

The Special Tribunal for Lebanon and National Reconciliation

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1. Introduction

Writing as an optimist, I believe the Special Tribunal for Lebanon ('STL') can contribute to reconciliation in Lebanon. Its distinctive features give it a unique role. These include its jurisdiction, its hybrid procedures, its technical capability, its operational transparency, its outreach programme and its judicial model.

One of the great tragedies of modern Lebanese life is the absence of a mechanism to establish accountability for what occurred during the devastating 15-year civil war – from 1975 until the signing of the *Ta'if* Agreement, or the 'National Reconciliation Agreement', in Saudi Arabia, in October 1989. In 1991, the Lebanese Parliament passed a general amnesty law for 'political crimes' committed before 28 March 1991. But unlike in, say, South Africa, it was not accompanied by a corresponding truth and reconciliation mechanism. Since 1991, many further breaches of international humanitarian and human rights law in Lebanon have been reported.

In 2013, the International Center for Transitional Justice ('ICTJ') documented the armed conflicts on Lebanese soil occurring *after* the *Ta'if* Agreement, to name some: the 'Seven-Day War on Operation Accountability' in 1993; the conflict between the Lebanese Army and the Islamic Militant Group in January 2000; the withdrawal of Israeli forces from South Lebanon in May 2000; the 2006 war between Hezbollah and Israel; and the conflict between the Lebanese Army and Fatah-al-Islam in 2007. It mentioned possible crimes committed when Syrian armed forces were deployed in Lebanon between 1991 and 2005. It also listed targeted assassinations, car bombings, and alleged human rights violations such as arbitrary detentions, torture and enforced disappearances between 1994 and 2008. The ICTJ concluded that many

war crimes were committed.¹ Among other organisations, Amnesty International, Human Rights Watch ('HRW') and the International Committee of the Red Cross ('ICRC') have likewise documented allegations of similar breaches of international law.²

Here I refer only to documented *allegations* of breaches of international human rights and humanitarian law. Applicable international instruments include the 1948 Universal Declaration of Human Rights, the 1949 Geneva Conventions and their 1977 Additional Protocols, the 1954 Hague Convention and its Protocol, the 1966 International Covenant on Civil and Political Rights ('ICCPR'), and the 1984 Convention Against Torture. For example, Article 3 common to the four Geneva Conventions reflects customary international law, and according to the International Court of Justice, a "minimum yardstick" for all armed conflicts – international or non-international.³ The prohibition against tor-

¹ ICTJ, "Lebanon's Legacy of Political Violence: A Mapping of Serious Violations of International Human Rights and Humanitarian Law in Lebanon, 1975–2008", September 2013, pp. 72–91.

² Reports include: Amnesty International Israel/Lebanon, "Out of all proportion – civilians bear the brunt of the war", November 2006; Amnesty International, "Lebanon: Torture Allegations in Wake of Sidon Armed Clashes", July 2013; HRW, "An Alliance Beyond the Law: Enforced Disappearances in Lebanon", May 1997; HRW, "Operation Grapes of Wrath: the Civilian Victims", September 1997; HRW, "Why They Died: Civilian Casualties in Lebanon during the 2006 War", 5 September 2007; ICRC, "The families of people missing in connection with the armed conflicts that have occurred in Lebanon since 1975: An assessment of their needs", ICRC Beirut, May 2013; and ICRC, "People on War: Country Report Lebanon – ICRC worldwide consultation on the rules of war", February 2010.

³ International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. Reports 14, para. 218. Common Article 3 requires humane treatment for all persons in enemy hands, without any adverse distinction, and specifically

ture likewise expresses non-derogable customary law. The ICCPR forbids arbitrary arrest or detention.⁴ Parties to these conventions, such as Lebanon, are obliged to conduct thorough, independent and impartial investigations into violations and to bring perpetrators to justice. However, reports show very limited domestic action.⁵ Lebanese law, it also appears, requires specific national legislation to criminalise international crimes.⁶

The Security Council established the United Nations International Independent Investigation Commission ('UNIIC') in 2005 and the STL in 2009,⁷ with a strictly defined jurisdiction for the latter. Amnesty International stated in 2009 that the establishment of these two bodies "marks an important break from the pattern of impunity of the past in Lebanon, which has seen perpetrators of political killings and other gross violations of human rights able to escape accountability for their crimes over many years".⁸ I believe that the STL *can* help Lebanon with reconciliation. Its model and expertise, including its specialised jurisdiction, demonstrate how.

2. Jurisdiction

The STL's jurisdiction is unique. Unlike the other international or hybridized courts also using international criminal procedural law, it applies the substantive criminal law of Lebanon.⁹ Its jurisdiction is confined to the attack on the former Lebanese Prime Minister Rafik Hariri on 14 February 2005 and any connected attacks occurring between 1 October 2004 and 12 December 2005.¹⁰ The indictment against the five Accused on trial charges them with committing offences contrary to Leb-

prohibits murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and unfair trial.

⁴ Article 9, ICCPR.

⁵ ICTJ, "Failing to Deal with the Past: What Cost to Lebanon?", January 2014. See also *supra* note 2.

⁶ STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 114, STL-11-01/I/AC/R176*bis*. The Appeals Chamber surveyed Lebanese judicial practices and legislation and concluded "(i) customary international law can be and normally is applied by Lebanese courts; (ii) however, this body of international law may not be applied in penal matters absent a piece of national legislation incorporating international rules into Lebanese criminal provisions".

⁷ United Nations International Independent Investigation Commission, established by Security Council Resolution 1595 (2005), the STL by Resolution 1757 (2007).

⁸ Amnesty International, "The Special Tribunal for Lebanon: Selective Justice", February 2009, p. 1.

⁹ The Lebanese Criminal Code and the Lebanese Law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith struggle'.

¹⁰ Article 1, Statute of the Special Tribunal for Lebanon, annexed to Resolution 1757. The Tribunal has also exercised its primacy under Article 4(b) of the STL Statute in three 'connected cases': Marwan Hamadeh, George Hawi and Elias El-Murr (STL-11-02).

anese law, namely, conspiracy to commit a terrorist act, committing a terrorist act with an explosive device, the intentional homicide of 22 people, and attempted intentional homicide of 226.¹¹ Choosing this particular attack for an international investigation and then trial – but using Lebanese substantive criminal law – demonstrates a break with the past and a move towards accountability. These first steps are confined to the *Ayyash* case and the three 'connected' cases. But with political will and popular support, progress could be made in dealing with other alleged crimes.

3. Hybrid Procedures

The STL uses the hybrid international criminal law procedures that mainly originated in the Rules of Procedure and Evidence of the ICTY, ICTR and SCSL, and a victims participation regime similar to that of the ICC.¹² Although building upon the experience of the many international criminal trials since the ICTY's first case in 1994, the rules emanate from the procedures of the Nuremberg International Military Tribunal and the International Military Tribunal for the Far East in the 1940s. In the international sphere, at least, such procedures are generally considered more transparent than a dossier style investigation where the results are kept in a sealed file given to a Trial Chamber to which the Prosecution and Defence have access.

4. Neutrality and Transparency

A major plank of the *Ta'if* Agreement is expressed as: "Abolishing political sectarianism is a fundamental national objective. To achieve it, it is required that efforts be made in accordance with a phased plan".¹³ This is also in the Lebanese Constitution.¹⁴ Consistent with this objective, none of the STL's principal international officials were appointed on the basis of their confession. Seven of the eleven judges, the Prosecutor, the Head of the Defence Office, and the Registrar are non-Lebanese. The STL has the advantage of distance and an appearance of

¹¹ STL, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, Consolidated indictment, 10 March 2014, Case No. STL-11-01/T/TC. Three Accused are also charged as accomplices.

¹² International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone and International Criminal Court.

¹³ Section II. G., *Ta'if* Agreement. It continues to state: "Abolish the sectarian representation base and rely on competence and specialization in public jobs, the judiciary, the military, security, public, and joint institutions, and in the independent agencies in accordance with the dictates of national accord, excluding the top-level jobs and equivalent jobs which shall be shared equally by Christians and Muslims without allocating any particular job to any sect."

¹⁴ Lebanese Constitution, 1926, paragraph H of the Preamble states: "The abolition of political confessionism shall be a basic national goal and shall be achieved according to a staged plan".

neutrality – with its unique combination of Lebanese and international personnel – judges, Prosecutor and Deputy Prosecutor, defence counsel, Defence Office, Chambers, and Registry staff.

The Prosecutor is strictly independent – he and defence counsel conduct their own investigations and present their own cases in court. The results of the STL’s investigations are openly presented in court. Counsel for the Prosecution, Defence and participating victims, and the judges, may publicly test the witnesses and challenge documents.

5. Specialised Units or Courts

The ICTJ recommended establishing – within the Lebanese judiciary – specialised units to investigate and prosecute the most serious crimes.¹⁵ Similar examples exist elsewhere: the Extraordinary Chambers in the Courts of Cambodia trying Khmer Rouge crimes; the International Crimes Division of Uganda’s High Court; the War Crimes and Organized Crime, Economic Crime and Corruption Chambers of the Court of Bosnia and Herzegovina; the International Crimes Tribunal in Bangladesh; and the (announced) International and Organised Crime Division of the Kenyan High Court. Senegal has its Extraordinary African Chambers within the courts of Senegal, created to prosecute international crimes committed in Chad between 1982 and 1990, and Serbia and Croatia have specialised war crimes chambers. No model is perfect. Like the STL, several – for example, the Bosnian, Senegalese and Cambodian – feature international judges, prosecutors and other personnel working with national counterparts. As an example of the breadth of their jurisdiction, the Ugandan court may try war crimes, crimes against humanity, genocide, terrorism, human trafficking, piracy and other international crimes.

The model of an independent investigator – first the UNIIC, and then the STL’s independent Prosecutor – using forensic specialists and analysts, is one that Lebanon could examine for the future. International technical assistance could also be sought. Closely examining the methodology used by the UNIIC and STL investigators could also assist. For example, after working alongside international investigators and forensic experts in 2005 and 2006, the Lebanese Internal Security Forces appear to have modernized and adapted their forensic investigation procedures. The Lebanese personnel working at the STL have also gained the technical expertise both to transfer these skills and to themselves work in any such specialised unit.

6. Truth and Reconciliation Models

The procedural model of witnesses testifying in televised

¹⁵ ICTJ, “Confronting the Legacy of Political Violence in Lebanon: An Agenda for Change”, October 2014, p. 22.

public proceedings, could be used by a Lebanese court, or a truth and reconciliation or fact-finding mechanism – for past, continuing or future violations of international human rights and humanitarian law.

7. Chapter VII Tribunal and Model of State Co-operation

As the STL was created by a Security Council resolution pursuant to Chapter VII of the UN Charter,¹⁶ Lebanon is obliged co-operate with it. This includes providing access and materials to both Prosecution and Defence investigations. This model sets an example for Governments to provide any judicial unit or truth and reconciliation mechanism with the necessary assistance to perform its work.

8. Outreach

The STL has a significant outreach programme in Lebanon and has close links with civil society, including the two Lebanese bar associations and universities. Its Inter-University Programme on International Criminal Law and Procedure, in which Lebanese students attend video-link lectures on substantive and procedural international criminal law and complete examinations, is in its fifth year. The course is open to students in the eight participating universities. In 2014, 79 students ‘graduated’ from the course.¹⁷

The Tribunal – using donor outreach funding – also sponsors visits to The Hague by NGO representatives, journalists and media editors, Lebanese lawyers, including the leaders of its bars, university deans and other academics, and also the best graduating students – allowing them to experience first-hand the STL and The Hague’s international justice institutions.¹⁸ Lebanese national visiting professionals and interns work in the STL’s Chambers, Prosecution, Registry and Defence Office. The STL also employs Lebanese nationals in each of these four organs. These measures provide direct technical assistance to Lebanon in advancing international criminal law and international human rights law.

9. Memorialisation

The STL’s archives will publicly preserve the record of the investigation and witness testimony and any trial records. These documents will add to the understanding of

¹⁶ Charter of the United Nations, Chapter VII ‘Action with respect to threats to the peace, breaches of the peace, and acts of aggression’.

¹⁷ Since 2011, 612 students have enrolled, and 411 certificates have been handed out – 182 for completing the course and 229 for attending.

¹⁸ As an example, with Swiss Government funding and STL co-operation, the 3rd edition of Antonio Cassese’s International Criminal Law has just been translated into Arabic and is being published in Lebanon.

what occurred in February 2005, and hence contribute to reconciliation. This type of memorialisation may also present a model for a truth and reconciliation mechanism – and most particularly because the STL’s criminal case record may also have historical value.

10. Reparations

The UN General Assembly’s (‘UNGA’) 2005 General Principles specify the importance of reparations, or compensation, for victims of breaches of international human rights and humanitarian law.¹⁹ According to the ICTJ, however, few efforts have been made to implement the various recognized measures of reparations, such as compensation, rehabilitation and apologies.²⁰ The STL cannot itself directly order reparations to victims from a convicted accused person, but its Registrar may forward a judgment to any relevant national authority to allow victims to make compensation claims under national law.²¹ Irrespective of whether this is ever utilized, the existence of this measure is a concrete step towards recognizing the UNGA’s 2005 General Principles.

11. Victim Participation

The importance of victim participation in reconciliation cannot be over-emphasised. The STL allows victim participation in trials. More than 70 individuals have victim participant status in the *Ayyash* case – five were added during the trial. All are jointly represented by three legal representatives. This model of victim participation could help foster reconciliation, particularly by allowing victims to publicly present their accounts.

12. Witness protection

The STL, following the pioneering work of the UN *ad hoc* tribunals, has a sophisticated witness protection programme that, in extreme cases, may include relocation.²² The court may use measures to protect a witness’ iden-

¹⁹ UNGA, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, 16 December 2005, UN Doc. A/RES/60/147 (adopted by consensus).

²⁰ ICTJ, “Failing to Deal with the Past: What Cost to Lebanon?”, p. 19, see *supra* note 5.

²¹ Article 25, STL Statute.

²² ICTY, ICTR and later SCSL and ICC. Former Yugoslav States subsequently introduced witness protection measures based on the ICTY model.

tity such as a pseudonym, and, in televised proceedings, voice and face distortion. The STL’s model is easily transportable to a national criminal justice system or a truth and reconciliation mechanism.

13. Conclusion

The “obligation to respect, ensure respect for and implement international human rights law and international humanitarian law” is principle 1 of the UNGA’s 2005 General Principles. The ICTJ stated that while the STL “has been fraught with setbacks, it nevertheless represents an important international effort to establish accountability for a limited number of serious crimes”.²³ The UNIIC and STL represent an attempt to deal with some crimes – the targeted assassinations, often by car-bombings – that have plagued Lebanon since the end of the civil war. This is a start, but one that required – at the Lebanese Government’s request – international assistance. The STL’s function is thus both real and symbolic.

Criminal justice and truth and reconciliation are far from mutually exclusive. The two can and should co-exist. By its existence, its model and expertise, the STL can contribute to both, and hence, in the broader sense, to reconciliation. Fully implementing the *Ta’if* Agreement is a Lebanese national political issue but one directly affecting its criminal justice system and national reconciliation. The Lebanese people deserve accountability that could combine criminal justice with truth and reconciliation. Lebanon could use the tools, methodology and model developed by the UNIIC and STL in this respect. UNIIC and now the STL may be two steps on that journey.

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²³ ICTJ, “Failing to Deal with the Past: What Cost to Lebanon?”, p. 13, *supra* note 5.