutor_v_Ayyash.pdf, paragraphs 32-39.
26. *Idem*, paragraph 28.
27. *Idem*, paragraphs 52-77 for the general steps taken to inform the accused; paragraphs 78-104 for the measures taken in respect to each accused; paragraphs 105-111 for the conclusion regarding these measures.
28. *Idem*, 47.
29. Special Tribunal for Lebanon, Appeals Camber, *The Prosecutor v. Aalim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra, Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial in Absentia Decision*, STL-11-0I/PT/AC/ARI26.1, 1 November 2012, http://www.worldcourts.com/stl/eng/decisions/2012.11.01_Prosecutor_v_Ayyash.pdf, paragraphs 27-30.
30. *Idem*, paragraph 31.
31. *Idem*, paragraphs 40-52.
32. See https://www.stl-tsl.org/en/the-cases/contempt-cases.
33. The Statute of the International Criminal Court specifically prohibits the prosecution of legal entities in article 25(1). While the prosecution of corporate **executives** is not a new phenomenon as there had already been prosecutions of this kind after the Second World War against German corporate officials, including by the International Military Tribunal in Nuremberg, the international and hybrid tribunals have not ventured into this area so far. See also in this regard the Special Tribunal for Lebanon, Contempt Judge, *In the Case against New TV S.A.L and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/CJ, 24 July 2014, http://www.worldcourts.com/stl/eng/decisions/2013.08.02_Prosecutor_v_Ayyash_2.pdf, paragraph 75, footnote 117.
34. Rule 60bis of the Rules of Procedure and Evidence, https://www.stl-tsl.org/images/RPE/RPE_EN_April_2017.pdf.
35. Note 34, paragraphs 63-79.
36. See Special Tribunal for Lebanon, Appeals Panel, *In the case of New TV S.A.L. and Karma Mohamed Tahsin Al Khayat, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings*, STL-1405/PT/AP/AR126.1, 2 October 2014, https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05, paragraphs 45-50.
37. *Idem*, paragraphs 51-58.
38. *Idem*, paragraphs 63-67.
39. *Idem*, paragraphs 68-71.
40. *Idem*, paragraphs 74 and 90-93.

41. Special Tribunal for Lebanon, Contempt Judge, *In the Case against Al Jadeed [Co.] S.A.L./New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/T/CJ, 18 September 2015, https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05/filings-stl-14-05/main-case/judgments-stl-14-05/4363-f0176prv, paragraphs 61-69. For a discussion of contents of the crime of contempt (with reliance especially on ICTY jurisprudence), see paragraphs 42-54.
42. *Idem*, paragraph 72.
43. *Idem*, paragraphs 127 and 143-144.
44. Special Tribunal for Lebanon, Contempt Judge, *In the Case against Akhbar Beirut S.A.L and Ibrahim Mohamed Ali Al Amin,* STL-14-06/T/CJ, 15 July 2016, https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06/judgments-stl-14-06/5092-f0262prv, paragraph 164. The judgment relied on the *dicta* in the previous case, *Al Jadeed*, re contempt and corporate liability, see paragraphs 32-45.
45. Special Tribunal for Lebanon, Contempt Judge, *In the Case against Akhbar Beirut S.A.L and Ibrahim Mohamed Ali Al Amin*, STL-14-06/S/CJ, 5 September 2016, https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06/filings-stl-14-06/other-filings-stl-14-06/5190-f0265, paragraph 24.
46. Note 6.
47. Special Tribunal for Lebanon, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Criminal Association and Review of the Indictment*, STL-17-07/I/AC/R17bis, 18 October 2017, https://www.stl-tsl.org/en/the-cases/stl-17-07/filings-17/orders-and-decisions-15/6023-f0021, paragraph 29.
48. *Idem*.
49. *Idem*, paragraphs 37-43.
50. *Idem*, paragraphs 84-88.
51. For the difference between international and transnational crimes, see Robert J. Currie and Dr. Joseph Rikhof, *International & Transnational Criminal Law, Second Edition*, 2013, Irwin Law, at 13-22 and 325-326.
52. *Idem*. For more details about the debate whether terrorism is an international or transnational crime, at 317-323.