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August 24, 2011

THE SPECIAL TRIBUNAL FOR LEBANON’S UNIQUE BEGINNINGS, ITS POLITICAL OPPOSITION AND ROLE AS MODEL FOR FUTURE AD HOC CRIMINAL TRIBUNALS FOR TERRORISM PROSECUTION

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DANIEL RUNGE

ABSTRACT

This article suggests that the Special Tribunal for Lebanon in many respects can serve as a model for future ad hoc international tribunals for the prosecution of terrorism. The article discusses the assassination of Rafiq Hariri and the investigation that followed, leading to the tribunal’s formation. After this background, the formation of the tribunal is analyzed. Initially designed as a hybrid international tribunal based on a treaty between the United Nations and Lebanon, the tribunal was ultimately established unilaterally by the United Nations Security Council following the failure of the Lebanese government to approve the treaty. The article then discusses the political divisions in Lebanon and the power of Hezbollah’s opposition to the tribunal’s work and what impact, if any, this may have on the tribunal. Within this background framework the article then discusses the unique characteristics of the tribunal, including its mandate for the prosecution of terrorism, the first international tribunal of this nature, as well as the application of Lebanese substantive law regarding the definitions of terrorism and the application of international procedural standards. Finally, the article offers a critique of the tribunal as a model for future ad hoc international tribunal prosecutions of terrorism, arguing that Hezbollah’s power serves as a cautionary tale to the international community because of the group’s opposition, from within the government, to the tribunals work. However, the unique legal framework with its application of domestic legal definitions of terrorism combined with internationally recognized procedural standards, can serve as a model to be duplicated in future tribunals.

TABLE OF CONTENTS

INTRODUCTION........................................................................................................................................2
I. THE SPECIAL TRIBUNAL FOR LEBANON: ITS BEGINNING, FORMATION, FIRST INDICTMENTS AND POLITICAL RESPONSE
   a. The Impetus for the Special Tribunal for Lebanon (STL).........................................................2
   b. The Assassination Investigation..................................................................................................3
   c. The Formation of the Tribunal....................................................................................................3
   d. Financing the Special Tribunal for Lebanon, Preconditions to Beginning its Work, Key Procedural Aspects..................................................6
   e. The First Indictments: Hezbollah in the Crosshairs.................................................................7
   f. Lebanese Political Response to the STL.....................................................................................8
II. THE UNIQUE CHARACTERISTICS OF THE SPECIAL TRIBUNAL FOR LEBANON..............11
III. THE SPECIAL TRIBUNAL FOR LEBANON AS A MODEL FOR FUTURE AD HOC TRIBUNALS FOR TERRORISM PROSECUTION.................................................................13

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This paper takes a critical look at the Special Tribunal for Lebanon (STL) within its unique background, political opposition and as a model for future ad hoc tribunals for the prosecution of terrorism. As a unique criminal tribunal, my paper will look at the STL up to and including the issuance of indictments in the summer of 2011. First I examine the background to the STL, its formation and the tribunal’s first indictments. Next I will discuss the responses of the Lebanese political establishment to the work of the STL. Finally, I will analyze the unique characteristics of the STL including its mission for the prosecution of terrorism and its application of domestic substantive law, within the framework of whether or not the tribunal could serve as a model for future ad hoc international tribunals for the prosecution of terrorism. Given the unique characteristics of the tribunal, the role of Lebanese political and religious divisions and other obstacles, it is unlikely to serve as a model to be replicated under political circumstances similar to the current situation in Lebanon. However, I argue, it is possible that an ad hoc tribunal for the prosecution of terrorism, applying domestic substantive but with international character, could serve as a model under the right political circumstances, as the legal framework provides for a strong foundation. In connection with further discussion of the right political circumstances I argue that the probable success of the Tribunal would be bolstered by its creation as a purely international Tribunal instead of in its hybrid form.

I. THE SPECIAL TRIBUNAL FOR LEBANON: ITS BEGINNING, FORMATION, FIRST INDICTMENTS AND POLITICAL RESPONSE

a. The Impetus for the Special Tribunal for Lebanon (STL)

In February of 2005, the former Lebanese Prime Minister Rafiq Hariri was assassinated by a destructive car bomb in the hotel district of Beirut. Hariri was a “larger-than-life” politician who served as Prime Minister of Lebanon from 1992-1998 and 2000-2004. Hariri was against Syrian influence in Lebanon and was vital to the rejuvenation and rebuilding of Beirut following the end of the Lebanese civil war. The massive car bomb that killed Hariri also took the lives of 21 others and injured 230. Hariri was a Sunni Muslim, in a country deeply divided between Sunni and Shia Muslim and Christian. His leadership following the post-war era led to significant reconstruction and development efforts while his opposition to Syrian involvement in Lebanese politics and the resulting pressure from Syria is widely believed to be the reason for his 2004 resignation. In December of 2005, Lebanon asked the United Nations to conduct an international investigation into the assassination and to try those responsible for the death of Hariri. The Special Tribunal for Lebanon arose out of this request.

2 Id.
4 Supra, note 1.
5 Supra, note 3.
6 Id.
7 Id.
after years of investigation with the Tribunal’s stated mission being the prosecution of those responsible for Hariri’s murder and the deaths of the other victims of the bomb blast.\textsuperscript{8}

\begin{itemize}
  \item \textit{The Assassination Investigation}

  United Nations involvement following the February 14\textsuperscript{th} assassination of Hariri began immediately with an investigation into the assassination, largely at the insistence of the United States and France.\textsuperscript{9} The investigation resulted in allegations of Syrian involvement, but with the ultimate response, due to perceived shortcomings within the Lebanese investigation, was the creation of the United Nations International Independent Investigation Commission to take over the work of the investigation.\textsuperscript{10} Lebanon played no part in establishing the Commission, other than expressing its approval of the UNIIIC’s mandate and agreeing that the government would not interfere with the investigation.\textsuperscript{11} The Commission’s first report, authored by the Commission’s first Commissioner, Mehlis, pointed to Syria as the culprit behind the assassination. However, the findings, not unlike the findings of the initial investigation that were viewed unfavorably by many Lebanese,\textsuperscript{12} quickly unraveled as witnesses turned out to be unreliable and others later publicly recanted their testimony.\textsuperscript{13} Mehlis was succeeded in 2006 as Commissioner by Serge Brammertz.\textsuperscript{14} Brammertz suggested Mehlis was “carried away” by anti-Syrian sentiment based on significant international pressure.\textsuperscript{15} The Commission reports under Brammertz focused more on evidence such as crime scene analysis and forensic details while downgrading suspects to persons of interest.\textsuperscript{16} The UNIIIC mandate ended on February 28\textsuperscript{th} 2009 and was superceded by the Special Tribunal on March 1, 2009.\textsuperscript{17}

  \item \textit{The Formation of the Tribunal}

  The institution of a tribunal was first requested in December of 2005 by then Lebanese Prime Minister Siniora.\textsuperscript{18} The UN and the Lebanese government engaged in discussions until March of 2006, at which time the UN recommended establishing a hybrid tribunal through an agreement between the UN and Lebanon.\textsuperscript{19} UN Security Council Resolution 1664 passed, requesting the Secretary-General to negotiate an agreement with the Lebanese government to establish a “tribunal of international character.”\textsuperscript{20} The UN would draft a proposal for the tribunal and present it to the Lebanese Cabinet for approval from which the Cabinet would send the

\begin{footnotes}
\item[8] Supra, note 1.
\item[10] Id. at 179.
\item[11] Id.
\item[12] Id. at 180.
\item[13] Id. at 181.
\item[14] Id. at 184.
\item[15] Id.
\item[16] Id. at 185.
\item[18] Letter from the Chargé d’affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General, December 13, 2005, available at http://www.stl-tsl.org/sid/49
\item[20] Id.
\end{footnotes}
agreement to Parliament for final approval.\textsuperscript{21} This proposed process for creating the hybrid international tribunal would follow the roadmap for negotiations of the previous hybrid tribunals including Sierra Leone, East Timor and Kosovo in creating a treaty-based or internationalized tribunal.\textsuperscript{22} November of 2006 saw the passage of the proposal approved by the Cabinet but by early 2007, with the country in turmoil, Hezbollah exerting its influence in the Lebanese Parliament and the pro-Syrian Shiite President refusing to sign off on the draft, Prime Minister Siniora asked the UN to exert its Chapter VII powers to avoid the need for passage of the agreement in Parliament and unilaterally establish the Tribunal.\textsuperscript{23} Chapter VII powers allow the UN to take action with respect to threats to the peace, breaches of peace and acts of aggression. Resolution 1757 gave the government 10 days to ratify the agreement after which the agreement would enter into force unilaterally as a UN Resolution.\textsuperscript{24} The Special Tribunal for Lebanon became the first tribunal in UN history originally designed as treaty-based to be enforced by Chapter VII powers following the inability of the state party to the agreement to meet its constitutional requirements for the enactment of a binding treaty.\textsuperscript{25}

The formation of the Tribunal, given its unique and controversial background, is worthy of further discussion and analysis. Resolution 1757 states that “the provisions of the annexed document\textsuperscript{26} including its attachment\textsuperscript{27} shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19(1)\textsuperscript{28} of the annexed document before that date.”\textsuperscript{29} The annexed document, the agreement between Lebanon and the UN, was signed by the Government of Lebanon and the United Nations but was not approved by the Lebanese Parliament nor signed off by the President, as discussed supra. Therefore, the Lebanese constitutional law requirements for approval, as contemplated by Article 19(1) were not met because the United Nations had not received notification of approval from the government of Lebanon.\textsuperscript{30} The basic aim of the actions of the Security Council, based on the inaction of Lebanese government bodies, was to put the Agreement into effect without the ratification and approval of Lebanon.\textsuperscript{31}

The U.S. Ambassador to the UN lauded the passage of Resolution 1757 as demonstrating a commitment to the principal that there shall be no “impunity for political assassination in Lebanon or elsewhere” and that the tribunal will “serve to deter future political assassinations.”\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{21} Supra, note 9 at 186.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Letter from the Secretary-General to the President of the Security Council, May 15, 2007, available at http://www.stl-tsl.org/sid/49
\item \textsuperscript{25} Supra, note 9 at 188.
\item \textsuperscript{26} The agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon.
\item \textsuperscript{27} The STL Statute.
\item \textsuperscript{28} “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.”
\item \textsuperscript{29} Supra, note 24.
\item \textsuperscript{30} Fassbender, Basso “Reflections on the International Legality of the Special Tribunal for Lebanon,” 5 J. Int’l Crim. Just 1091 at 1092.
\item \textsuperscript{31} Id. At 1093.
\end{itemize}
As a result of its establishment under Chapter VII, the tribunal is binding an all states and entered into force after the Lebanese government failed to implement the previous agreement. The Security Council vote was 10-0 with abstentions coming from China, Indonesia, Qatar, Russia and South Africa. Representatives from the abstaining countries and others opposed to the tribunal claimed that the Resolution entailed “legal encroachments,” would serve to “politicize international law” and might destabilize or complicate the situation in Lebanon.

As discussed supra, the original intention of Lebanon and the United Nations was to create a treaty-based tribunal of international character. The UN Secretary General confirmed as much in his November 2006 report, stating that “[t]he legal basis for the establishment of the special tribunal is an agreement between the United Nations and the Government of Lebanon, to which the statute of the tribunal is attached” and “as a treaty-based organ, the special tribunal is neither a subsidiary organ of the United Nations, nor is it a part of the Lebanese court system.” Unfortunately, as discussed supra, the tribunal was not consummated in this fashion, becoming an organ of the United Nations and not treaty-based.

The Special Tribunal for Lebanon was created in Security Counsel Resolution 1757 as discussed supra. This method for imposing the Tribunal is controversial. There are two differing opinions as to how the STL was brought into force. First and the least likely option, is that the Security Council intended to “substitute a Chapter VII decision for a ratification of an international treaty” which would be unprecedented. The second option is that the tribunal was established “with the jurisdiction, organization and procedure envisaged in the terms of the Agreement, in the regular way provided for by Chapter VII of the UN Charter.” This “regular way” would be through a Security Council Resolution, which in this case integrated the “Agreement” and “Annexed Document” into the Security Council Resolution, with the same effect as if the provisions had “all been verbatim included in the operative part of the resolution,” as the Council is not “prevented from transferring the substance of a (draft) treaty into a resolution under Chapter VII.” Because the tribunal could be established in the “regular way” it is fair to say that its legal basis derives from Security Council Regulation 1757 and not through a unilateral enforcement of a treaty by the United Nations. This is clear, as the Lebanese government never consented to being bound by a treaty, because the parliament did not pass nor did the president ratify the treaty. The “Council did not substitute a decision made under Chapter VII of the UN Charter for the missing ratification of the Agreement by Lebanon, but instead established the STL by making the provisions of the agreement negotiated with Lebanon an integral part of a resolution under Chapter VII” with importance given to the fact that Lebanon was actively involved in the establishment of the “substance of the obligations imposed
upon it.”^{41} The STL, therefore, does not have its legal basis residing in its status as a treaty-based organization, but as an independent international tribunal with its formation by way of Security Council Resolution.

d. Financing the Special Tribunal for Lebanon, Preconditions to Beginning its Work, Key Procedural Aspects

In May of 2008 sufficient funds by way of donations and pledges to establish and operate the tribunal were secured to operate the tribunal for 12 months.^42 Voluntary contributions from UN member states finance 51% of the tribunal with the other 49% paid by Lebanon.\(^43\) Resolution 1757 contains no further instructions as to how Lebanon funds the tribunal. With the initial formation of the tribunal, segments of the Lebanese Government backed the work of the tribunal and Lebanon was able to meet the financial preconditions for establishment. With the rise of Hezbollah as a major political influence in 2011 for governing Lebanon, discussed infra, the continued funding of the tribunal may be in jeopardy. However, the Resolution does not outline the consequences of Lebanon failing to meet the 49% financing threshold. However, Article 5(2) of the Resolution requires that “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.” It can be deduced that, if Lebanon were to de-fund the Tribunal based on Hezbollah’s opposition and increased political power, alternative sources of funding could be established with Lebanon possibly facing Security Council sanctions for not complying with Resolution 1757.

An important corollary to the funding issue is the role of the Management Committee. The Management Committee of the tribunal, which is barred from interfering with judicial matters includes the US, UK, France, Germany, Holland and the UN,\(^44\) but does not include Lebanon. The Management Committee was established based on consultations of the parties.\(^45\) It is curious, therefore, that Lebanon as the biggest donor to the STL was not placed on the Management Committee. Even though the members of the committee are not to interfere with judicial aspects of the tribunal, the Secretary-General who appointed the committee may not have agreed to the appointment of Lebanon to manage the day-to-day dealings of the tribunal. Thus leaving the administrative tasks of the tribunal up to the international community. Through the Management Committee, donors will control how to use tribunal funds.\(^46\) The UN established three conditions that had to be met before the tribunal could begin its work. These conditions included enough money to operate for one year and pledges to cover two more, sufficient headway made by the UNIIIC and consultations with the Lebanese government following headway in the investigation.\(^47\) These conditions were met before May 1, 2009 when the tribunal superceded the UNIIIC. In late 2007 and early 2008 judges were selected, a prosecutor was appointed, a headquarters agreement with the Netherlands was established and a

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41 Id., at 1100.
43 Supra, note 24.
44 Supra, note 42.
45 Supra, note 24 at art. 6.
46 Id.
47 Id.
building near The Hague was selected to house the tribunal.\textsuperscript{48} The previously aforementioned Management Committee reviews the budget and provides policy advice and direction on non-judicial aspects of the tribunal and is composed of the main donors.\textsuperscript{49}

The key procedural features of the tribunal, as established in Resolution 1757, include requirements for judges and the organs of the tribunal. No fewer than eleven and no more than fourteen independent judges, with a minimum of seven international judges and four Lebanese and a maximum of nine international judges and five Lebanese sit in the Chambers.\textsuperscript{50} Each judge is assigned to specific roles as pre-trial judge, Trial Chamber judges, an optional second Trial Chamber, and an Appeals Chamber and two alternate judges.\textsuperscript{51} The organs of the tribunal include the Chambers, the Prosecutor, the Registry and the Defence Office.\textsuperscript{52} The Prosecutor and the head of the Registry are appointed by the Secretary-General for a 3 year term.\textsuperscript{53}

The judges of the tribunal must be of “high moral character, impartiality and integrity, with extensive judicial experience” as well as independent from any Government.\textsuperscript{54} Lebanese judges are selected by the Secretary-General following the presentation of a list of twelve choices compiled by the Lebanese Supreme Council of the Judiciary\textsuperscript{55} while international judges are selected by the Secretary-General following nominations from States at the invitation of the Secretary-General or by competent persons.\textsuperscript{56}

The Prosecutor is appointed for a three-year term with eligibility for reappointment.\textsuperscript{57} The Prosecutor is selected by the Secretary-General from a list of recommendations of a selection panel composed of two current or former judges of an international tribunal and the representative of the Secretary-General.\textsuperscript{58} The Deputy Prosecutor, who is required to be Lebanese is appointed by the Lebanese Government after consultation with the Secretary-General.\textsuperscript{59}

e. \textit{The First Indictments: Hezbollah in the Crosshairs}

In January of 2011, the current UN prosecutor, Canadian Daniel Bellemare, submitted a sealed indictment before the pretrial judge, just days after the collapse of the Lebanese pro-western government.\textsuperscript{60} At that stage of the STL’s work, the indictments remained confidential, however indictment of Hezbollah members was widely anticipated and the organization strongly

\textsuperscript{49} Id.
\textsuperscript{50} Supra, note 29.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Supra, note 24 at Art. 2(4)
\textsuperscript{55} Id. at art. 2(5)(a).
\textsuperscript{56} Id. at art. 2(5)(b).
\textsuperscript{57} Id. at art. 3(1)
\textsuperscript{58} Id. at art. 3(2).
\textsuperscript{59} Id. at art. 3(3)
denied involvement in the assassination of Hariri and the other 21 deaths and 230 injuries resulting from the massive car bomb. 61 In late June of 2011, the STL provided the first indictments and arrest warrants to the Lebanese State Prosecutor Saeed Mirza. 62 Lebanese judicial sources identified the four suspects as two senior Hezbollah officials accused of masterminding the plot to kill Hariri, and a second official accused of carrying out the attack, as well as two other Hezbollah members, while the STL would not confirm any of the indictee’s identities. 63 The confirmation of the indictment by the Pretrial Judge Daniel Fransen signals that he was “satisfied that there is prima facie evidence for this case to proceed to trial,” and that it is not a “verdict of guilt and any accused person is presumed innocent unless his or her guilt is established at trial.” 64 Lebanon will have 30 days to serve the warrants and the Prosecutor indicated his office, while confirming the identities of the accused, would study the appropriate steps to be taken. 65 If the suspects are not arrested in this time period, the STL will make public the indictment and summon the suspects to appear before the court. 66

f. Lebanese Political Response to the STL

The assassination of Hariri and the difficulties in approving the STL by the Lebanese government embodies “all the complex challenges that confront Lebanon: Sunni-Shiite sectarian tensions, Hezbollah’s weapons, confessional power-sharing, the influence of regional players particularly Syria” and “broader proxy battles between the West and Hezbollah/Syria/Iran alliance.” 67 In 2006 during attempts at approval of the STL through the Lebanese Cabinet and Parliament, the division over the STL created at the time what was called “Lebanon’s worst political turmoil in decades.” 68 As discussed supra, the Cabinet approved the STL, but the Parliament did not. The Cabinet’s approval came even after Hezbollah resigned. 69 While Parliament failed to approve the STL, the pro-Hariri factions argued that Hezbollah and its allies resigned to prevent the STL from forming and Hezbollah alleged that the pro-Hariri camp was using the STL as a political tool to threaten Syria and Lebanon, “Washington’s enemies.” 70 At this point the pro-Syrian Shiite Speaker of the House, a Hezbollah ally, refused to convene Parliament until the stalemate was resolved and the President, a Syrian ally refused to sign the draft proposal. 71 This led to the UN using its power under Chapter VII to form the tribunal following the Prime Minister’s request. 72 The initial response to the STL’s formation was a harbinger of things to come.

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61 Id.
63 Id.
64 Id.
66 Id.
67 Supra, note 1.
68 Supra, note 9 at 187.
69 Id. at 187.
70 Id. at 187-188.
71 Id.
72 Id.
In January 2011, Hezbollah and its allies, based on Prime Minister Saad Hariri’s cooperation with the STL’s investigation walked out on the government causing its collapse.\textsuperscript{73} Hezbollah and its allies opposition to the STL is based on a belief that the tribunal is a “political tool wielded by the west” to pressure Hezbollah, this serves as a platform for portraying the STL members as motivated to discredit Hezbollah and not bring justice to Lebanon.\textsuperscript{74} Hezbollah’s leader Hassan Nasrallah has regularly referred to the tribunal as an American-Israeli conspiracy and defended Hezbollah’s role in the collapse of the Saad Hariri “March 14” government in January 2011 to protect Lebanon from the “consequences of the indictments” including sectarian strife.\textsuperscript{75}

In June of 2011, following the January collapse of the previous government, the new Lebanese government was finally formed. The new Prime Minister Najib Mikati is backed by Hezbollah and has been accused of being like the “façade of a Hezbollah-controlled and Syrian-made government.”\textsuperscript{76} The “March 14” opposition party believes that Mikati’s government will seek confrontation with the international community and will withdraw from the STL, while Mikati states that all international obligations will be upheld.\textsuperscript{77} However, Mikati’s government has raised suspicion by stating its intention to replace key security and judicial officials in the Information Branch of the Internal Security Forces, which aids the STL investigations.\textsuperscript{78}

Hezbollah’s resistance to the tribunal has been prevalent from the beginning but its intense campaign in 2010 to discredit the STL led to the fall of Saad Hariri’s government.\textsuperscript{79} The “skillful public relations campaign” aimed to discredit the tribunal as an American-Israel tool and to weaken “the resistance.”\textsuperscript{80} Given the new makeup of the Lebanese government it is unlikely that the suspects will be diligently pursued but lip service will likely be played to Lebanese responsibilities to the STL.\textsuperscript{81} In late June, the new Hezbollah backed Cabinet formalized its government’s policy statement. The statement’s language concerning the STL stopped short of reiterating the country’s support and commitment to the STL while stressing Lebanon’s respect for UN resolutions and pledged to follow the path of the tribunal to reach the truth about the Hariri assassination.\textsuperscript{82}

The fears of the opposition party and Mikati’s actions raise the key question of whether or not the Lebanese government can withdraw or undermine the STL and what the Lebanese obligations under 1757 are and what they mean. Article 15 of Resolution 1757 speaks to the obligations of cooperation with the Special Tribunal, placed on Lebanon. These explicit obligations include cooperation with the organs of the tribunal at all stages of the proceedings and compliance without undue delay with any request for assistance by the tribunal in order to

\textsuperscript{73} Supra, note 3.
\textsuperscript{74} Id.
\textsuperscript{75} Supra, note 41.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Supra, note 62.
identify and locate persons, serve documents arrest or detain persons or transfer an indictee to the tribunal.\textsuperscript{83} Lebanon is however, not simply required to cooperate on these limited explicit instances, as Article 15(2) includes the language “including, but not limited to…”,\textsuperscript{84} thus one can argue, there are implicit requirements of cooperation and this surely includes continued funding and participation in the tribunal.

Hezbollah’s new role in the Lebanese government as a “strong political force” may allow the organization and its allies to potentially block legal proceedings in parliament.\textsuperscript{85} Hezbollah’s long stated goal has been the end of Lebanese cooperation with the STL and given its current hold on the power structure, its influence, some argue, could lead to withdrawing Lebanese judges from the tribunal and ending funding of the STL budget,\textsuperscript{86} of which Lebanon is responsible for 49\%. Many Lebanese politicians, as well as members of the international community have long suspected Hezbollah, acting on orders from its patrons Iran and Syria, carried out the attack and assassination,\textsuperscript{87} potentially providing a basis for Hezbollah’s resistance to the tribunal.

While commentators and observers have postulated that Lebanon may withdraw funding or judges, I argue that Resolution 1757, which incorporated the agreement between Lebanon and the United Nations, requires compliance with the UN mandated tribunal. The key to this argument is that the Resolution is binding, therefore requiring compliance, like any other UN Resolution. If this was a treaty-based tribunal, the argument for Lebanese withdrawal of funding and judges could hold more weight, especially if the treaty included a unilateral withdrawal mechanism. However, the Agreements between the two parties did not include this mechanism, and that point is moot regardless. Lebanon is not allowed to withdraw from the tribunal and if it attempts to do so, it will face the threat of UN sanctions, like any other country not complying with United Nations Resolutions. If Lebanon does actively attempt to thwart the tribunal, the UN may sanction the country and the international community will step in with continued funding and support of the tribunal. The outcome of Hezbollah’s campaign against the tribunal is, however, uncertain. Resolution 1757 does include language regarding settlement of disputes that would require negotiation or other mutually agreed upon settlement.\textsuperscript{88} The first step in settling active uncooperative behavior by Lebanon would be the settlement through negotiation. Again, this step would have an uncertain outcome, with the possibility of UN sanctions if Lebanon continued to thwart the tribunal’s work and would also require the cooperation of Lebanon in talks. The Security Council Resolutions relating to the STL, outside of 1757, do not speak to the administration of the tribunal, but the approval of various stages of the investigations or the granting of extensions and give no further insight into how the UN would respond to Lebanese obstruction.\textsuperscript{89}

\begin{itemize}
\item \textsuperscript{83} Supra, note 24 at art. 15.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} “Lebanon Fears Crisis with Issue of Arrest Warrants” Speigel Online International, July 1, 2011, available at 2011 WLNR 13133428.
\item \textsuperscript{86} Supra, note 65.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Supra, note 24 at Art. 18.
\item \textsuperscript{89} See, UN Security Council Resolutions 1852, 1748, 1686, 1664, 1644, 1636, 1595, available at http://www.stl-tsl.org/sid/49
\end{itemize}
Given Hezbollah’s influence in Lebanon, the safest place for the accused may be in Lebanon, making it highly unlikely that the alleged perpetrators will stand trial (they may be tried in absentia) or even be arrested.90 “Nothing’s going to happen,” if the warrants are served they will be blocked and if someone is actually arrested “all hell will break loose.”91 Arguably, technical reporting requirements will be met but no real move to arrest anyone will be made.92 This observation is complicated by the Resolution’s vague references to arrest, detention and location of persons and the responsibilities of Lebanon. As discussed supra, if the government is willfully obstructing these requirements of cooperation, negotiation or sanctions may follow. Resolution 1757 does not include nor does any other Resolution regarding the STL speak to the authority of UN member states, Management Committee member states or donor states to arrest, detain or locate indictees or other persons. Unlike the International Criminal Court, there is no mechanism requiring the international community (or as in the case of the ICC, other member states) to serve arrest warrants on defendants if a state knows he is in their territory or if the opposition party may arrest, detain or transport individuals to the STL. However, Article 22 of the Special Tribunal’s statute articulates that a trial in absentia is authorized when the accused is absent as the result of not being “handed over to the Tribunal by the State authorities concerned.”93 It may be inferred from this language, and the absence of other pertinent language authorizing arrest detention or transfer by states or parties other than Lebanon, that the sole authority for these activities rests with the Lebanese government. If not arrested within 30 days, however the UN Security Council may take “the necessary measures in line with Chapter VII.”94

As a continued cog in Hezbollah’s public relations game, its leader, Hassan Nasrallah, has denounced the STL as biased and corrupted with investigators that are former CIA agents whom previously targeted the group.95 Nasrallah has also argued that the STL has ignored evidence that Israel was involved in the bombing while the Prosecutor has welcomed the organization to share this evidence and defended his staff as professional, impartial and fully qualified.96 This PR campaign has convinced Hezbollah’s followers that Israel was behind the assassination and has cast doubt upon the tribunal even with Lebanese who don’t support the organization.97 The UNIIIC investigation and the STL has also hindered its own work with excessive leaking, reliance on witness later discredited and the “seemingly political about-face in which it initially pinned the murder on Syria but later shifted its focus to Hezbollah.”98

II. THE UNIQUE CHARACTERISTICS OF THE SPECIAL TRIBUNAL FOR LEBANON

91 Id.
92 Id.
96 Id.
97 Cambanis, Thanassis “Hezbollah Is In Trouble” the Atlantic, 7/11/11, accessed online at [NEED THIS CITATION]
98 Id.
The Special Tribunal for Lebanon has two characteristics unique in the scheme of international criminal tribunals. The STL is the first international criminal tribunal with its stated purpose being the prosecution of crimes of terrorism.\(^99\) Secondly, the tribunal’s application of Lebanese domestic law as to the definitions of the crime of terrorism is one-of-a-kind, making the subject matter jurisdiction reliant totally on domestic law at a tribunal of international character groundbreaking.

The creation of a tribunal of international character for the prosecution of terrorism is in and of itself is unique. However, a closer look at the narrow mandate of the tribunal further illustrates the limited scope and unprecedented nature of the tribunal. Previous tribunals, the ICTY, ICTR, Sierra Leone and Cambodia have undertaken prosecution of the universal crimes of genocide and crimes against humanity amongst others. The STL’s narrow mandate is in stark contrast to its international criminal tribunal forbearers. Article 1 of the STL statute authorizes 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 person.”\(^100\) The scope of the tribunal, given Lebanon’s history of political assassination, terrorist attacks and war crimes, is surprising.\(^101\) However the statute does allow for possible jurisdiction over other attacks that took place between October 2004 and 12 December 2005 or any other later date, if they are connected by way of criminal intent (motive), purpose behind the attacks, the nature of victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.\(^102\) Broadening beyond 12 December 2005 would require agreement between the UN and Lebanon as to the cut-off date and consent by the Security Council.\(^103\) These three requirements make an expansion of the STL’s prosecutorial mandate highly unlikely.

Given these tight restrictions limiting the prosecution to certain dates, the requirement of strong connections to the Hariri assassination with expansion beyond 12 December requiring consent and the allowance of joint trials, it is more likely than not that the STL will only try one case or a limited number of cases.\(^104\) Furthermore, given that the STL statute allows for trial in absentia, it is even more likely that the one case will proceed without defendants present.

The second unique characteristic is the tribunal’s international criminal jurisdiction over solely domestic crimes.\(^105\) Other tribunals, particularly the Special Court for Sierra Leone, the Iraqi High Tribunal, the East Timorese Serious Crimes Panel, the Extraordinary Chambers of the Courts of Cambodia and the War Crimes Chamber in Bosnia and Herzegovina have exercised jurisdiction with domestic substantive law applicable but international criminal law has played a role as well.\(^106\) The difference between these previous hybrid tribunals and the STL is that the

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101 Id. at 1109.
102 Id. at 110.
103 Id.
104 Supra, note 9.
106 Id.
STL is a tribunal of international character exercising jurisdiction solely on the basis of crimes drawn from a domestic source, the Lebanese Penal Code.107 Specifically, the Code relating to the prosecution and punishment of acts of terrorism, crimes and offenses against life and personal integrity, illicit associations and failure to report crimes and offenses under the Lebanese law.108

Under the Lebanese Penal Code “terrorist acts” are defined as “acts designed to create a state of alarm which are committed by means such as explosive devices, inflammable materials, poisonous or incendiary products or microbial agents likely to create a public hazard.”109 This definition does not require establishment of an “ideological, political or any other motive” but does require use of “explosive devices, inflammable materials, poisonous or incendiary products or infectious or microbial agents or other means that cause public hazard.”110 This would exclude the use of handguns or other weapons that do not cause a public hazard, even if they do “terrorize.”111 Whatever the deficiencies of the Lebanese Penal Code regarding its definition of terrorism, the acts perpetrated on February 14, 2005 fall within the definition, as the means were an explosive device, creating a state of alarm and causing a public hazard.

A key question then, concerning a Chapter VII tribunal of international character’s application of domestic law, is whether or not that domestic law will become a model definition for terrorism at the international level, i.e. will the definition be “internationalized”?112 The greatest deficiency of the definition is the missing political or ideological motive, which could end up encompassing an overbroad application of the definition. The definition, at least for application at an international level, is missing an element of cross-border acts, which could be preferable in an international norm for the definition of terrorism. An example of the problematic nature of the Lebanese definition’s unlikely elevation to an international norm, includes the fact that the shooting of a political figure in a Lebanese public square was not ruled to be a terrorist act, because the act was committed with a gun.113 This example would not be problematic at the STL level, but an internationalization of the Lebanese definition is unlikely, because of the definitions limitations.

III. THE SPECIAL TRIBUNAL FOR LEBANON AS A MODEL FOR FUTURE AD HOC TRIBUNALS FOR TERRORISM PROSECUTION

The two key aspects of my paper, Lebanese political divisions regarding the tribunal and the groundbreaking legal framework of the statute have differing effects on evaluating the STL as a model for future ad hoc tribunals for terrorism. Lebanese politics, Hezbollah’s power, the influence of 3rd party nation-states and their respective impacts on the tribunal offers a cautionary tale for the creation of an ad hoc tribunal for terrorism prosecution within a nation-state with the similar divisiveness of Lebanon. However, the legal framework will provide a model for future

107 Id.
108 Id.
109 Id. at 1129.
110 Id. at 1136.
111 Id.
112 See, Nidal at 1137.
113 Supra, note 9, at 192.
tribunals, especially considered in a vacuum outside of the complicated nature of Lebanese politics.

The unique political characteristics of Lebanon and the nature of Hezbollah’s power in the country will make it difficult for the tribunal to see major success, if that success is defined by arrests and the physical presence of defendants at trial, facilitated by Lebanese participation, so long as Hezbollah is in power. It is unlikely that success will come from voluntary acquiescence by the Lebanese government in the near future and will only arrive with pressure from the United Nations or the international community. During the initial formation of the tribunal, Lebanon was not as deeply divided over the tribunal’s work. The Prime Minister actively pursued the formation of the tribunal, financial backing was procured from Lebanon, the agreement and statute were authorized by the Lebanese Cabinet. While the organization failed to be established as treaty-based by Lebanon, it did have more than insignificant support from the Lebanese government and people. Now, given the heightened role of Hezbollah in both official government power and unofficial street power, the political landscape is even further changed. When looking to the other well-known international criminal tribunals, one sees the two basic forms, the treaty-based form and the Chapter VII based form. The Chapter VII tribunals, i.e., the ICTY and ICTR have had the generally good support from the cooperating countries. The same can be said for the hybrid, treaty-based tribunals as well. The key difference with the STL is that the cooperating country is loudly protesting the work of the tribunal. Herein is whether the rub lies when looking at the STL as a model for future ad hoc terrorism tribunals. The cooperating country must fully support the activities of the tribunal. In the future, if a country experiences a terrorist attack and looks for cooperation with the UN in creating this type of tribunal, an examination of that country’s political situation and the facts of the alleged crimes of terrorism will need to occur. If there are factions in a specific country deeply opposed to the prospective work of a tribunal the international community may want to think twice about attempting cooperation on an international tribunal. Establishing a system where the cooperating country provides significant funding, is engaged in the selection of judges and prosecutors and is required to actively participate in the running of the tribunal, should be balanced against the currents of government and street opinion as to the prospective work of the tribunal. In a state with the political situation that Lebanon finds itself in, the circumstances may not be right for cooperation on this type of tribunal. However, a state fully supportive of cooperative behavior, willing to finance and provide staff and support to the tribunal and fully committed to ending impunity for terrorism and political assassination, could partner with the international community to establish an efficient and functioning hybrid tribunal. Given the political circumstances of the STL, Lebanon is more likely a model for when not to institute a hybrid tribunal or imposing a Chapter VII tribunal, requiring cooperation between a state and the UN. The legal framework of the STL however, provides a different and much more positive outlook for serving as a model.

From a purely international legal standpoint, the tribunal most certainly can serve as a model for future terrorism prosecutions at the ad hoc level. The two unique aspects of the substantive tribunal practices, prosecution of terrorism and the tribunal’s international character with substantive domestic law and procedural international standards, provide a sufficient model for terrorism prosecution tribunals in the future. The strongest positive of the STL is its prosecution of terrorism. Given the lack of an international standard or custom regarding the
definition of terrorism, future international tribunals wishing to prosecute terrorist acts will need to follow the lead of the STL. Secondly, the application of domestic terrorism law and international due process standards is laudable. The application of domestic law is neatly tied to the goal of terrorism prosecution. Because there is no uniform international standard for a definition of terrorism, the use of domestic law is required. As I discussed supra, Lebanese penal code language regarding the definition of terrorist acts is not perfect, and will likely not be “internationalized” but it will suit the tribunal well, especially considering the facts of the Hariri assassination and how they clearly fit within Lebanese law. The tribunal is combining the best possible options for litigating a terrorism prosecution in an international tribunal. First, the application of international due process and procedural standards will ensure fairness and justice to all parties involved. Secondly, the use of domestic law gives ownership of the prosecution to the state of Lebanon. This type of combination allows the victims and the government of the cooperating state a real hand on the steering wheel in terms of adjudicating the prospective prosecution on their own terms while ensuring widely held standards of process are applied at the tribunal.

It is easy to question the creation of the tribunal given its political difficulties and, in my estimation, the unlikelihood of full support from Lebanon resulting in limitations on the success of the tribunal. However, as with any new legal creation, the tribunal’s growing pains and obstacles and 20/20 hindsight provide clarity as to the appropriate road to successful prosecution. The goal of ending impunity for political assassination and the prosecution for the perpetrators of the assassination, injuries and deaths would have been better served within the framework of a fully international tribunal as opposed to the hybrid UN-Lebanon creation. The solely international tribunal would not face the same types of obstacles as the STL is currently. The obstacle to that type of tribunal, of course, is that there is no customary definition of terrorism, unlike the crimes of genocide and crimes against humanity. A second complication is the fact that the crime prosecuted is singular in nature and not a widespread atrocity. The solution to the first problem would be the application of Lebanese criminal law, based on the original insistence by members of Lebanese government on help in creating a tribunal for the prosecution of the Hariri assassination. Secondly, the tribunal would only exist with the support of the international community, which in the case of a political assassination allegedly masterminded and carried out by Hezbollah, would be likely. If the Special Tribunal for Lebanon had been created as a fully international tribunal, the STL would have been modeled after the ICTY, with the exception being the sole application of substantive Lebanese criminal law and the creation of a tribunal for the prosecution of a single crime.

In the main, the Special Tribunal for Lebanon’s status as an ad hoc tribunal for the prosecution of terrorism is a noble idea with unique characteristics and should be accorded respect for its goal of ending impunity for political assassinations and terrorism. The STL’s legal model combining domestic terrorism definitions with international legal norms can serve as a model for future ad hoc tribunals for the prosecution of terrorism. However, Lebanese politics and widespread opposition to the tribunal’s work have made the investigation and now prosecution much more difficult to execute. In its original incarnation, the United Nations and the Lebanese government were to work hand-in-hand to investigate, prosecute and punish the perpetrators of the terrorist act. As a result the complex moving parts of Lebanese politics and culture provide a cautionary tale, to be avoided in the future by the international community.
when a state with similar tensions explores the creation of an international tribunal. The divisive nature of Lebanese politics and Hezbollah’s heavy influence were never going to allow for the completion of the Agreement between the two parties and the founding of a hybrid criminal tribunal. Even given the shortcomings of the tribunal from a Lebanese participation standpoint, the Special Tribunal for Lebanon’s unique hybrid application of domestic terrorism law and international due process standards provides a strong model for future prosecutions. However, in Lebanon’s case, its government and people, the United Nations, the pursuit of international justice and the prevention of Lebanese obstruction would have been better served by the Special Tribunal for Lebanon’s establishment as a fully international tribunal, as this would prevent changing political winds in Lebanon from impacting the performance of the Lebanese government of its obligations to the tribunal.