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Would an accused or a witness who is a state official be able to claim immunity from before the STL? If so, what type of immunity and what would the consequences of such a successful claim be?

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I. INTRODUCTION

A. Scope

This memorandum evaluates the possible types of immunity claims an accused state official may have before the Special Tribunal for Lebanon (STL). Additionally, the memorandum will address the consequences of each immunity protection if these claims are upheld.[*] Possible claims will be analyzed for all lower ranking state officials and categorically for former and current higher ranking state officials. Additionally, the exceptions that invalidate immunity claims will be evaluated including: being tried by an international tribunal, wavier by a nation through a treaty, and waiver by nations through other implicit or explicit means. In addition to immunity claims from the accused, the STL may face claims from witnesses who are state officials. This aspect is outside of the scope of this memorandum and will be addressed in later work. This memorandum will conduct its legal analysis by focusing primarily on the approaches of previous ad hoc and hybrid tribunals including: 1) the International Criminal Tribunal for the former Yugoslavia (ICTY), 2) the Special Court for Sierra Leon (SCSL), 3) the International Criminal Tribunal for Rwanda (ICTR), and the 4) Extraordinary Chambers in the

[*] "Would an accused or a witness who is a state official be able to claim immunity from before the STL? If so, what type of immunity and what would the consequences of such a successful claim be?" This memorandum topic has been scaled down to only address state official immunity claims for content and time purposes. The issue of immunity for witnesses who are state officials will be addressed in the spring semester of 2010 in a separate student memorandum.

Courts of Cambodia (ECCC), as these tribunals best reflect the traits of the STL.[1] In addition, legal precedent from the International Criminal Court (ICC), the International Court of Justice (ICJ), and a selection of domestic case law will be provided for further comparison and analogy.

B. Summary of conclusions

1. Lower Ranking officials will not be able to claim immunity before the STL.

State Official immunities are reserved for high ranking state officials including; including; Diplomats, Heads of State, Heads of Government, and Ministers of Foreign Affairs. Low ranking state officials that do not function in a similar capacity to these positions in their jobs will not be provided immunity protections for the Hariri assassination, and the STL will have the same jurisdiction over these individuals as they would over non-government citizens.

2. There are two categories of immunity protections afforded to state officials; 1) personal ("ratione personae") immunity protections and 2) functional immunities ("rationae matariae") immunity protections. State officials are either afforded functional immunity protections or personal immunity protections, or both, depending on the rank of their position and if they are current or formal officials.

Personal immunities provide a complete bar from criminal prosecution in foreign jurisdiction for high-ranking state officials over any act they execute, both within and outside of their official duties. In general, functional immunities are provided to all ranking state officials for acts carried out as part of their official duties for their state.

[1] International Center for Transitional Justice Prosecutions Program, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON, 35–38 (April, 10 2008). [reproduced in accompanying notebook III at tab 54].

The immunities for their official acts exist both while they are in office and after they leave office.

3. Diplomatic immunity claims can be determined by analogy to high-ranking state official claims.

Analysis for diplomatic immunity claims is approached in the same manner as current high-ranking state officials immunities, and diplomats are subject to the same exceptions the same immunity protections. However, the protections given to diplomats for their private acts (personal immunity protections) are limited to the receiving states. The current general rule for high-ranking state official immunities is one of affording restrictive immunity. State Official Immunity Protections are not absolute; immunities can be contested through three exceptions. There is international consensus that sitting high-ranking state officials including Heads of States, Heads of Governments, Vice Presidents, Prime Ministers, and Ministers of Foreign Affairs are provided immunity for both functional and personal activities. However, diplomats, current, and former high-ranking state officials share three major exceptions to their immunity protections. These exceptions include; 1) if the individual is being tried by an International Court, 2) if immunity is waived by officials government by virtue of a treaty, or 3) the state the official represents gives its implied or explicit consent for waiver of the officials immunity. The STL will be able to remove immunities for accused high-ranking state officials if any of these exceptions are applicable.

4. Under the first exception, for state official immunity, prosecution by an international court, no explicit test for defining an international court exists however factors emerge from case law that can be applied to the Special Tribunal for Lebanon.

The level of authority vested to the STL can be determined by evaluating the mode of establishment used to create the court, the explicit powers granted to it through its statute, and the level of Security Council Support expressed during its creation. In addition to these three factors, the historical background of the STL's creation gives further insight into the international nature of the tribunal. While the STL does not have an explicit waiver of immunity in it's statute, the Security Council established it by passing an agreement for the court through its Chapter VII power. It was intended to be an international court with the authority vested to it mirroring other international tribunals**.**

Lebanon passes the threshold for being considered an "international" court under these factors. The STL is characteristically very similar to other international hybrid tribunals. However, the court will face challenges proving that its domestic subject matter jurisdiction affords it the powers of other international courts to eliminate claims of immunity from high-ranking state officials.

5. Evaluating the Courts characteristics of the STL including, title and description, location, judicial composition, procedure and funding reveal that it is a characteristically international hybrid tribunal.

Although the tribunal does not have the word "international" in its name other factors weigh highly in it being an "international" tribunal. The courts judicial staff composed of a majority of international judges, over half its funding comes from

international sources, it uses international procedural methods and it is located in the Hague, Netherlands. These attributes are all very similar to those embodied by other international hybrid tribunals.

6. The Treaty for the Suppression of Terrorist Bombings was ratified by both Lebanon and Syria, and is evidence of waiver of immunities by the Syrian government. However, Syria will still be afforded the opportunity to try its officials in its own domestic courts and is unlikely to give the Special Tribunal for Lebanon precedence.

In addition to the waiver of immunity through the Treaty for the Suppression of terrorist bombings, there is also an implicit waiver of immunities from Syria by treaty through Articles 25 and 103 of the UN charter, which allow Security Council decisions, such as the creation of the STL, to take precedence any treaty laws between two states. This would require Syrian officials to comply with the requests of the STL and eliminate immunities for their high-ranking state-officials being tried before the STL.

7. The volatile history between the Syria and Lebanon makes it doubtful that Syria will explicitly waive immunities for its heads of state.

No current implicit of explicit waiver between Lebanon and Syria exists, and it is unlikely that Syria will voluntarily renounce the immunity protections of any of their high-ranking state officials.

8. Two additional exceptions to immunity protections apply to former high-ranking state officials, these exceptions include removal for immunity for 1) acts completed prior to or after the individual was in office and 2) acts complete outside of the "official capacity" of the officials position.

Former high-ranking officials claims for immunity will likely not be upheld because even if neither of the first two exceptions are applicable to the accuse, it is unlikely that participating in a bombing that took 22 lives will be considered within the "official capacity" of the individuals position. Former state officials will accordingly be liable for all crimes committed outside of their "official capacity" while in office.

II. FACTUAL BACKGROUND

A. Background and Relevant Events Leading to the Creation of the STL

Syrian forces have occupied parts of Lebanon since April of 1975 when the then-Syrian leader Hafez Al-Assad sent troops to strengthen the sitting Lebanese Christian Maronite government.[2] The occupation was initiated in response to Lebanese-Palestinian warfare that was occurring, as well as the internal political fighting between the Lebanese Christian Maronite community and the leftist National Movement.[3] Syrian troops stayed in Lebanon through two Israeli invasions in 1978 and 1982. In October of 1989 under the Taif Accords, Lebanese Muslims were granted a larger share of political power and "preferred relations" between Lebanon and Syria began, Syria's role as the "guarantor of Lebanon's security" was defined in the agreement. After the Taif Accords, Syria agreed to create a timetable for troop withdrawal from Lebanon by 1992,

[2] Katherine Iliopoulos, *Hariri Tribunal Opens in The Hague*, Crimes of War Project (2009), *available at*, http://www.crimesofwar.org/onnews/news-lebanon.html. [available in accompanying notebook 1 at tab 15].

[3] *Id.*

however this did not occur.[4] In 1992 Rafiq Hariri became prime minister of Lebanon and in 2004 after the withdraw of Israeli forces, the Security Council passed the U.S. and France co-sponsored U.N. Resolution 1559 with Hariri's support.[5] This resolution requests for "foreign forces" to leave Lebanon, terminate any connection with Lebanese political affairs, and for the disarmament of militias.[6] Additionally, the UN Secretary General appointed a special envoy to implement the Resolution, and with the aid of this envoy, Lebanese and Syrian officials began meeting in early February of 2005 to discuss how to accomplish the requests of the Resolution. There were several attacks on civilians and politicians from suspected Syrian supporters from the time Hariri took office.[7] On February 14 2005, the then former Lebanese Prime Minister Rafiq Hariri and 22 others were assassinated by a car bomb.[8]

Two years after the attack, the UN and Lebanon signed an agreement to create the Special Tribunal for Lebanon to try those who were deemed responsible for the attack, and for

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[4] *Id.*

[5] *Id.*

[6] U.S. Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices: Lebanon* (February 23, 2001), *available at*, http://www.state.gov/g/drl/rls/hrrpt/2000/nea/800.htm. [reproduced in accompanying notebook I at tab 18]

.[7] *Id.* (including an the bombing of a Maronie church in Beirut that killed one person and the beating death of Akram Arbeed who was attacked while accompanying a candidate in the 1996 parliamentary election).

[8] Melia Amal Bouhabib, *Power and Perception: The Special Tribunal for Lebanon*, 5 J. Int'l Crim. Just. 1061, 1062-63 (2009), *available at* http://works.bepress.com/melia_bouhabib/1. [reproduced in accompanying notebook II at tab 38].

subsequent related attacks that resembled it in manner and purpose.[9] The attacks the tribunal is to address include any that happened between 1 October 2004 and 12 December 2005, that the it decides are "connected in accordance with the principles of criminal justice and ... of a nature and gravity similar to the attack of 14 February 2004."[10] Crimes similar in nature that occur after the specified dates may also be included if they are approved by a future agreement between the UN and the Lebanese government, with the approval of the Security Council.[11] The Lebanese Parliament failed to ratify the agreement through its domestic legislative process by June 10th 2007. Desiring to establish the tribunal immediately the UN Security Council disregarded the legislative stalemate and authorized the formation of the tribunal, under Chapter VII of the Security Council powers with a vote of ten members approving and five abstaining. [12]

The UN also initiated a fact-finding mission to the killing and the adequacy of the subsequent Lebanese authorities' investigation regarding the killing.[13] It noted the possible role of both Syrian Military Intelligence and some in leadership positions in the Lebanese Security

[9] *Id.*

[10] Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. DOC. S/RES/1757 (May 30, 2007). [reproduced in accompanying notebook I at tab1].

[11] Melia Amal Bouhabib, *Power and Perception: The Special Tribunal for Lebanon*, 5 J. Int'l Crim. Just. 1061, 1062-63 (2009), *available at* http://works.bepress.com/melia_bouhabib/1. [reproduced in accompanying notebook II at tab 38].

[12] United Nations Security Council 5686 Meeting Record on *the creation of the Special Tribunal for Lebanon*, S/PV.5685 30 (May 2007). [reproduced in accompanying notebook III at tab 59].

[13] *Id.* (finding that President Bashar Al-Assad had threatened Hariri just months before the assassination, and determined that Syria bore the primary responsibility for the political tension present before the assassination).

Services in planning and implementing the attack. It also found that the investigation run by Lebanon was critically defective. [14] Syrian officials and Lebanese Security services deny any involvement or wrongdoing with the bombing, however President Bashar al-Assad stated that if any Syrian were accused of being involved the individual would be brought to justice in Syria.[15] The suspected involvement of high-ranking state officials both in the Lebanese and Syrian governments will likely lead to several claims of state official immunity before the STL. Accordingly, all possible claims of immunity and the exceptions to immunities for current and former state officials must be evaluated.

B. Legal Background

1. General Overview: Doctrine of State Official Immunities

State official immunity represents a procedural bar to the ordinary jurisdiction of a court to try individuals charged with crimes.[16] The issue of state official immunity is one that addresses a growing international tension of finding a balance between principles of sovereign equality and

[14] *Id.* (stating that "[t]here is probable cause to believe that the decision to assassinate former Prime Minister Rafiq Hariri could not have been taken without the approval of top-ranked Syrian security officials and could not have been further organized without the collusion of their counterparts in the Lebanese security services. . ").

[15] Kim Ghattas, Lebanon's groundbreaking tribunal BBC News April 21 2006, last visited 11/15/09 *available at* http://news.bbc.co.uk/2/hi/middle_east/4926536.stm. [reproduced in accompanying notebook I at tab 13].

[16] Nsongurua J. Udombana , Pay Back Time in Sudan? Darfur in the International Criminal Court, 13 Tulsa J. Comp. & Int'l L. 1, 38 (2005). [reproduced in accompanying notebook II at tab 48]

upholding global justice. [17] Nations grant foreign high-ranking officials the amount of immunity they deem is necessary to perform official duties without subjecting the official's to arrest or detention.[18] Additionally, a survey of international case law reveals two main types of immunities afforded to state officials, functional immunity, and personal immunity.[19] State officials are either afforded functional immunity protections or personal immunity protections, or both, depending on the rank of their position and if they are current or formal officials.[20]

a) ***Personal Immunity***

The first form of immunity protections that may be afforded to a state official under an immunity claim before the STL is personal immunity.[21] This is also referred to an immunity *ratione persona*, and it provides a complete bar from criminal prosecution in foreign jurisdiction

[17] Curtis A. Bradley & Jack L. Goldsmith, Pinochet and International Human Rights Litigation, 97 MICH L. REV. 2129, 2130 (1999). [reproduced in accompanying notebook II at tab 37].

[18] Jerrold L. Mallory, *Resolving the Confusion Over Head-of-State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 179 (1986) (listing in order from least to most broad claims of immunity protections; the British granting a modified form of restrictive immunity based on sovereign and diplomatic immunity, French courts granting a broad immunity to heads of state based on their status as government officials that is similar to diplomatic immunity, the Soviet Union and East European countries granting a broad degree of immunities to high-ranking officials and in some cases absolute immunity). [reproduced in accompanying notebook III at tab 42].

[19] Katherine Iliopoulos, *Hariri Tribunal Opens in The Hague*, Crimes of War Project (2009) http://www.crimesofwar.org/onnews/news-lebanon.html .[reproduced in accompanying notebook I at tab 15]

[20] Antonio Cassese, *When May Senior State Officials be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case,* 13 EUR. J. INT'L L. 853, 868 (2002) (stating that while the two forms of immunity exist independently, they might also overlap if the state official is holding office while he is being tried for crimes).[reproduced in accompanying notebook II at tab 39].

[21] *Id.*

for state officials over any act they execute, both within and outside of their official duties.[22] The rationale behind personal immunity protections is that any official receiving these protections must be immune from foreign jurisdiction to insure foreign states do not: 1) infringe on protected sovereign rights of a nation, or 2) interfere with the official functions of a state official by claiming that the alleged crime was done as a private act.[23]

b) ***Functional immunity***

The second form of immunity protections that may be afforded to a state official under an immunity claim is a functional immunity. This immunity from criminal prosecution is afforded to state officials for cases arising in foreign jurisdictions. Functional immunity or immunity *ratione materiae* is immunity provided to state officials for acts carried out as part of their official duties for their state. [24] In general, functional immunities are provided to all ranking state officials for acts carried out as part of their official duties for their state. The immunities for their official acts exist both while they are in office and after they leave office. [25] The

[22] Salvatore Zappala, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, 12 Eur. J. Int'l L. 595, 601 (2001). [reproduced in accompanying notebook III at tab 51].

[23] Cassese *supra* note 20. [reproduced in accompanying notebook II at tab 39].

[24] Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 Eur. J. Int'l Law 853, 862 (2002). [reproduced in accompanying notebook II at tab 39].

[25] *Id.*

reasoning behind affording functional immunity is that the state official acts are attributed directly to the state, and, therefore, individual liability does not arise. [26]

c) ***Individuals who may claim immunity before the STL***

The amount of functional or personal protections provided to each state official that claims they are immune from prosecution before the STL will depend on what level of office the individual holds and if they are currently in office. Individual's claiming state official immunity generally fall into one of four categories: 1) lower ranking state officials, 2) diplomats, 3) current high ranking state officials, and 4) former high ranking state officials. Each category receives a different level of protections in foreign courts, however diplomats, current, and former high-ranking state officials share three major exceptions to their immunity protections. Former high-ranking state officials may be criminally prosecuted under two additional exceptions.

(1) Lower Ranking State Official Claims for Immunities

Personal immunity is afforded only to individuals in the highest positions of government including and is not extended to lower ranking state officials. [27] The International Court of Justice enumerated positions that receive immunity protections including; Diplomats, Heads of State, Heads of Government, and Ministers of Foreign Affairs.[28] Civil servants who do not work in one of these positions, or a position with a similar level of responsibility are not granted

[26] *Id.*

[27] *Id.*

[28] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) (Congo v. Belgium), 2002 I.C.J. 3 (Feb. 14); *see also ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, House of Lords.[reproduced in accompanying notebook I at tab 19]

immunities for crimes they commit, as they do not personify the nations they serve in the same capacity as a head of state does.[29]

(2) Diplomats Claims for Immunities

Diplomats are afforded diplomatic immunity protections, which mirror the immunity protections afforded to current high-ranking state officials. Diplomatic immunity is defined under The Vienna Convention on Diplomatic Relations.[30] "Official/Diplomatic agents" of a nation's diplomatic staff receive functional immunity in a receiving state for their "official duties." [31] Along with functional immunity protections, diplomatic immunity includes providing personal immunity to diplomatic agents of a country.[32] Analysis for diplomatic immunity is approached in the same manner as current high-ranking state officials immunities, and diplomats are subject to the same exceptions to immunity protections. However, the protections given to diplomats for their private acts (personal immunity protections) are limited to the receiving states

[29] Diego A. Archer, MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR -ISSUE 5: HEAD OF STATE DOCTRINE AND INTERNATIONAL LAW VIOLATIONS, Case Western Reserve University School of Law War Crimes Research Project 32 (2003). [reproduced in accompanying notebook III at tab 52].

[30] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 29- 38, 23 U.S.T. 3227, 3240-45, 500, art. 31, 23 U.S.T. at 3240, 500 UNT.S. at 112.[reproduced in accompanying notebook I at tab 4].

[31] *Id.*

[32] Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 Eur. J. Int'l Law 853, 862 (2002). [reproduced in accompanying notebook II at tab 39]

while personal immunity of High-ranking officials is not confined within the borders of a receiving state and extends to all nations.[33]

(3) High-ranking State Official Immunity Claims

High-ranking state official immunity law is defined and has evolved through customary international law, because although international courts have addressed the topic no treaty has been signed that clarifies or limits the scope of current and former high-ranking official immunities. [34] Principles that are considered customary international law are those that are broadly accepted by the international community and require the legal obligations of enforcement from all nations.[35] Historically, officials were afforded absolute immunity, such that no state could be put on trial without its own consent.[36] Absolute immunity protection was founded on the idea of promoting sovereign equality, the concept that all states are equal and independent under international law. [37] However, the current general rule is one of affording restrictive immunity. Restrictive Immunity is the idea that states can be subject to foreign

[33] Salvatore Zappal, *Do Heads of State In Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, 2 European Journal of International Law [EJIL] 595, 599 (2001). [Reproduced in accompanying notebook III at Tab 51].

[34] Michael A Tunks, 52 Duke L.J. 651, 653 *Diplomats or Defendants? Defining the Future of Head-of-State Immunity* (2002).[reproduced in accompanying notebook III at tab 47].

[35] Jerrold L. Mallory, *Resolving the Confusion Over Head-of-State Immunity: The Defined Rights of Kings,* 86 COLUM. L. REV. 169, 176-77 (1986).[reproduced in accompanying notebook III at tab 42].

[36] Michael A Tunks, 52 Duke L.J. 651, 653 *Diplomats or Defendants? Defining the Future of Head-of-State Immunity* (2002).[reproduced in accompanying notebook III at tab 47].

[37] *Id.*

jurisdiction under certain circumstances.[38] This theory was born out of the need to aid the increasing involvement of states in commercial enterprises; however, it has also been applied in criminal cases to ensure a denial of justice did not take place.[39] Under the theory of restrictive immunity, courts generally approached high-ranking state official immunity claims by affording different levels of protections to 1) current high-ranking officials and 2) former high-ranking officials. [40]

Three exceptions limit both current and former high-ranking state official immunity claims. The limitation of immunity is applicable when: 1) the high-ranking official is being tried before an international court, 2) the immunity is waived by treaty, or 3) there is an explicit or implicit waiver by the government of the state official's immunity. In addition to the shared exceptions to immunity for current and former high-ranking officials, courts find two further exceptions exist for former high-ranking state officials. High-ranking officials who are no longer in office do not receive immunity protections for things done while they were in office that were outside of the scope of their position. Additionally, former high-ranking state officials are not afforded protections for acts committed before or after their term in office.

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[38] Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press New York, NY 16 (2008).[reproduced in accompanying notebook II at tab 28].

[39] *Id.*

[40] Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 Eur. J. Int'l Law 853, 862 (2002). [reproduced in accompanying notebook II at tab 39]

III. LEGAL ANALYSIS

A. Lower Ranking State Officials Immunity Claims

The International Court of Justice first addressed the issue of current High-ranking Official Immunities in the case of *Democratic Republic of Congo vs. Belgium* (hereinafter the *Arrest Warrant*).[41] In the *Arrest Warrant* case, a Brussels court issued an arrest warrant for the incumbent minister of foreign affairs of Congo, Abdulaye Yerodia Ndombasi (hereinafter Yerodia) for crimes against humanity and other crimes under international law that violated the 1949 Geneva Conventions for allegedly inciting the massacre of a Tutsi ethnic group in Kinshasa.[42] The Democratic Republic of Congo claimed that immunity protections for Yerodia must be upheld because he was a current Minister of Foreign Affairs.[43] As previously mentioned, the International Court of Justice enumerated positions that receive immunity protections including; Diplomats, Heads of State, Heads of Government, and Ministers of Foreign Affairs.[44] Low ranking state officials who do not hold a position similar in responsibility to those enumerated by the *Arrest Warrant* court will have no claims for immunity before the STL, and may be fully prosecuted.

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[41] *Arrest Warrant* of 11 April 2000 (Dem. Rep. Congo v. Belg.) (Congo v. Belgium), 2002 I.C.J. 3 (Feb. 14).[reproduced in accompanying notebook I at tab 19]

[42] *Arrest Warrant* 41 I.L.M. 536, 541 ¶5 (2002) (including in the list of crimes delivering speeches that incited racial hatred).[reproduced in accompanying notebook II at tab 19]

[43] *Arrest Warrant* 41 I.L.M. 536, 541 ¶5 (2002). [reproduced in accompanying notebook II at tab 19]

[44] *Arrest Warrant* 41 I.L.M. 536, 541 ¶5 (2002) [reproduced in accompanying notebook at II tab 19]; *see also* Regina v. Bow Street Magistrate, Ex parte Pinochet, [1999] 2 W.L.R. 827 (H.L.).[reproduced in accompanying notebook II at tab 25].

B. Immunity Protections Afforded to Current High-ranking State Official and Diplomats

Generally, personal and functional immunity protections for high-ranking state officials are absolute in protection during criminal proceedings that are tried by third party foreign courts.[45] As previously mentioned, the protections and exceptions to protections for diplomats mirror those afforded to current and former heads of state, however are limited to the diplomats time in the receiving state.[46] The court in the *Arrest Warrant* case defined the scope of current high ranking state official immunity protections when it held in a final binding decision that the international circulation of an arrest warrant by Belgium violated the foreign minister's personal immunity from criminal prosecutions.[47] It then ordered Belgium to cancel the arrest warrant.[48] The court said that it was only deciding the scope of immunity from criminal jurisdiction for an incumbent Minister for Foreign Affairs, and that it was doing so on the basis of international customary law.[49] Additionally, the court opinioned that immunities afforded to ministers of Foreign Affairs are provided to enable individuals to fully perform their job requirements on

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[45] Diego A. Archer, MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR - ISSUE 5: HEAD OF STATE DOCTRINE AND INTERNATIONAL LAW VIOLATIONS, CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW WAR CRIMES RESEARCH PROJECT 35 (2003).[reproduced in accompanying notebook III at tab 52].

[46] *Supra* Diplomatic Immunities Background section of the memorandum.

[47] *Arrest Warrant* 41 I.L.M. 536, 541 ¶5 (2002) [reproduced in accompanying notebook I at tab 19]

[48] United Nations Information Service, Press Release AFR/379
ICJ/602, ICJ REJECTS BELGIAN ARREST WARRANT FOR FOREIGN MINISTER OF DEMOCRATIC REPUBLIC OF CONGO, (February 15 2002), *available at* http://www.unis.unvienna.org/unis/pressrels/2002/afr379.html. [reproduced in accompanying notebook I at tab 17]

[49] *Id.*

behalf of the nations they represent, and to successfully complete his job a minister of foreign affairs throughout his time in office must be afforded full immunity, both personal and functional from criminal jurisdiction. [50] As stated in the analysis of lower ranking state official claims for immunity, the ICJ enumerated other positions that would need full personal and functional protections while in office including; Diplomats, Heads of State, Heads of Government, and Ministers of Foreign Affairs.[51] These protections extend to other high-ranking state officials that work in a similar capacity and at a similar level as a minister of foreign affairs, including high-ranking cabinet members or Ministers of Defense.[52] After defining the scope of immunities afforded to current high-ranking state officials, the court enumerated the exceptions to claims of immunity both for a current and former high-ranking officials.[53]

Examples of providing both personal and functional immunities for current high-ranking officials is reflected in several national court cases. A Spanish National Court (*Audencia Nacional*) held that the president of Cuba, Fidel Castro, could enjoy complete immunity during his time in office.[54] A French court (*Cour de Cassation*) also held that Muammar al-Gaddafi the

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[50] *Id.*

[51] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) (Congo v. Belgium), 2002 I.C.J. 3 (Feb. 14); *see also ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, House of Lords.[reproduced in accompanying notebook I at tab 19]

[52] United Nations Information Service, Press Release AFR/379 ICJ/602, ICJ REJECTS BELGIAN ARREST WARRANT FOR FOREIGN MINISTER OF DEMOCRATIC REPUBLIC OF CONGO, (February 15 2002), *available at* http://www.unis.unvienna.org/unis/pressrels/2002/afr379.html. [reproduced in accompanying notebook I at tab 17]

[53] *Id.*

[54] Antonio Cassesse, When May Senior Officials Be Tried for International Crimes? Some

President of Libya could not be held responsible for possible crimes he participated in while he was a sitting head of state.[55] Overall, there is an international consensus that sitting high-ranking state officials including Heads of States, Heads of Governments, Vice Presidents, Prime Ministers, and Ministers of Foreign Affairs are provided immunity for both functional and personal activities.

C. Exceptions for both Former and Current High-ranking Official Immunities

There are three general exceptions to the total personal and functional immunity protections afforded to current high-ranking state officials and the functional immunity protections afforded to former high-ranking officials. According to the court in *the Arrest Warrant* case these exceptions include: 1) if the official is being tried by an international tribunal, 2) if the home nation the official is representing or has represented waives immunity through a treaty, or 3) if the home nation of the official waives the immunity through either implicit or explicit consent.[56] While the portion of the opinion defining exceptions was considered obiter dictum, and only the judgment itself was binding on the parties of the case, it

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Comments on the Congo v. Belgium Case, 13 European Journal of International Law [EJIL] 853, 866 (2002). [Reproduced in accompanying notebook II at Tab 39].

[55] *Id.*

[56] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) (Congo v. Belgium), 2002 I.C.J. 3 ¶ 61 (Feb. 14) (stating the exceptions are 1) "such persons enjoy no criminal immunity under international law in their own countries;" 2) they cease to enjoy immunity from the jurisdiction of another state "if the State they represent or have represented decides to waive that immunity;" 3) a former Minister for Foreign Affairs may be prosecuted by another state in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity;" and, 4) "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international courts, where they have jurisdiction.").[reproduced in accompanying notebook I at tab 19]

still will significantly affect international law because ICJ Court cases are persuasive authority for future decisions of UN created tribunals.[57] If one of the three exceptions applies to a sitting high-ranking state official, the STL may be able to supersede the immunity claim and prosecute the accused.[58]

1. Prosecution by an International Tribunal

The first exception to state official immunities occurs when an "international court" is trying an accused. The Nuremburg Tribunal first explained the need for restrictive immunity and the elimination of high-ranking state official immunity claims when the accused is being tried before an international tribunal for crimes against humanity, war crimes and crimes against peace.[59] This groundbreaking international tribunal stated: "Crimes against international law are committed by men, and not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[60] More recently, The ICJ voiced this same sentiment in the *Arrest Warrant* Case when it stated that while the courts of a third state are bared from trying sitting or former heads of state, "certain international criminal courts" may try these individuals where the international courts have jurisdiction.[61] The court

[57] Louis Henkin et. al., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 49 (2d ed. 1991) (discussing the *Nicaragua* case).[reproduced in accompanying notebook II at tab 29]

[58] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) (Congo v. Belgium), 2002 I.C.J. 3 ¶ 61 (Feb. 14) [reproduced in accompanying notebook I at tab 19]

[59] International Military Tribunal (Nuremburg) Judgment and Sentences, 41 AM. J. INT'L L. 172,221 (1946). [reproduced in accompanying notebook II at tab 21]

[60] International Military Tribunal (Nuremburg) Judgment and Sentences, 41 AM. J. INT'L L. 172,221 (1946). [reproduced in accompanying notebook II at tab 21]

did not define criteria for identifying "international courts," but did distinguish them from a "foreign jurisdiction" or a court of "one state." [62] Additionally it gave examples of the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda and the future International Criminal Court as such courts that do have jurisdiction over individuals from a third party state.[63] These examples enumerated by the court all UN created tribunals, and like the STL the ICTY and the ICTR were created under the Security Council's chapter VII powers.

Additionally in the *Prosecutor v. Charles Taylor* case before the hybrid UN created Special Court of Sierra Leone, Charles Taylor the former President of Liberia was indicted for crimes against humanity, war crimes, and other serious violations of international law including terrorism.[64] Taylor challenged the validity of his indictment by claiming that because it was issued while he was still in office, and it was contrary to the immunity afforded to a head of state

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[61] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, (2008) (stating examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention.) [reproduced in accompanying notebook III at tab 44]

[62] *Id.*

[63] Arrest Warrant of 11 April 2000 (Congo v. Belg.), Cour de Cassation (Fr.), Mar. 13, 2001, Judgment No. 1414, *reprinted in* 105 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 473, para. 161 (2001).

[64] Prosecutor v. Charles Taylor, Case No. SCSL-01-01-PT, (May 2007).[reproduced in accompanying notebook at II tab 24]

under international law.[65] The court rejected his argument based on the Statutes of the Nuremberg and Tokyo International Military Tribunals, the approach and authority vested in ad hoc international criminal courts, the approach of the ICC, as well as the holdings in the Arrest Warrant and Pinochet cases.[66] The court stated that from viewing the evolution of immunities afforded to high-ranking officials, "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."[67]

There is strong precedent for the denial of immunity claims when individuals are being tried before UN created "international" courts, however there exists no bright line rule for defining an "international court." A survey of relevant case law reveals several factors that courts balance to make determinations when the issue arises including: 1) the authority vested to the court, 2) the characteristics of the court, and the 3) the subject matter jurisdiction of the court.[68] The STL has several distinctive attributes that no UN created court before it possessed.

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[65] Dapo Akande, *International Law Immunities and the International Criminal Court, 98 AM. J. INT'L L. 407, 416 (2004)*. [reproduced in accompanying notebook II at tab 35].

[66] Prosecutor v. Charles Taylor, Immunity from Jurisdiction, No. SCSL-03-01-I (May 31, 2004).[reproduced in accompanying notebook II at tab 24].

[67] Prosecutor v. Charles Taylor, Immunity from Jurisdiction, No. SCSL-03-01-I (May 31, 2004).[reproduced in accompanying notebook II at tab 24].

[68] *See Generally* William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, 514 (2008) (looking to the subtopic's of Schabas's article for direction on factors).[reproduced in accompanying notebook III at tab 44]; *See also* International Center for Transitional Justice Prosecutions Program, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON, 9-31 (April, 10 2008)(comparing and contrasting the STL to other international ad hoc and hybrid tribunals).[reproduced in accompanying notebook III at tab 54]
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	STL (2007)	ICTY (1993)	ICTR (1994)	SCSL (2002)	ECCC (2003)	ICC (2002)	ICJ

These characteristics raise new legal issues that must be addressed to determine if the STL, a court of "international character" (as described by the Security Council in its creation) is also an "international court." These attributes include it being the first tribunal of international character that: 1) will hear solely cases of crimes of terrorism and terrorism-related offenses, 2) with subject matter jurisdiction framed only with references to domestic law, and 3) who's statute does not eliminate state official immunity like other UN created tribunals before it. [69] To determine if the STL is an international tribunal a comparison must be completed of the STL and previous international UN created tribunals. The following is a visual comparative representation of the STL, previous UN created hybrid and ad hoc tribunals, as well as the ICC and the ICJ. Following the visual comparison, this memorandum will individually analyze each component in a legal context.

a) Visual Comparison of UN Created Tribunals

69 Melia Amal Bouhabib, *Power and Perception: The Special Tribunal for Lebanon*, 5 J. Int'l Crim. Just. 1061 (2009), *available at* http://works.bepress.com/melia_bouhabib/1. [reproduced in accompanying notebook at tab 38]

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War Crimes Lab Fall 2009
Office of the Prosecutor Special Tribunal for Lebanon

Mode of Establishment	Agreement between Lebanon and Security Council not Ratified in Lebanon, Security Council uses Chapter VII Powers to impose agreement	Imposed by Security Council under Chapter VII Powers - Resolution 827	Imposed by Security Council under Chapter VII Powers - Resolution 955	Bilateral Agreement/Treaty between the Security Council and Sierra Leone	Bilateral Agreement/Treaty between the General Assembly and Cambodia	Universal Multilateral Treaty - "Rome Statute of the International Criminal Court"	Universal Multilateral Treaty – Under Chapter XIV of the Charter of the United Nations
Provision Eliminating High Ranking Official Immunities in Charter	No	Yes	Yes	Yes	Yes	Yes	Yes
Security Council Voting Record	10 Approve, 5 Abstain	15 Approve	13 Approve, 1 Abstains, 1 Disapproves	N/A	N/A	N/A	N/A
Title and Description	"Special" Tribunal for Lebanon	"International" Criminal Tribunal for Yugoslavia	"International" Criminal Tribunal for Rwanda	"Special" Court for Sierra Leone	"Extraordinary" Chambers in the Courts of Cambodia	"International" Criminal Court	"International" Court of Justice
Judicial Composition	Majority International, Minority National	All International	All International	Majority International, Minority National	Majority National, Minority International	All International	All International
Funding	Voluntary Contributions: 49% Lebanon & 51% Other States	Contributions by All Member States of the UN as decided by budgetary bodies of the General Assembly	Contributions by all Member States of the UN as decided by budgetary bodies of the General Assembly	Voluntary Contributions of UN Member States	Voluntary Contributions of UN Member States	Contributions by All Member States of the UN as decided by budgetary bodies of the General Assembly	Contributions by All Member States of the UN as decided by budgetary bodies of the General Assembly
Location	Headquarters: The Hague, Netherlands Field Office: Beirut, Lebanon	The Hague, Netherlands	Headquarters: Arusha, Tanzania Field Office: Kigali, Rwanda	Freetown, Sierra Leone Exception: *Charles Taylor Trial*: The Hague, Netherlands	Phnom Penh, Cambodia	The Hague, Netherlands	The Hague, Netherlands
Procedural Methods of the Court	International Covenant on Civil and Political Rights	International Covenant on Civil and Political Rights	International Covenant on Civil and Political Rights	International Covenant on Civil and Political Rights	International Covenant on Civil and Political Rights	International Covenant on Civil and Political Rights	International Covenant on Civil and Political Rights

Subject Matter Jurisdiction	Lebanese Penal Code: Terrorist Attacks and Assassinations	War crimes, Genocide, and Crimes Against Humanity	War crimes, Genocide, and Crimes Against Humanity	War crimes, Crimes Against Humanity and Domestic Crimes (independent not linked to the domestic judicial system)	War Crimes, Genocide, Crimes Against Humanity and Domestically Defined Crimes (linked to the domestic judicial system)	War Crimes, Genocide, and Crimes Against Humanity for individuals referred by the Security Council	Jurisdiction over disputes between or among states, no jurisdiction over violations of international or domestic criminal law committed by individuals

b) *Level of Authority Vested to the STL*

The level of authority vested to the STL can be determined by evaluating the mode of establishment used to create the court, the explicit powers granted to it through its statute, and the level of Security Council Support expressed during its creation. In addition to these three factors, the historical background of the STL's creation gives further insight into the international nature of the tribunal. These combined aspects of the tribunal illustrate that the STL has been vested a level of authority similar in scope to other international tribunals.

(1) Mode of Establishment

Examining a court's mode of establishment is one factor weighed in determining if the authority vested into the court from the international community mirrors the levels afforded to other international courts.[70] The STL's creation through the Security Council passing agreement 1757 for the tribunal under its Chapter VII enforcement powers is unique from methods used by other ad hoc or hybrid international tribunals. The forms of establishment for

[70] Larry D. Johnson, *MYRES S. MCDOUGAL LECTURE: UN-Based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L. & POL'Y 275, 276 (2008). [reproduced in accompanying notebook II at tab 34]

previous UN created international tribunals includes a Security Council Resolution under Chapter VII enforcement powers, an agreement between the UN and the nation the tribunal is created for, and a multilateral universal treaty.

The Security Council representing the will of the international community established the two ad hoc tribunals, the ICTY and ICTR under its Chapter VII enforcement powers.[71] This is a valid method of establishment for an international tribunal because states through the Security Council may choose to bring alleged perpetrators of crimes under international law before an international tribunal instead of an International Court.[72] This option is recognized in Article VI of the Genocide Convention, the commentary to the 1949 Geneva Conventions, and through the Nuremburg Judgment.[73]

The two hybrid tribunals, the SCSL and ECCC were created through a bilateral treaty between the UN and the respective countries. The SCSL signed a treaty with the Security Council and the ECCC with the UN General Assembly.[74] These tribunals were not imposed on the countries concerned like the ITCY and ITCR were; they instead were created with the consent and at the request of each nation. It may be contested that the STL's new method of creation, through the UN Security Council passing an agreement under its Chapter VII powers

[71]Larry D. Johnson, *MYRES S. MCDOUGAL LECTURE: UN-Based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L. & POL'Y 275, 276 (2008). [reproduced in accompanying notebook II at tab 34]

[72] Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* Vol. 1, Transnational Publishers Inc., New York, NY 37 (1995). [reproduced in accompanying notebook II at tab 31].

[73] *Id.*

[74] *Id.*

that has not been ratified by Lebanon, is not a valid method of formation used by prior international tribunals. That the Security Council overstepped its powers and forcibly passed a treaty through its "peacekeeping" powers.[75]

Specifically, individuals with immunities claims may argue that because the Lebanese Parliament has yet to approve the agreement, Lebanon itself does not endorse the tribunals and the tribunal is invalid without the actual ratification of the agreement by the Lebanese Parliament. In November of 2006, the United Nations Legal Counsel Nicolas Michel addressed this issue when he spoke to the Security Council and stated,

> "The Lebanese constitutional process for the conclusion of an agreement with the United Nations has not been completed . . . major steps remain to be taken, in particular formal approval by the Government, which is the prerequisite for the signature of the treaty and its submission for parliamentary approval and, ultimately, its ratification."[76]

Although the Security Council was forced to move the agreement to implementation through its Chapter VII powers, it did not intend to bring the agreement into force as an international treaty binding Lebanon but instead was complying with Lebanon's request for a tribunal to be created. Like the ICTY, ICTR, ECCC, and the SCSL, the STL was created after careful consideration of the advantages and the disadvantages of the various options for establishment.[77] Prime Minister Fouad Siniora first approached the UN and requested the

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[75] Charter of the United Nations, Chapter VII, *available at* http://www.un.org/en/documents/charter.shtml.).[reproduced in accompanying notebook I at tab 11].

[76] Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 ICJ 1091, 1092 (2007). [reproduced in accompanying notebook III at tab 40].

[77] Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1, Transnational Publishers Inc New York, NY 79-81 (1998).).[reproduced in accompanying notebook II at tab 32]

tribunal be created. It has not been adopted constitutionally by Lebanon because the Lebanese Parliament has not approved the plan. One reason for the stalled approval of the tribunal in Parliament is that the Lebanese Parliament speaker, Nabih Berri, will not convene the chamber to address the tribunal's creation. [78] In the Taylor Case, the appeals chamber of the SCSL also faced a similar argument. The defense argued that a Security Council created agreement for a tribunal between the Sierra Leone government and the UN was not supported by the will of the Sierra Leone people because it although the agreement was ratified, it was not approved by a popular referendum, and accordingly was not a legitimate international tribunal.[79] The prosecution countered that the agreement between Sierra Leone to create the tribunal and the UN was representative of an agreement between Sierra Leone and all members of the UN, and that a referendum was not needed.[80] Additionally, that the agreement was a representation of the overall will of the international community (including Sierra Leone) to try the crimes committed in Sierra Leone at an international level, and the binding resolution trumped any lack of support shown by the citizens of Sierra Leone through a referendum.[81] It was held that the court was a "truly international court" under this line of reasoning. [82] Like the SCSL the STL was also

[78] Security Council 5685th Meeting (PM), *Security Council authorizes establishment of special tribunal to try suspects in assassination of Rafiq Hariri*, Resolution 1757 http://www.un.org/News/Press/docs/2007/sc9029.doc.htm (2007) (Adopted by 10-0-5; China , Indonesia, Qatar, Russian Federation, South Africa Abstain).[reproduced in accompanying notebook III at tab 58].

[79] Decision on Immunity from Jurisdiction, *Taylor* (SCSL-2003-01-I), Appeal Chamber, 31 May 2004.[reproduced in accompanying notebook II at tab 24]

[80] *Id.*

[81] *Id.*

[82] *Id.*

created by a request from the national government, however unlike Sierra Leone the Lebanese government has not approved the creation of the tribunal.[83] It may be argued that Lebanon does not expressly disapprove of the tribunal, and that the will of the people is unknown only because Nabih Berri is refusing to convene parliament and accordingly freezing the political process.[84] Additionally, unlike the other tribunals that did not involve the respective governments in the negotiations for their statutes, the Lebanese government has been actively involved in creating the STL statute showing further support for the tribunal.[85] Complying with Lebanon's requests the Council created the Resolution under its Chapter VII Article 39 powers of "promoting international peace and security", and did not forcibly ratify a treaty but instead established a new international criminal jurisdiction.[86]

The mode of establishment for the STL will have implications on the enforcement powers the tribunal holds, the Agreement and Statute for the STL binds Lebanon with tribunal decisions, but are silent as to the tribunal's powers to require states to comply with its orders and

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[83] Security Council 5685th Meeting (PM), *Security Council authorizes establishment of special tribunal to try suspects in assassination of Rafiq Hariri*, Resolution 1757 http://www.un.org/News/Press/docs/2007/sc9029.doc.htm (2007) (Adopted by 10-0-5; China , Indonesia, Qatar, Russian Federation, South Africa Abstain).[reproduced in accompanying notebook III at tab 58]

[84] Marieke Wierda, Habib Nassar, Lynn Maalouf, *Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon*. 5 J. INT'L CRIM. JUST. 1065, 1074 (2007). [reproduced in accompanying notebook III at tab 49]

[85] International Center for Transitional Justice Prosecutions Program, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON, 35 (April, 10 2008).[reproduced in accompanying notebook III at tab 54]

[86] Charter of the United Nations, Chapter VII *available at* http://www.un.org/en/documents/charter.shtml.).[reproduced in accompanying notebook I at tab 11]

requests.[87] Formation of a tribunal through a bilateral treaty affords the court no enforcement powers for orders and requests outside of the states concerned with the tribunals.[88] In contrast, establishment through a Security Council imposed resolution binds all UN member states, requiring them to comply with the tribunal's orders under their Chapter VII enforcement powers. It also allows the Security Council to enforce sanctions on states that do not comply with requests of the tribunal.[89] For the ICTY and ICTR Security Council Chapter VII enforcement, powers apply to every portion of the Resolutions. For example, the ITCR statute states that under the Secuirty Council chapter VII powers;

> ". . . all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and *requests* States to keep the Secretary-General informed of such measures;"[90]

For the STL Chapter VII enforcement powers apply only to the first paragraph of the Tribunals Resolution 1757, and this paragraph does not address issues of requiring compliance by third party states with the court's decisions and requests.[91] This paragraph states,

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[87] International Center for Transitional Justice Prosecutions Program, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON, 36 (April, 10 2008).[reproduced in accompanying notebook III at tab 54]

[88] *Id.*

[89] *Id.*

[90] Statute of the International Criminal Tribunal for Rwanda, art. 6, S.C. Res. 955, U.N. SCOR 49th Sess., 3453d mtg. at 16, U.N. Doc. S/Res/955 (1994). [reproduced in accompanying notebook I at tab 6].

[91] *Id.*

> "*Reaffirming* its determination that this terrorist act and its implications constitute a threat to international peace and security,
>
> 1. *Decides*, acting under Chapter VII of the Charter of the United Nations, that:
>
> (a) The provisions of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19 (1) of the annexed document before that date;
> (b) If the Secretary-General reports that the Headquarters Agreement has not been concluded as envisioned under Article 8 of the annexed document, the locationof the seat of the Tribunal shall be determined in consultation with the Government of Lebanon and be subject to the conclusion of a Headquarters Agreement between the United Nations and the State that hosts the Tribunal;
> (c) If the Secretary-General reports that contributions from the Government of Lebanon are not sufficient to bear the expenses described in Article 5 (b) of the annexed document, he may accept or use voluntary contributions from States to cover any shortfall."[92]

Following the paragraph the Security Council attached the agreement between the Council and Lebanon. This language only affords the Security Council's chapter VII powers to the establishment of the tribunal, requiring the agreement for the STL be entered into force.

Lack of enforcement powers may cause problems for the tribunal if it needs a nation to extradite their officials so that they may be tried before the tribunal. Lebanon is the only nation bound by Security Council resolution 1757 that is required to co-operate completely with requests of the STL.[93] Accordingly, it is possible that Syria, a third party state to the tribunal, may choose not to carry out the requests of the court.[94] This might cause problems with

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[92] Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. DOC. S/RES/1757 (May 30, 2007). [reproduced in accompanying notebook I at tab 1].

[93] Katherine Iliopoulos, *Hariri Tribunal Opens in The Hague*, Crimes of War Project (2009*), available at*, http://www.crimesofwar.org/onnews/news-lebanon.html. [reproduced in accompanying notebook I at tab 15].

[94] *Id.*

completing arrests or surrenders of Syrian nationals or any other nationals that belong to third party States.[95]

(2) Presence of Explicit Provision Eliminating High-ranking Official Immunities in the Charter

Another reflection of the authority vested in the STL is the explicit powers granted to it through its statute. All International Jurisdictions prior to the STL, including, the ICTY, ICTR,[96] the Extraordinary Chambers for the Courts of Cambodia, and the International Criminal Court, include a provision in their Statutes derived from the Statute of the International Military Tribunal (Nuremburg) that specifically eliminates Head of State and state official immunity for those being tried.[97] The Nuremburg Charter Article 7 states: "the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[98] The Nuremburg principle has since been restated in the 1946 resolution of the General Assembly that affirmed

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[95] *Id.*

[96] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, S.C. Res. 827, UN SCOR, 48th Sess., 3217th mtg., Annex, UN Doc. S/Res/827/Annex (1993), reprinted in 32 I.L.M. 1192, 1194("The official position of any accused person, whether as Head of **State** or Government or as a responsible Government official, shall not relieve such person of **criminal** responsibility ...."); Statute of the International Criminal Tribunal for Rwanda, art. 6, S.C. Res. 955, UN SCOR 49th Sess., 3453d mtg. at 16, UN Doc. S/Res/955 (1994) [hereinafter ICTR Statute] (same). [reproduced in accompanying notebook I at tab 5]

[97] *See* Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1107, *1111* (2007).[reproduced in accompanying notebook II at tab 36]

[98] See Agreement for the Prosecution and Punishment of the Major War Criminal of the European Axis, and Charter of the International Military Tribunal, *58 Stat. 1544,* 82 UNT.S. 280 (Aug. 8, 1945). (ARTICLE 7).[reproduced in accompanying notebook I at tab III]

the principles of international law recognized by the charter of the Nuremberg Tribunal and Judgment of the Tribunal.[99]

The Nuremburg provision in these jurisdictions bars protection for high-ranking state officials from prosecution, responsibility, or mitigation of punishment for acts being prosecuted by the tribunal.[100] The Statute for the Special Tribunal for Lebanon has a provision in article 6 of the statute that states amnesty will not be a reason to bar prosecution; however, it mentions nothing about excluding state official immunities. [101] It is possible that this was done deliberately, because the elimination of immunity for state officials is typically reserved for international crimes *stricto senso* and no traditional *stricto senso* crimes are being tried before the STL. [102] The issue of whether the crimes being prosecuted at the STL are considered *stricto senso* will be addressed in a later portion of this memorandum.

Syrian officials may also claim that the lack of a provision in the statute eliminating state official immunity grants them this immunity in default.[103] The Office of the Prosecutor can

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[99] Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press New York, NY 209 (2008).[reproduced in accompanying notebook II at tab 28]

[100] See Agreement for the Prosecution and Punishment of the Major War Criminal of the European Axis, and Charter of the International Military Tribunal, *58 Stat. 1544,* 82 UNT.S. 280 (Aug. 8, 1945). (ARTICLE 7).[reproduced in accompanying notebook at tab]

[101] *See* Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1107, *1110-11* (2007).[reproduced in accompanying notebook at tab]

[102] *See* Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1107, 1111 (2007).[reproduced in accompanying notebook I at tab 3]

[103] See Agreement for the Prosecution and Punishment of the Major War Criminal of the European Axis, and Charter of the International Military Tribunal, *58 Stat. 1544,* 82 UNT.S. 280 (Aug. 8, 1945). (ARTICLE 7).[reproduced in accompanying notebook I at tab 3]

argue that, although the STL does not have a provision in its statute eliminating high-ranking state official immunities, the previous unfailing and frequent use of an immunity eliminating clause in previous UN created tribunals signifies the consensus of the international community that all individuals will be required to face justice in front of an international tribunal for the most heinous crimes regardless of their official position.[104] This makes it unnecessary for the drafters of the STL tribunal's statute to include explicit reference to exclusion of immunity statute, as it has become customary in international criminal law for international tribunals to prosecute individuals responsible for committing *stricto senso* crimes regardless of official position.[105] The Draft Code it is not binding authority in international law but is an authoritative instrument that is evidence of customary international law, and it too reflects the need for to eliminate of high-ranking state official immunities for international crimes.[106] It States: "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment."[107] Additionally, the Rome Statute of the International

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[104] Mark A. Summers, *Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States that are Not Parties to the Statute of the International Criminal Court*, 31 Brooklyn J. Int'l L. 463, 486 (2006)).[reproduced in accompanying notebook II at tab 45]

[105] Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press New York, NY 209 (2008).[reproduced in accompanying notebook II at tab 28]

[106] Nsongurua J. Udombana , Pay Back Time in Sudan? Darfur in the International Criminal Court, 13 Tulsa J. Comp. & Int'l L. 1, 39-40 (2005). [reproduced in accompanying notebook III at tab 48]

[107] *Id.*

Criminal Court specifically eliminates all immunities for individuals accused of all international crimes. Article 27(1) of the Statute states:

> "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute."[108]

These legal authorities and the explicit elimination of high-ranking official immunity in the statutes of all UN created tribunals (with the exception of the STL) suggest that it has become customary in international criminal law to eliminate state official immunity protections for individuals being tried before UN created tribunals. Accordingly, it was not necessary to include a provision in the statute of the STL, and the lack of one does not reduce the authority vested to the tribunal by the members of the UN to try individuals regardless of their official positions.

(3) Level of Security Council Support for the Creation of the tribunal

The level of Security Council support during the creation of the tribunal is also reflective of the implicit authority vested to the STL by the international community. The Security Council must vote to establish a tribunal under its Chapter VII powers, and during the creation of Resolution 1757 for the STL; five Security Council members abstained from voting.[109] It may be contested that the five abstentions reflect the apprehensions of Security Council members that

[108] Rome Statute of the International Criminal Court, art. 27(1), UN Doc. A/ CONF.183/9 (1998), reprinted in *37 I.L.M. 999, 1017 (1998)* [hereinafter Rome Statute]. [reproduced in accompanying notebook I at tab 9]

[109] United Nations Security Council 5686 Meeting Record on *the creation of the Special Tribunal for Lebanon,* S/PV.5685 30 (May 2007) [reproduced in accompanying notebook III at tab 59]

the Council is exceeding its authority and interfering into strictly domestic Lebanese issues. Additionally, that the voting record is proof that the STL is not a legitimate international tribunal created from a Security Council supported resolution.[110] The ICTY was established through Resolution 827 under chapter VII of the UN charter by a unanimous vote in the Security Council.[111] The Security Council passed resolution 955 that created the ICTR with one member voting against its creation and one abstaining. [112] It is arguable that the ICTR vote of no support coupled with an abstention is stronger evidence of the lack of international agreement for the tribunal, than the five abstentions present in the creation of the STL. However, in addition to the five votes of abstention council members cautioned that the implementation of the STL could have serious political repercussions. Despite of these concerns, the STL Resolution was pushed forward and legitimately passed like the ICTY and ICTR, and without any members of the Council voting against its implementation. Like the ICTY and the ICTR, the UN views the STL as a legitimate Security Council backed international tribunal.[113] A further examination of the history behind its creation better defines the authority vested in the STL.

c) *History of Establishment*

Several events leading up the implementation of the STL contribute to the conclusion that it was intended to be an "international" tribunal capable of eliminating state official immunity

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[110] *Id.*

[111] *International Center for Transitional Justice Prosecutions Program, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON, 36 (April, 10 2008). [reproduced in accompanying notebook III at tab 54]*

[112] *Id.*

[113] *Id.*

claims. The prime minster of Lebanon referred to the STL as being a "tribunal of an international character" in his letter on December 13th, 2005 to the Secretary General of the United Nations that launched the process of the tribunal creation.[114] The Security Council and the Secretary General of the United Nations continued to use the term, "tribunal of an international character" in various other official documents and reports when referring to the STL.[115] For example, the Secretary General in a Report to the Security Council specifically stated that a purely national tribunal would not be able to fully prosecute those accused of the assassination and other acts being tried.[116] However, the Secretary General also pointed out in his report that a purely international tribunal would not give enough responsibility to Lebanon for achieving justice in crimes that affect Lebanon primarily.[117] This designated the tribunal as a hybrid form of court but did little to clarify the definition of a court of "international character." After this report, the Security Council requested the Secretary General negotiate the establishment of a tribunal of "international character."[118] The Secretary General acted accordingly and published a second report with the draft agreement between the UN and Lebanon for the new tribunal, and directly addressed the concept of developing a "tribunal of

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[114] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, 514 (2008). [reproduced in accompanying notebook III at tab 44]

[115] *Id.* (proposing Lebanon would have a tribunal that is an international or internationally assisted tribunal based on an agreement between the United Nations and Lebanon).

[116] Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005) UN Doc. S/2006/176 (2006). [reproduced in accompanying notebook III at tab 56]

[117] *Id.*

[118] Schabas supra note 110 at 515 [reproduced in accompanying notebook III at tab 44]

international character." [119] In this report, he stated that although features of international character were not specifically discussed in the statute,

> "The legal basis for the establishment of the special tribunal is an international agreement between the United Nations and a Member State; its composition is mixed with a substantial international component; its standards of justice, including principles of due process of law, are those applicable in all international or United Nations-based criminal jurisdictions; its rules of procedure and evidence are to be inspired, in part, by reference materials reflecting the highest standards of international criminal procedure; and its success may rely considerably on the cooperation of third States. While in all of these respects the special tribunal has international characteristics, its subject matter jurisdiction or the applicable law remains national in character, however." [120]

The Secretary General established through this statement the several attributes of the STL that mirror other international criminal tribunals. However, he also expressed that the subject matter (including terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences) of the tribunal and the applicable law (the Lebanese Criminal Code) were national in character.[121]

These combined events demonstrate the UN's opinion that the STL is similar to other international tribunals with the exception of its subject matter jurisdiction, which only covers crimes defined under the Lebanese Penal Code. The next sections of this memo will evaluate if the STL can be considered "international" by definition even if its subject matter and

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[119] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, 515 (2008). [reproduced in accompanying notebook at tab]

[120] Report of the Secretary-General on the establishment of a special tribunal for Lebanon UN Doc. S/2006/893 (2006).. (emphasis added)[reproduced in accompanying notebook III at tab 57]

[121] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, 516 (2008). [reproduced in accompanying notebook III at tab 44]

applicable law is national in character, either because the nature of the crimes being tried are international or because of other international characteristics that supersede the tribunals national traits.[122]

d) *Characteristics of The Special Tribunal for Lebanon*

In addition to evaluating the authority vested to the tribunal, the "characteristics" of the court may be assessed to determine if the STL is an "international" tribunal capable of eliminating high-ranking official immunity claims. The characteristics of a court include its title and description, the composition of its judges and staff, its sources of funding, and location.[123] When evaluating these characteristics for the STL it is important to compare its attributes to previous UN created ad hoc and hybrid tribunals. The characteristics of the STL are evaluated along with the level of authority vested to the court and the subject matter jurisdiction of the court (which will be discussed in a later portion of this memorandum) to determine if it is an "international" tribunal capable of eliminating immunity claims.

(1) Title and Description of the Court

The first characteristic of the tribunal that aids in determining if it is "international" is its title and description. Unlike several other previous UN sponsored criminal tribunals the Special Tribunal for Lebanon does not have the word "international" in its title. In contrast, the

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[122] *Id.*

[123] *See Generally* International Center for Transitional Justice Prosecutions Program, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON, 9-31 (April, 10 2008)(comparing and contrasting the STL to other international ad hoc and hybrid tribunals).[reproduced in accompanying notebook III at tab 54].

International Court of Justice, the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda all include the term "international" in their titles.[124] *In Prosecutor v. Taylor* a similar legitimacy argument was brought before the Appeals Chamber of the Special Court for Sierra Leone (SCSL), which along with the Extraordinary Chambers in the Courts of Cambodia (ECCC) is also missing "international" in its name. The Appeals Chamber attached little significance to distinctions in the titles of the tribunals, and held that a "Special Court" is equivalent in status to other UN backed international tribunals with the word "international" in their title.[125] Similarly, the STL uses the designation of "special" in its title and was created by UN. It is unlikely that the lack of the term "international" in its title will delegitimize it as an international tribunal.

(2) Judicial and Staff Composition of the Court

The second factor used for evaluation to determine if the STL is an "international" tribunal is the composition of its judges and staff. A comparison of the Judicial Composition of the STL reveals that it is similar to UN created hybrid tribunals. In the ICTY and the ICTR ad hoc tribunals, all of the judges are international with no national judges serving in the Chambers.[126] The statute that establishes the STL states that the chambers must be composed

[124] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, 514 (2008). [reproduced in accompanying notebook III at tab 54].

[125] Prosecutor v. Taylor, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, A. Ch., 31May 2004. [reproduced in accompanying notebook II at tab 24]

[126] Security Council 5685th Meeting (PM), *Security Council authorizes establishment of special tribunal to try suspects in assassination of Rafiq Hariri*, Resolution 1757 http://www.un.org/News/Press/docs/2007/sc9029.doc.htm (2007) (Adopted by 10-0-5; China ,

of at least 11 independent judges and no more than 14 judges. Additionally, the judges on the STL must serve in the following capacities: 1) a single international judge as the Pre-Trial Judge, 2) three judges in the Trial Chamber, one who is Lebanese and two who are international, 3) in the event of the creation of a second Trial Chamber, that Chamber must be staffed in the same international to national ratio as the first defined Trial Chamber, 4) five judges must serve in the Appeals Chamber, including two Lebanese judges and three international judges, and there must be 5) two alternate judges, one who is Lebanese and one who is international.[127] It could be argued that because the STL's judicial body (the Chambers) does not consist of an international judicial staff it is not a characteristically international tribunal. However, the ECCC and SCSL hybrid tribunals do not have an entirely international judicial staff and are considered characteristically international. In the chambers of the SCSL, the majority of the judges are international with the minority being from Sierra Leone, and at the ECCC, the majority of the judges are national with a minority being international.[128] It is noteworthy that like the SCSL, the majority of judges in each of the trial and appeals chambers of the STL must be international. The STL chambers employ more "international" judges than the ECCC, and its similarity in composition to the SCSL makes it characteristically "international."

Indonesia, Qatar, Russian Federation, South Africa Abstain) [reproduced in accompanying notebook III at tab 58]

[127] *Id.*

[128] Larry D. Johnson, *MYRES S. MCDOUGAL LECTURE: UN-Based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L. & POL'Y 275 (2008). [reproduced in accompanying notebook at tab 34].

In addition to the Chambers, there are three additional bodies of employees that perform different functions these include, the Registry, Prosecutor, and Defense office.[129] The STL's register is an employee of the United Nations who receives aid from the UN Office of Legal Affairs.[130] The prosecutor for the STL is chosen from a selection panel that is appointed by the Secretary-General, Lebanon will get to choose the deputy-prosecutor.[131] The ECCC was the first tribunal to use the method of choosing a prosecutor through a panel, and the STL is the only tribunal to follow its example. It could be contested that the selection of a prosecutor through a panel is not transparent process, additionally the presence of a national deputy prosecutor is evidence that the SCL is not an international tribunal. However, the use of a selection panel arguably allows for the selection of a more impartial and professional tribunal staff.[132] Moreover, a domestic deputy prosecutor was used in the ECCC and was proposed at the SCSL.[133] The Prosecutor selection process and composition is similar to other international tribunals.

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[129] *See generally* Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. DOC. S/RES/1757 (May 30, 2007). (defining throughout the different bodies of the tribunal and their functions) [reproduced in accompanying notebook at tab 1]

[130] Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. DOC. S/RES/1757 (May 30, 2007). [reproduced in accompanying notebook at tab 1]

[131] International Center for Transitional Justice Prosecutions Program, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON, 35–38 (April, 10 2008). reproduced in accompanying notebook at tab 54].

[132] *Id.*
[133] *Id.*

The STL is the first to include the office of the defense as a fourth "organ" of the court.[134] Under the STL statute the defense office has the same status as the prosecutor, the chambers, and the registry. [135] Including the defense office as an organ of the court ensures defendants will be afforded a more effective defense than other tribunals because defendants will have more access to court finances and resources. Like other UN tribunals, the UN Secretary-General, in consultation with the STL's president, appoints the head of the STL Defense Office.[136] Overall, the defense office is more arguably more international in nature than the Defense Offices of other UN backed tribunals because the office is included as an official organ of the court.

(3) Funding Sources

The funding scheme for the STL is the third characteristic that is weighed to determine if the tribunal is characteristically "international." The ICTY and ICTR ad hoc tribunals are subsidiary bodies of the Security Council and report directly to it; accordingly, the two tribunals receive their funding in the same manner as other UN established program activities.[137] Every expense for the ICTY and ICTR is reviewed and funded by all of the Member States of the UN, and a budgetary body in the General Assembly determines each member state's contribution.[138] In comparison, the SCSL and the ECCC are funded by voluntary contributions of UN Member

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134 *Id.*
135 *Id.*
136 *Id.*
137 Larry D. Johnson, *MYRES S. MCDOUGAL LECTURE: UN-Based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L. & POL'Y 275, 279 (2008) [reproduced in accompanying notebook at tab 34]

138 *Id.*

States, and do not receive contributions from the general UN budget.[139] The STL's funding scheme is similar to the funding systems used by the SCSL and the ECCC. Unlike the ad-hoc international tribunals, the STL is not funded by regular contributions to the United Nations, and it will not be required to report to the UN General Assembly.[140] The STL will be funded 49% by voluntary contributions of nation states, and 51% by Lebanon.[141]

In addition, if the appropriate amount of voluntary funding cannot be acquired the Security Council may explore other means of financing. [142] Individuals claiming immunity may argue that this funding scheme allows for further funding to come from Lebanon, and that a tribunal that receives the majority of its funding from the Lebanese's Government is not international, but instead a domestic court. However, it is likely that the Security Council put this provision in the agreement to leave open the possibility of funding from the UN general fund like the SCSL has received or from other interested UN member donors.[143] The SCSL and the ECCC have both had difficulties raising funds for the tribunals; this funding uncertainty may

[139] *Id.*

[140] International Center for Transitional Justice Prosecutions Program, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON, 15 (April, 10 2008). [reproduced in accompanying notebook at tab][reproduced in accompanying notebook at tab 54]

[141] *Id.* at 16.

[142] Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. DOC. S/RES/1757 (May 30, 2007). (May 30, 2007) [reproduced in accompanying notebook at tab 5].

[143] International Center for Transitional Justice Prosecutions Program, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON, 16 (April, 10 2008). [reproduced in accompanying notebook at tab 54]

lead to delays in the judicial process.[144] Requiring Lebanon to contribute a set amount, while still allowing for flexibility in the funding percentage from donors will ensure the tribunal does not face the same financial difficulties that other voluntarily funded UN tribunals have faced.

Additionally, Syria may argue that the large contribution of funding to the STL by the Lebanese government reduces the accountability and impartiality of the court, and prosecutions and convictions will be largely guided by Lebanese - not International interests. However, like the Special Court for Sierra Leone, the STL has a management committee composed of its major international donors that provides policy advice and direction for the non-legal aspects of the court.[145] This body can insure that the use of funding reflects the needs of the international community that created the tribunal.[146] Current members of the Management Committee include the United Kingdom (the committee chair), Germany, the Netherlands, the United States, France, and Lebanon.[147] The Secretary-General of the UN is also an ex-officio member of the Committee, the Secretary-General does not vote on Management Committee Decisions, but adds an additional degree of impartiality and international character to the STL.[148] The management committee is required to report on a regular basis to the "Group of Interested States," an assembly of nations that are interested in knowing about the happenings of the tribunal but may

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[144] Larry D. Johnson, *MYRES S. MCDOUGAL LECTURE: UN-Based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L. & POL'Y 275, 280 (2008). reproduced in accompanying notebook at tab 34].

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

not necessarily support its work.[149] Syria or any other UN member state may join this group if it is concerned with the financial influence of the STL's funding scheme. The management committee may also expand its membership if any additional considerable donors wish to participate. The funding system for the STL is very similar to the voluntary donor systems used by the ECCC and the SCSL, and although Lebanon is required to contribute 49% of the funding for the tribunal the accountability provided by the Management Committee will ensure that its funds are used to achieve impartial international justice.

(4) Location of the Courts Headquarters and Offices

The location of the STL is the forth factor evaluated when determining if the tribunal is characteristically "international". The principal judicial organs of the UN, the International Court of Justice, and the International Criminal Court are all located in The Hague, Netherlands.[150] The placement of these judicial organs couple with the inability to hold a tribunal in a war torn nation prompted the placement of the ICTY in The Hague as well.[151] Like the ICTY, the ICTR was established soon after a war and its main office is located outside of the nation, in Arusha, Tanzania but it still staffs a field office in Kigali, Rwanda.[152] In contrast, the SCSL and the ECCC are located in the borders of the concerned countries. The STL's location is most similar to the ICTR, with its headquarters stationed outside of Lebanon in The Hague,

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

Netherlands and a field office in Beirut, Lebanon.[153] In Article 8 of the Security Council Agreement for the STL it states that the Tribunal shall specifically have its "seat" outside of Lebanon to insure that justice, fairness, security and administrative efficiency (which includes upholding the rights of witnesses and victims).[154] The tribunal consequently signed a "headquarters agreement" with the Netherlands through the UN legal counsel to keep the headquarters in The Hague throughout its existence.[155] The headquarters location of the STL mirrors the placement of multiple other UN created international courts, including the ICJ, the ICC, the ICTY, and the Appeals Chamber for the ICTR.[156]

It may be argued that because the STL has an office in Lebanon that total impartiality will not be achieved. In the Security Council agreement, it states that the purpose of the Lebanon office is to further investigations.[157] However, it is possible that it could also be used conduct trials of the accused, and this could lead to a slippery slope of all trials eventually being held in Lebanon under the Lebanese Penal Code, an event that would eliminate its "international" characteristics.[158] It is unlikely that any trials will be held in Lebanon because

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[153] International Center for Transitional Justice Prosecutions Program, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON, 12 (April, 10 2008). [reproduced in accompanying notebook at tab 54]

[154] Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. DOC. S/RES/1757 (May 30, 2007). [reproduced in accompanying notebook at tab 1]

[155] International Center for Transitional Justice Prosecutions Program, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON, 12 (April, 10 2008). [reproduced in accompanying notebook at tab 54]

[156] *Id.*

[157] Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. DOC. S/RES/1757 (May 30, 2007).[reproduced in accompanying notebook at tab 1]

[158] Katy Glassborow, *"Turf War" Over Charles Taylor Case*, Institute for War and Peace

of the need for high levels of security. In international tribunals that prosecute high-ranking state officials, it is necessary to keep the trial of high-ranking officials who still have supporters outside of the nations boarders. The need to conduct trials in a location outside of a nation was addressed during the *Charles Taylor* trial at the SCSL. The decision to move Taylor's trial from Sierra Leone to The Hague occured to ensure the existing Taylor supporters in Sierra Leone would not use violent means to delay or enable to the trial from occurring.[159]

As previously discussed in the background portion of this memorandum the current political environment of Lebanon is heated, and holding prosecutions in the Lebanon Beirut office is improbable.[160] The divisions and tensions among the groups of Lebanon has already lead to violence and killings, and the increased security risks of holding a trial in Lebanon would make a functioning court almost impossible.[161] The location of the STL is characteristically international because of the limited function of the Beirut office and the headquarters of the tribunal being located out of the country in The Hague, Netherlands.

Reporting, Mar. 23,
2007, at 1, http://www.iwpr.net/?p=acr&s=f&o=334328&apc_state=henpacr. reproduced in accompanying notebook at tab 14]

[159] *Id.* ("While other trials conducted by the United Nations-backed Special Court for Sierra Leone, SCSL, have taken place in Freetown, the court is trying Taylor at the premises of the International Criminal Court, ICC, in The Hague. The decision to locate the trial in The Hague was taken in the interests of keeping the peace in Sierra Leone and the wider region.") [Reproduced in accompanying notebook II at Tab 76].

[160] Infra section

[161] Larry D. Johnson, *MYRES S. MCDOUGAL LECTURE: UN-Based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L. & POL'Y 275, 279 (2008) [reproduced in accompanying notebook at tab 34]

(5) Procedural Law of the Special Tribunal for Lebanon

All of the UN created tribunals listed in the visual comparison section of this memorandum use very similar procedural laws.[162] Each tribunal's procedural laws are based on the international standards of justice and due process that was inspired by the International Covenant on Civil and Political Rights.[163] Even though the Special Tribunal for Lebanon is the first international tribunal to apply only domestic law, the procedural rule of the tribunal will also be required to replicate international standards of justice and due process.[164] This factor weighs favorably in the determination that the STL is an international tribunal.

When comparing the characteristics of the STL to other UN created tribunals, it is apparent that its characteristics are very similar to other UN created tribunals before it. The traits of the courts will likely not give rise to concerns that characteristically it is not an international tribunal. However, the subject matter jurisdiction of the court may become a seriously contested factor in determining if the STL is an international criminal tribunal for individuals with immunity claims before the court.

e) ***Subject Matter Jurisdiction for the Special Tribunal for Lebanon***

[162] *Id.* at 278.

[163] *Id.*

[164] *Id.*

The subject matter jurisdiction of a court is also evaluated to determine if the tribunal has the ability to prosecute crimes similar to other international tribunals, and is therefore intrinsically "international."[165] The STL may be characteristically similar to a hybrid tribunal, however the scope of its subject matter jurisdiction is unlike any previous UN created tribunals.[166] The Special Court for Sierra Leone and The Extraordinary Chambers of the Courts of Cambodia like the STL have jurisdiction over domestic crimes, however the SCSL and the ECCC also have jurisdiction over international crimes.[167] The STL's jurisdiction is for crimes defined *only* by a domestic source, The Lebanese Penal Code (LPC) [168], and the tribunal is not trying traditional "international" crimes under the Lebanese Penal Code.[169] Included in the jurisdiction of the tribunal are acts of terrorism, crimes, and offenses against life and personal integrity, illicit associations, and failure to report crimes and offences defined under the Lebanese Penal Code.[170] The Tribunal's lack of jurisdictional power over international crimes may be a major problem for the Office of the Prosecutor, because high-ranking state official

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[165] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, 517 (2008). [reproduced in accompanying notebook at tab 44]

[166] *Id.*

[167] Nidal Nabil Jurdi, *THE SUBJECT-MATTER JURISDICTION OF THE SPECIAL TRIBUNAL FOR LEBANON*, 5 J. Int'l Crim. Just. 1125, 1126 (2007).[reproduced in accompanying notebook at tab 41]

[168] *Id.*

[169] Schabas *supra* note 150. [reproduced in accompanying notebook at tab 44]

[170] Jurdi *supra* note 152.[reproduced in accompanying notebook at tab 41]

immunities have not historically been waived for individuals that commit domestic crimes.[171] However, if the acts of terrorism being tried at the STL are considered international in nature, states may be obligated to prosecute or extradite officials to be tried at the tribunal and this will reduce the availability of immunity claims.[172]

(1) Terrorism Defined Under the Lebanese Penal Code

The portions of the Lebanese Penal Code included in the subject matter jurisdiction of the tribunal are; Articles 270, 271, 314, 335, 547, 548 and 549 of the LPC and Articles 2, 4, 5 and 6 of the 'Law dated January 11 1958. This portion of the Lebanese Penal Code (LPC) defines terrorist acts as those activities, "intended to create a state of panic committed by using such means as explosives, inflammable materials, toxic or incendiary products, and infectious and microbial agents that cause public danger." [173] Hariri's assassination was committed by using explosives and will be considered an act of terrorism under the LPC if it can be proven that the accused intended to create a state of fear among the Lebanese public.[174] Assuming the Hariri assassination was an act of terrorism as defined by the LPC, the act must also be classified as an

[171] *Id.*

[172] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, (2008).[reproduced in accompanying notebook at tab 44]

[173] Issam Michael Saliba, *International Tribunals, National Crimes and the Hariri assassination: A Novel Development in International Criminal Law,* The Law Library of Congress 5 (2007) *available at* www.loc.gov/law/help/hariri/hariri.pdf. [reproduced in accompanying notebook at tab 16].

[174] *Id.*

international crime either independently or under the broader subset of "crimes against humanity" to eliminate the immunities of accused state officials before the STL.[175]

(2) Terrorism as an independent international crime defined by a treaty or through customary international

A crime may be defined as "international" either because a treaty labels it as such, or because they are universally accepted through customary international law.[176] In general, international crimes are forms of conduct so egregious that those who engage in the acts are considered "enemies of all man kind," and accordingly all nations of the world have an interest in insuring they are prosecuted.[177] The idea that certain crimes are "international" stems back to the Nuremberg trials where Justice Jackson explained the authority to try certain crimes existed because, "those acts which offended the conscience of our people… (were) criminal by standards generally accepted in all civilized countries."[178] Making this assertion Jackson cited the historic precedent to criminalize these crimes including the Hague Conventions of 1907 that discussed prosecuting war crimes as a part of the "laws of humanity", the Kellogg-Briand pact of 1928 renouncing war, and the Geneva Protocol of 1924 which declared wars of aggression as

[175] Issam Michael Saliba, INTERNATIONAL TRIBUNALS, NATIONAL CRIMES AND THE HARIRI ASSASSINATION: A NOVEL DEVELOPMENT IN INTERNATIONAL CRIMINAL LAW 5 (2007), available at *www.loc.gov/law/help/hariri/hariri.pdf*.[reproduced in accompanying notebook at tab 16]

[176] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, 517 (2008). [reproduced in accompanying notebook at tab 44]

[177] Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH L. REV. 2129, 2134-53 (1999).[reproduced in accompanying notebook at tab 37]

[178] Report of Robert H. Jackson to the President on Atrocities and War Crimes, (June 7, 1945). Available at http://www.yale.edu/lawweb/avalon/kbpact/kbmenu.htm [Reproduced in accompanying notebook at 55]

international crimes.[179] Since Nuremberg, several other tribunals have voiced opinions about the power of tribunals both national and international to try *stricto senso* crimes.

Before the nineteenth century, nations used this concept to justify the prosecution of piracy.[180] Currently there are three widely recognized "international" or *stricto senso* crimes. *Stricto Senso* international crimes include genocide, war crimes, and crimes against humanity. [181] The crimes being tried before the STL including; terrorist acts, crimes of illicit association, and offenses against life and personal integrity are generally not considered part of the historic list of *stricto senso* crimes.[182] However, an international trend is emerging that suggests terrorism should also be included on the list.

(a) Terrorism an International Crime as defined by a treaty

In addition to the universal jurisdiction granted to *stricto senso* crimes, treaties authorize universal jurisdiction over additional crimes. Crimes granted jurisdiction by treaties include torture, hostage apprehension, and hijacking crimes. The grant of universal jurisdiction created by these international documents suggests that perpetrators of these crimes, like those who commit *stricto senso* crimes, are "enemies of mankind" and are condemned by the international

[179] Michael P. Scharf and Michael A. Newton, "Terrorism and Crimes against Humanity" in Leila Sadat, CRIMES AGAINST HUMANITY (forthcoming). [Reproduced in accompanying notebook at 30]

[180] Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH L. REV. 2129, 2134 (1999).[reproduced in accompanying notebook at tab 37]

[181] *See* Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1107, 1110-11 (2007).[reproduced in accompanying notebook at tab 36]

[182] *Id.*

community.[183] In addition to torture, hostage apprehension, and hijacking criminal treaties, there conventions and treaties against terrorism, which require member states to prosecute or extradite the accused to a forum where they can be prosecuted.

International support for combating acts of terrorism through treaties began as early as 1926 when the International Congress of Penal Law recommend that the Permanent Court of International Justice should have the power to "judge individual liabilities" that happened as a result of international offenses that were "a threat to world peace".[184] This idea died, however similar suggestions of including terrorism as an international crime tried under universal jurisdiction have been made throughout the following years.[185] Once suggestion came from the French government to the League of Nations that the ICC would be the best forum for trying political crimes of an international nature, and an international convention on the suppression of terrorism should be created to initiate the process.[186] In 1937, a Conference for the Repression of Terrorism met and collaborated to adopt a Convention of an International Criminal Court to address terrorist acts.[187] Although this treaty was rejected the idea before it was ratified, every

[183] Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH L. REV. 2129, 2134 (1999).[reproduced in accompanying notebook at tab 37]

[184] Michael P. Scharf and Michael A. Newton, "Terrorism and Crimes against Humanity" in Leila Sadat, CRIMES AGAINST HUMANITY (forthcoming), *citing Voeau of the International Congress of Penal Law Concerning an International Criminal Court* (Brussels, 1926), *reprinted in Historical Survey of the Question of International Criminal Jurisdiction,Memorandum Submitted by the Secretary-General* 74, U.N. Doc. A/CN.4/7Rev.1 (1949) (Translating the original French text found in *Premier congres international de droit penal, Actes du congres* 634). [reproduced in accompanying notebook at tab 30]

[185] *Id.*

[186] *Id.*

[187] *Id.*

multilateral anti-terrorism convention adopted since has adhered to the pattern used by the Conference and has defined specific terrorist acts as violations of international law.[188] In 1994, the General Assembly Resolution on "Measures to Eliminate International Terrorism" provided a general definition of terrorism stating:

> "[c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[189]

Currently, several multilateral anti-terrorism conventions exist that focus on the domestic enforcement of terrorism through international cooperation. However, acts of transnational terrorism, like the Hariri assassination, are becoming a serious problem and defining terrorism as an international crime to bring offenders to justice is now a priority in nations across the globe.[190] The large number of existing terrorism treaties is a reflection of this priority of combating terrorism worldwide. However, none of the conventions specifically refer to terrorism as an international criminal offense.[191]

(b) Terrorism as an International Crime as defined by customary international law

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[188] *Id.*

[189] *Id.*, *citing* G.A. Res. 49/60, Dec. 9 1994, para. I.3.

[190] *Id.*

[191] Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1107, *1110-11* (2007).reproduced in accompanying notebook at tab 36]

As previously mentioned, principles that are considered customary international law are those that are broadly accepted by the international community and require the legal obligations of enforcement from all nations.[192] Combating grave crimes under customary international law reflects international community interests about protecting higher norms of justice when they come into conflict with the rules of immunity.[193] The previous section of analysis on terrorism as defined by a treaty provides several examples of the acceptance by the international community for the need to combat terrorism. In addition, the UN General Assembly has voiced its opinion that "any acts of terrorism are criminal and unjustifiable regardless of motivation, whenever and by whomsoever committed and are unequivocally condemned,[194] there have also been proposals to include terrorist crimes in the Statute of the ICC.[195] Currently, the UN Security Council requires member nations of the UN to "accept and carry out" resolutions that combat "terrorism," but has yet to define what those terms mean.[196]

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[192] Jerrold L. Mallory, *Resolving the Confusion Over Head-of-State Immunity: The Defined Rights of Kings,* 86 COLUM. L. REV. 169, 176-77 (1986).[reproduced in accompanying notebook at tab 42]

[193] Arrest Warrant of 11 April 2000 (Congo v. Belg.), Cour de Cassation (Fr.), Mar. 13, 2001, Judgment No. 1414, *reprinted in* 105 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 473 (2001). [reproduced in accompanying notebook at tab 19]

[194] U.N. Doc. A/C.6/62/L.14, Measures to eliminate international terrorism, 13 Nov 2007, UNGAOR (62d Sess.), Agenda Item 108. [reproduced in accompanying notebook at tab 53]

[195] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, 517 (2008). [reproduced in accompanying notebook at tab 44]

[196] Michael P. Scharf and Michael A. Newton, "Terrorism and Crimes against Humanity" in Leila Sadat, CRIMES AGAINST HUMANITY (forthcoming). [reproduced in accompanying notebook at tab 30]

Domestic court cases may aid in determining if a trend exists in customary law of defining terrorism as a *stricto senso* international crime. A few national courts recently expressed support for an exception to state official immunity protections for crimes that are so egregious, that not prosecuting the individuals responsible would violate widely understood norms of justice.[197] Included in these national cases is a US court case, *Siderman de Blake v. Republic of Argentina*, where the court held that international law does not recognize an act of torture as a sovereign act.[198] It may be argued that unlike torture, a bombing which took the lives of 22 individuals by car bomb is not extreme enough to be defined as "international." Those claiming state immunities before the STL might use the *Qaddafi* case as evidence of this assertion. In the *Qaddafi* case, the leader of Liberia, Muammar Qaddafi (hereinafter Qaddafi), was sued in France for his government's participation (complicity) in a terrorist bombing, which lead to the crash of a French UTA aircraft over Africa, and the loss of the 170 French civilian lives.[199] The court held that no matter how serious the crime of terrorism Qaddafi was being charged with was, it did not fall into one of the exceptions to immunity claims for current foreign Heads of State.[200] However, the court in its decision failed to give any explanation why

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[197] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, 517 (2008)(including other cases, from Greece, Prefecture of Voiotia v. Federal Republic of Germany, and Italy Ferrini v. Federal Republic of Germany)). [reproduced in accompanying notebook at tab 44]

[198] *Id.*

[199] Arrest Warrant of 11 April 2000 (Congo v. Belg.), Cour de Cassation (Fr.), Mar. 13, 2001, Judgment No. 1414, *reprinted in* 105 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 473 (2001). [reproduced in accompanying notebook at tab 19]

[200] *Id.*

terrorism is not an international crime.[201] If terrorism is not yet specifically categorized as an international crime by either customary or treaty law, it may be argued that some acts that amount to terrorism can be considered crimes against humanity because of their intrinsic gravity and odious consequences on the lives and assets of innocent civilians.[202] Apart from of the *Qaddafi* case, a general overall trend in of national courts to willingly expanding the traditional list of *stricto senso* crimes to include other grave offenses such as torture, or particularly abhorrent acts of terrorism is emerging.

(3) Terrorism as a crime against humanity

The STL Office of the Prosecutor may also argue that the acts of terrorism being tried before the STL can be included as crimes against humanity under the category of "other inhumane acts."[203] Crimes against humanity are criminal acts that when taken together equate to "a widespread or systematic attack directed against a civilian population."[204] In the *Prosecutor*

[201] Salvatore Zappala, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation,* 12 EUR. J. INT'L L. 595, 601 (2001). [reproduced in accompanying notebook at tab 51]

[202] Salvatore Zappala, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation,* 12 EUR. J. INT'L L. 595, 601 (2001). [reproduced in accompanying notebook at tab 51]

[203] Michael P. Scharf and Michael A. Newton, "Terrorism and Crimes against Humanity" in Leila Sadat, CRIMES AGAINST HUMANITY (forthcoming). [reproduced in accompanying notebook at tab 30]

[204] *Id.* (listing the following *acti rei* as crimes against humanity and proffering internationally accepted definitions of key terms within the specified offenses: Murder; Extermination; Enslavement; Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Rape, sexual slavery, enforced prostitution forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; Persecution against any identifiable group or

v. Stanislav Galic the court of The International Criminal Tribunal for the Former Yugoslavia held that, "the prohibition against terror is a specific prohibition within the general prohibition of attack on civilians, the latter of which constitutes a peremptory norm of international law."[205] This holding supports the idea that certain singular acts of terrorism are a part of a greater widespread systematic attack on a civilian population, and may be considered crimes against humanity. Individuals responsible for the Hariri attack may argue that the bombing was not part of a systematic attack on the civilian population of Lebanon, but was instead an isolated political event. However, as depicted in the Background section of this memorandum a long history of violence has affected Lebanon, and many of the attacks are attributed to the Syrian government's attempts to remain in control of the Lebanese political system.[206] The terrorist bombing being adjudicated by the STL is arguably a continuation of this violent history, and is part of a systematic plan of aggression on the Lebanese civilian population. Additionally, the ICTY holding supports the idea that an attack like the Hariri bombing that is expressly intended to

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collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; Enforced disappearance of persons; The crime of apartheid; Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health) [hereinafter Rome Statute].

[205] *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Trial Chamber I, Judgement and Opinion ¶ 66, 94-100 (Dec. 5 2003), *available at* http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf . [reproduced in accompanying notebook at tab 23]

[206] *Supra* Background Section of Memorandum

provoke terror in the civilian population or political structure of a nation does not comport with the laws and customs of war, and is a crime against humanity.[207]

(4) Can a court be considered International in Nature if it only tries domestically defined crimes?

Characteristically international hybrid tribunals are provided jurisdiction to try both domestic and international crimes, however the STL's subject matter jurisdiction is limited to crimes defined under the Lebanese Penal Code.[208] The Extraordinary Chambers in the Courts of Cambodia has jurisdiction over both domestic and international crimes, and is part of the Cambodian domestic court system.[209] The Special Court for Sierra Leone (SCSL) also has jurisdiction over both domestic crimes under Sierra Leonean law and international crimes.[210] In contrast, the SCSL is an independent judicial body and is not linked to the domestic judicial system.[211] It is arguable that because the STL lacks jurisdiction for any traditionally international crime it is not an international tribunal.

Additionally, the domestic crimes involving "terrorism" being tried at the STL are graver and more universally shunned than the domestic crimes of "setting fire to public buildings" or

[207] *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T (Dec. 5 2003). [reproduced in accompanying notebook at tab 53]

[208] Larry D. Johnson, *MYRES S. MCDOUGAL LECTURE: UN-Based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L. & POL'Y 275 (2008). [reproduced in accompanying notebook at tab 34]

[209] *Id.*

[210] *Id.* at 277.

[211] *Id.* at 277.

"abduction of a girl for immoral purposes" being tried at the SCSL. [212] Accordingly, the court must be afforded universal jurisdiction to eliminate immunity claims of the accused to achieve justice. [213] However, while the SCSL does have subject matter jurisdiction over the above-described domestic crimes, actual SCSL prosecutions focus on crimes against humanity, violations of Article 3 of the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian Law. To date, no individuals have been charged at the SCSL under Article 6, which spells out domestic offences of the Statute of the Special Court for Sierra Leone.[214] Additionally, domestic subject-matter jurisdiction has played a very small role in the SCSL trials. [215] Alternatively, domestic crimes would be the only offenses tried at the STL.[216]

No court decision has directly addressed the question of whether a UN created tribunal that prosecutes crimes which are not universally recognized as being international falls under the ICJ *Arrest Warrant* case definition of "certain international criminal courts" that have the power to eliminate claims of immunity.[217] In the *Arrest Warrant* Case the ICJ limited the removal of immunity to *stricto senso* crimes to international tribunals, and explicitly stated that

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[212] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 LEIDEN J. INT'L L. 513, 518 (2008) [reproduced in accompanying notebook at tab 44]

[213] *Id.*

[214] *Id.*

[215] *Supra* Terrorism section of Memorandum.

[216] *Supra* Terrorism section of Memorandum.

[217] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, 516 (2008)[reproduced in accompanying notebook at tab 44]

the exception to immunity does not exist in customary international law for national courts.[218] Individuals seeking immunity protections before the STL may argue that the STL is a domestic court unrightfully granted additionally powers by the UN. Additionally, that defining a tribunal as international that only has domestic subject matter jurisdiction impedes on the sovereign rights of nations, and the *Arrest Warrant* court's apprehension to expand the definition of what constitutes an "international court" is reflected in its statement that it "too new to admit of any definite answer" on what exactly what constitutes an "international court".[219]

The court in *Prosecutor v. Charles Taylor* supported this stance when the SCSL relied on customary international law and upheld immunities in national courts even when the crimes were those typically tried in international courts.[220] However, Judge Christine van den Wyngaert's dissent in the *Arrest Warrant* case supports the concept of allowing tribunals that are characteristically hybrid, like the STL, to exercise universal jurisdiction and eliminate state official immunities if doing so ensures "the whole recent movement in modern international criminal law towards recognition of the principle of individual accountability for international

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[218] Mark A. Summers, *Immunity, or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States that are Not Parties to the Statute of the International Criminal Court*, 31 BROOKLYN J. INT'L L. 463, 488 (2006).[reproduced in accompanying notebook at tab 45]

[219] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, 518 (2008)[reproduced in accompanying notebook at tab 44]

[220] Prosecutor v. Taylor, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, A. Ch., 31 at ¶50 (May 2004) (the court tried war crimes or crimes against humanity) [reproduced in accompanying notebook at tab]

crimes" is not ignored. [221] This is especially important for the STL where most of the accused will be current high-ranking state officials and will be afforded complete immunity if it is determined the tribunal is inherently domestic and not "international".[222]

f) *Conclusion*

Defining the STL as an international tribunal will trigger a vital exception to eliminating state official immunity claim. If the STL is determined to be a domestic rather than an international court, claims for immunity from Syrian high-ranking state officials will be recognized even if the crime of terrorism is categorized as a *stricto senso* crime. If the STL is considered an international and not a domestic court, it will be provided universal jurisdiction, and the ability to enforce "criminal or civil sanctions for violations of international law." [223] This was exemplified in the Special Court for Sierra Leone where it was determined that because the court was international in nature it was able to prosecute Charles Taylor a foreign head of state.[224]

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[221] Mark A. Summers, *Immunity, or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States that are Not Parties to the Statute of the International Criminal Court*, 31 BROOKLYN J. INT'L L. 463, 486 (2006).[reproduced in accompanying notebook at tab 24]

[222] *Id.*

[223] William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 Leiden Journal of International Law 513, 517 (2008).[reproduced in accompanying notebook at tab 44]

[224] *Prosecutor of the Tribunal v. Charles Taylor*, SCSL-2003-01-1. [Reproduced in accompanying notebook II at Tab 24]

The Special Tribunal for Lebanon has a parallel level of authority vested to it, and is characteristically very similar to international hybrid tribunals; nonetheless, terrorism is not a universally recognized "international" crime and has never been the sole subject matter jurisdiction of an international tribunal. Individuals claiming immunity before the STL will argue that this domestic subject matter jurisdiction eliminates the tribunals claim to being an international court. It is likely that the method of creation through the Security Council coupled with the support of the tribunal in Lebanon will factor highly into this determination and the tribunal will be deemed international. If the STL cannot eliminate claims of high-ranking state official immunity because they are considered an international court, the Office of the Prosecutor may look to two other recognized exceptions to immunity.

2. Waiver of Immunity by Government through a Treaty

The second possible exemption to high-ranking state official immunity claims is government waiver through a treaty. The government of a high-ranking official holds the rights to the individual's immunity and therefore may waive it through a treaty.[225] The jurisdiction for treaty based crimes is limited to the provisions of the treaty and does not provide complete universal jurisdiction and waiver for all crimes committed outside the prohibitions of the treaty.[226] Additionally, it will only be applicable if both states are members to the treaty.[227] If there exists a treaty that both Syria and Lebanon have ratified and that addresses attacks similar

[225] Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH L. REV. 2129, 2140 (1999)[reproduced in accompanying notebook at tab 37]

[226] Yitha Simbeye, *Immunity and International Criminal Law*, Ashgate Publishing Company Burlington, VT (2004).)[reproduced in accompanying notebook at tab 33]

[227] *Id.*

to what occurred in the Hariri bombing, then the state whose official is being tried will have waived the officials' immunity, and will be required to either prosecute or extradite the official.[228]

a) *The Pinochet Case waiver through the Torture Convention*

An example of waiver of immunity by treaty occurred in the *Pinochet* case before the United Kingdom House of Lords. In the *Pinochet* case, authorities issued an international arrest warrant to apprehend the former head of state of Chile, Augusto Pinochet, for allegations of torture during his time as Chile's head of state. [229] United Kingdom (UK) officials arrested Pinochet while he was visiting the UK and Spain then requested his extradition.[230] The Law Lords determined that customarily a former head of state such as Pinochet would be afforded immunity for acts of torture, however the court did not grant him immunity because Chile had ratified the Torture Convention of 1988 and consequently waived head of state immunity protections for acts of torture.[231]

b) *Syrian Waiver of High-Ranking State Official Immunities through the Ratification of the Convention Against Terrorist Bombings*

[228] *Id.*

[229] Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press New York, NY (2008).[reproduced in accompanying notebook at tab 28]

[230] Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH L. REV. 2129, 2130 (1999).[reproduced in accompanying notebook at tab 37]

[231] *Id.*

Similarly, it is possible that Syria's ratification of several UN anti-terrorism treaties are evidence of a waiver of high ranking state official immunities for terrorist attacks through a treaty. In order to waive immunity through a treaty it must address the issue at hand, and all involved parties in litigation must ratify the treaty.[232] A treaty that both Syria and Lebanon ratified is the 1997 International Convention for the Suppression of Terrorist Bombings.[233] This convention requires that all parties to the treaty criminalize certain types of conduct, surrender for prosecution, or extradite people apprehended in national boundaries that are suspected of the described crimes, and assist in the investigation and trial of the crime.[234] The attack the tribunal is prosecuting falls under article 22 of the treaty that requires the attack occur with explosives, happen in a public place, and cause death or bodily harm or massive economic loss.[235] The bombing of Hariri's motorcade happened in the middle of a public road, and occurred with the

[232] *Id.*

[233] International Convention for the Suppression of Terrorist Bombings, 37 ILM 249 (1998).[reproduced in accompanying notebook at tab 7]

[234] Samuel M. Witten, *CURRENT DEVELOPMENTS: The International Convention for the Suppression of Terrorist Bombings*, 92 A.J.I.L. 774, 775 (1998).[reproduced in accompanying notebook at tab 50]

[235] International Convention for the Suppression of Terrorist Bombings, 37 ILM 249 Article 2(1)(1998) stating:

> "Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:
>
> (a) with the intent to cause death or serious bodily injury; or
>
> (b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.")[reproduced in accompanying notebook at tab 28]

intention of causing bodily harm or injury.[236] It also covers those accomplices and those individuals who direct or organize terrorist bombing attacks.[237] If the attack falls under the subject matter this treaty was drafted to address, the language of the treaty must be evaluated to determine if immunity was waived through the treaty.

Syria may claim that while they did ratify the treaty, nothing in the treaty specifically addresses the waiver of immunity and that through signing the treaty they did not explicitly waive immunity claims.[238] However, the torture convention in the Pinochet case also did not address immunity.[239] While several of the Law Lords in Pinochet expressed that implicit waivers of state official immunity are not preferential under international law, the court still held that immunity was implicitly waived through the ratification of the treaty.[240] The Law Lords who used the torture convention for justification of waiving Pinchot's immunity focused on the purpose of the convention more than its language.[241] The purpose of the International Convention for the Suppression of Terrorist Bombings is to reinforce the ability of the

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[236] Melia Amal Bouhabib, *Power and Perception: The Special Tribunal for Lebanon*, 5 J. Int'l Crim. Just. 1061 (2009), *available at* http://works.bepress.com/melia_bouhabib/1. [reproduced in accompanying notebook at tab 38]

[237] Samuel M. Witten, *CURRENT DEVELOPMENTS: The International Convention for the Suppression of Terrorist Bombings*, 92 A.J.I.L. 774, 776 (1998).[reproduced in accompanying notebook at tab 50]

[238] *Id.*

[239] Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH L. REV. 2129, 2140 (1999).[reproduced in accompanying notebook at tab 37]

[240] *Id.*

[241] *Id.*

international community to explore, bring to court, and extradite individuals directly responsible for, conspirators and those who direct or contribute to any of the offenses defined in the Treaty.[242] This purpose is apparent throughout the different articles of the convention. It also reaffirms the Declaration on Measures to Eliminate International Terrorism that states,

> "The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States"[243]

It is arguable that through ratification of this treaty Syria has agreed to remove immunities for whomever" is responsible for the Hariri terrorist bombing, in order for the internationally community to fully condemn the act of terrorism. However, Syria may claim that the ratification of these treaties provides it the power to try the accused in their own court systems, eliminates the need for an international tribunal, and affords it the ability to enforce head of state immunity. Article 8(1) of the treaty states,

> "The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged without exception whatsoever and whether or not the offence was committed in its territory to submit the case. . . to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State."[244]

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[242] Samuel M. Witten, *CURRENT DEVELOPMENTS: The International Convention for the Suppression of Terrorist Bombings*, 92 A.J.I.L. 774, 776 (1998).[reproduced in accompanying notebook at tab 50]

[243] International Convention for the Suppression of Terrorist Bombing, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), *entered into force* May 23, 2001. [reproduced in accompanying notebook I at tab 7]

[244] *Id.*

This portion of the convention allows Syria the opportunity to not extradite their officials as long as they are tried before the Syrian Courts as any other individual who has committed crimes similar in nature would be tried.[245] It is arguable that any kind of prosecution of a high-ranking state official in Syrian courts would be for show, and that it is unlikely the same standards of impartialness would apply if the same individual was tried at the STL. Additionally, the Office of the Prosecutor could argue that past trials of high-ranking state officials in the nations own domestic courts often provided inadequate results. An example occurred in Germany after World War II when the Allied Associated Powers granted Germany the power to try Germans who were suspected of violating the laws and customs of war in their own domestic courts. The Reichsgericht only prosecuted twelve of the forty-five German military officers the Allied Associated Powers submitted, convicted six of the twelve prosecuted and gave the six light sentences.

While implicit waiver of state official immunity through the ratification of the Terrorist Bombing Convention mirrors the decision of the Pinochet case, unlike the Torture Convention the issue of trying individuals responsible for the attacks is explicitly addressed. Therefore it is likely that Syria will still be afforded the opportunity to first try their officials in their own local courts, and the treaty will not prohibit claims of Syrian state official immunity.

c) *Waiver through Articles 25 and 103 of the United Nations Charter*

[245] Samuel M. Witten, *CURRENT DEVELOPMENTS: The International Convention for the Suppression of Terrorist Bombings*, 92 A.J.I.L. 774, 779 (1998)(stating that the prosecution of the individual must occur "without exception whatsoever and whether or not the offence was committed in its territory").[reproduced in accompanying notebook at tab 50]

The Office of the Prosecutor may argue that even if Syria is afforded the right to try its own officials under the Terrorist Bombing Convention they must still comply with the requests of the STL because Articles 25 and 103 of the UN mandate their compliance with Security Council requests. Article 25 of the UN Charter States, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." [246] The STL was enacted under the Security Councils Chapter VII powers, and arguably, all member states of the UN should comply with its requests. The Syrian government will contest that this multilateral treaty allowing them to try their own high-ranking state officials for acts of terrorism takes precedence over the requests of the Security Council. However, Article 103 of the UN Charter states, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." This same argument was used in the *Lockerbie* bombing case before the ICJ. In the Lockerbie case, a Pan Am flight from Frankfurt to New York via London exploded over Scotland and killed all 259 individuals on the flight.[247] Libya was charged with the attack and, the United Kingdom and the United States requested that Libya surrender their suspects for trial either in Scotland or in the United States.[248] The Security Council consequently adopted three resolutions (731, 748 and

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[246] Charter of the United Nations, Chapter V art. 25, Chapter VII, Chapter XVI art.103, *available at* http://www.un.org/en/documents/charter.shtml. [reproduced in accompanying notebook at 11].

[247] Abdul Ghafur Hamid and Khin Maung Sein, *A Legal implication of the Lockerbie Case: Can the Internatonal Court of Justice Judicially Review Security Council Decisions?, available at* http://staff.iiu.edu.my/ghafur/Published%20Articles/A%20Legal%20Implication%20of%20Lockerbie%20case.pdf [reproduced in accompanying notebook at 60]

[248] *Id.*

883, two of which imposed sanctions) urging Libya "to provide a full and effective response" to the requests of the United Kingdom and the United States "so as to contribute to the elimination of international terrorism."[249] The US and UK brought a case to the ICJ requesting extradition of Libyan nationals, and Lydian officials claimed that under the Montréal Convention they were afforded the right to choose between extradition and prosecution in a Libyan court.[250] The court held that Libya was required under Article 25 to comply with the Security Council Resolution 748, and that Article 103 of the charter took precedence over the Montreal Convention provisions.[251]

This reasoning requires Syrian officials to comply with the tribunal under Security Council Resolution 1757, however as previously addressed in this memorandum, the Security Council's enforcement powers for the STL are different the enforcement powers for other ad hoc tribunals created under its Chapter VII powers.[252] The waiver by treaty under the Lockerbie holding will be a strong argument for the Office of the Prosecutor for removing high ranking official immunities.

3. Waiver by Consent of Government through other means either Explicitly or Implicitly.

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[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Supra* Memorandum Section Titled: Authority vested in the court

Immunity is a privilege that belongs to the state and not the state official, and with this power, a state can bestow or retract immunity.[253] This is the third possible exception to current and former high-ranking state official immunity, and is waiver by the government to which the individual oversees either implicitly or explicitly.[254] Additionally, diplomatic immunity "may be waived by the sending state," as, described in the Vienna Convention either expressly or implicitly and the waiver for diplomatic immunity in this section of the memorandum is analogous to high-ranking state official immunity.[255]

High-ranking state officials may be tried before the STL if their government waives the official's immunity. An example of explicit waiver occurred in the United States Federal Court of Appeals Case In re Grand Jury Proceedings Doe #700 (In re Doe).[256] In *In re Doe*, Ferdinand Marco's the President of the Philippines was accused along with his wife Imelda of embezzling money from the Philippine government.[257] Ferdinand left office, fled to the United States, and claimed immunity from prosecution. The Philippine government issued a diplomatic note expressly waving any immunity afforded to the two individuals. The court held that Ferdinand

[253] The Vienna Convention of Diplomatic Relations, 23 U.S.T. 3227 at Art. 32. [Reproduced in accompanying notebook I at Tab 4]

[254] The Vienna Convention of Diplomatic Relations, 23 U.S.T. 3227 at Art. 32. [Reproduced in accompanying notebook I at Tab 4]

[255] The Vienna Convention of Diplomatic Relations, 23 U.S.T. 3227 at Art. 32. [Reproduced in accompanying notebook I at Tab 4]

[256] *In re Grand Jury Proceedings*, Doe #700, 817 F.2d 1108, 1111 (4th Cir. 1987). [Reproduced in accompanying notebook 20]

[257] *In re Grand Jury Proceedings*, Doe #700, 817 F.2d 1108, 1111 (4th Cir. 1987). [Reproduced in accompanying notebook 20]

the Marcos could be served process because the Philippine government expressly waived their head of state immunity protections.[258] The court based its decision on the Vienna Convention's afforded privileges of immunity waiver for diplomats, and explained that the same rationale should be applied to high-ranking officials. Specifically that because of comity and respect of sovereignty of nations who hold the power of immunities, the countries wishes for waiver must be upheld. [259]

Considering that Syria and Lebanon have a very bad political history, it is highly unlikely that Syria will explicitly waive the immunities afforded to its high-ranking officials. Currently, no diplomatic note or express waiver of immunity exists for the, and as previously mentioned Syria has stated that any Syrian officials accused of the Hariri assassination will be tried in the Syrian courts.[260]

D. Additional Exceptions to immunities for Former High-ranking State Officials for acts Committed Prior to and After the Individuals time in office, and for Acts Outside of the Individuals "Official Capacity"

In addition to the three above analyzed exceptions to immunity (an individual being tried before an international court, immunity waiver by treaty, and implied or explicit waiver by home government), former high-ranking state official's claims to immunity are susceptible to two further exceptions to their immunity. Once out of office former high-ranking state officials may

[258] *In re Grand Jury Proceedings*, Doe #700, 817 F.2d 1108, 1111 (4th Cir. 1987). [Reproduced in accompanying notebook 20]

[259] *In re Grand Jury Proceedings*, Doe #700, 817 F.2d 1108, 1111 (4th Cir. 1987). [reproduced in accompanying notebook 1 tab 20].

[260] Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1107, 1110-11 (2007). [reproduced in accompanying notebook 2 Tab 36].

be tried for acts committed outside the scope of their position while in office.[261] Additionally, they will not be afforded immunity for acts committed before or after their term in office.

a) ***Former High Ranking State Officials are Not Afforded Functional Immunities for Acts committed Before or After Time in Office.***

After a high-ranking official leaves office, they are only entitled to immunity for "official acts" completed while they were in office, their immunity protections do not reach to acts before they took office or after they leave.[262] In the U.S. court case *In re Doe*, the Marcoes, former heads of states in the Philippines tried to argue that; "Head of State Immunity […] insulate[s] foreign leaders from the chilling effect of being subjected to the jurisdiction of foreign courts at some future date."[263] The court rejected this argument and stated;

> "Since the purpose of Head of State Immunity is to avoid the disruption of foreign relations, the original reason for immunizing the Marcoses - - protecting the relations between the United States and the Marcos' regime - - is no longer present. Head of State Immunity serves to safeguard the relationship among foreign governments and their leaders, not as the Marcoses assert, to protect former Heads of State regardless of their lack of official status."[264]

International tribunals follow in this line of thought, and if a Syrian official who is no longer in office took part in the Hariri bombing either before or after they were in office they will

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[261] Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press New York, NY 1 (2008).[reproduced in accompanying notebook at tab 28]

[262] Arrest Warrant of 11 April 2000 (Congo v. Belg.), Cour de Cassation (Fr.), Mar. 13, 2001, Judgment No. 1414, *reprinted in* 105 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 473 (2001). [reproduced in accompanying notebook 1 at tab 19].

[263] In re Grand Jury Proceedings, Doe #700, 817 F.2d 1108, 1111 (4th Cir. 1987). [Reproduced in accompanying notebook 20]

[264] *Id.*

not be afforded immunities before the STL. However, the protections afforded to former heads of states in international tribunals is often broader and applies to official acts committed while the individual was in office, if a former state official can prove the Hariri bombing was an "official act" of his position, he will be afforded immunity.

b) ***Former High Ranking State Officials are Not Afforded Personal Immunities***

The second exception to former high-ranking state official immunity is that unlike current high-ranking state officials, former officials do not receive personal immunities for acts committed outside of the scope of the "official capacity" of their position.[265] "Official capacity" is often determined on a very fact specific basis, and can be contrasted to personal immunity protections for acts that an official commits purely in a private capacity.[266] If an individual acts in the framework of exercising state authority under international law, the actions are accordingly completed on behalf of the state and afforded functional immunity protections.[267]

In the *Arrest Warrant* case the ICJ dictated that while a sitting High-ranking State official may have Jurisdictional immunity for certain offenses in a certain time period (while they are in office), they do not receive complete impunity from prosecution.[268] The first decision in the

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[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] United Nations Information Service, Press Release AFR/379 ICJ/602, ICJ REJECTS BELGIAN ARREST WARRANT FOR FOREIGN MINISTER OF DEMOCRATIC REPUBLIC OF CONGO, (February 15 2002), *available at* http://www.unis.unvienna.org/unis/pressrels/2002/afr379.html.[reproduced in accompanying notebook at tab 58]

United Kingdom House of Lords Pinochet case addressed the scope of former high-ranking state official immunity.[269] Pinchot's case became the first instance where an English court removed state official immunity from former head of state.[270] The House of Lords held that a former Head of State is afforded immunity protections for acts he performed in his official capacity as a Head of State.[271] The court also established that acts "condemned as criminal by international law" do not "amount to acts performed in the exercise of the [official] function of a Head of State."[272] Pinochet was initially denied his claim for immunity for acts of torture and hostage taking because; the court held that acts of such an atrocious nature are not official functions of a high-ranking official.[273] In the opinion, the court stated that not holding these officials accountable would make a travesty of international law.[274] This ruling may have set strong precedent for categorizing the acts of terrorism being tried before the STL as outside of the scope of any high ranking state official duties. However, the first Pinochet opinion was vacated due to

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[269] Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press New York, NY (2008).[reproduced in accompanying notebook at tab 28]

[270] William Miller, *Slobodan Milosevic's Prosecution by the International Criminal Tribunal for the Former Yugoslavia: A Harbinger of Things to Come for International Criminal Justice*, *22 Loy. L.A. Int'l & Comp. L.J. 553, 554-55 (2000).* [reproduced in accompanying notebook at tab]

[271] Regina v. Bow Street Magistrate, Ex parte Pinochet, [1999] 2 W.L.R. 827 (H.L.) [Reproduced in accompanying notebook 25]

[272] *Pinochet,* 2 W.L.R. 827 (1999). [Reproduced in accompanying notebook 25]

[273] Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH L. REV. 2129, 2137 (1999) (explaining one member of the majority state that "international law has made plain that certain types of conduct, including torture and hostage taking , are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so as it does to every one else.").[reproduced in accompanying notebook at tab 3]

[274] *Id.*

an undisclosed conflict of interest of one of the Law Lords in the case who failed to recues himself.[275] In a second full bench trial the court dropped the charges of hostage taking on the merits, and was left to decide the charges of torture, a topic that was previously discussed in this memorandum.[276] The crimes of terrorism being tried before the STL will need to be extremely egregious to fall outside of the scope of official duties if hostage taking could be considered protected under functional immunities. However, it could be argued that while the court dismissed the hostage taking charges on the merits, it did not explicitly identify what level of atrocious acts are in or outside of the scope official duties. This case established the lack of functional immunity for state officials; personal immunity was not contested and a definition of what acts qualify as part of an officials "positional duties," it is necessary to look further into case law to define each category.[277]

In the United States case, *U.S. v. Noriega* former General Manuel Noriega of Panama was charged for covering up and aiding a significant narcotics trade, Noriega attempted to claim head of state immunity and the U.S.'s lack of jurisdiction to eliminate his possible prosecution. The court held that Noriega would not be afforded his claims of immunity on the grounds that he was not recognized as a head of state as he was discharged from his position when his court case began, however they also pointed to the non-official character of the

[275] *Id.* at 2138.

[276] *Id.*; *surpa* Memorandum Section Titled: *Syrian Waiver of High-Ranking State Official Immunities through the Ratification of the Convention Against Terrorist Bombings*.

[277] William Miller, *Slobodan Milosevic's Prosecution by the International Criminal Tribunal for the Former Yugoslavia: A Harbinger of Things to Come for International Criminal Justice*, *22 Loy. L.A. Int'l & Comp. L.J. 553, 554-55 (2000).* [reproduced in accompanying notebook at tab 43]

crimes that were committed.[278] The court through this decision expressed that trading in narcotics will not be considered an activity commenced under the official capacity of a high-ranking official.[279]

Another case that addressed the scope what acts are not protected under the "official capacity" exception for former high ranking state official claims is the case of *Rainbow Warrior*. In *Rainbow Warrior* the crimes committed by secret service officials in the territory of a foreign state was addressed.[280] A Dutch photographer was killed when two violent explosions took place on board a Greenpeace ship name the Rainbow Warrior while it was in the port of Auckland, New Zealand.[281] New Zealand arrested and convicted two French secret service officials for complicity in manslaughter and willful damage to a ship, however France claimed that they had instructed the agents to sink the ship and that the attack occurred inside their functional immunity protections.[282] The case was eventually brought before UN arbitration, and while the Secretary General did not discuss the issue of personal responsibility, he did hold that the individuals responsible were to be put in solitary confinement in a French

[278] *United States v. Noriega* 746 F Supp 1506 (US, DC for the Southern District of Florida, 1990) 1519; *United States v. Noriega* 117 F 3d 1206 (US, Ct. of Apps. (11th Cir., 1997).[reproduced in accompanying notebook at tab 27]

[279] Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press Inc., New York, NY 115 (2008).[reproduced in accompanying notebook at tab 28]

[280] *Id.*

[281] Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press Inc., New York, NY 126 (2008).[reproduced in accompanying notebook at tab 28]

[282] *Id.*

military facility for at least three years. [283] This holding implicitly supports the idea that causing death by intentional bombing is not considered in the "official scope" of a state officials position, and therefore not afforded functional immunity protections.[284]

Syrian government officials may argue that because of the nature of the tumultuous relationship between Lebanon and Syria that the bombing was a political attack furthering an external conflict, and was not personal in nature, therefore both former and current high-ranking Syrian officials should be afforded immunity protections. In the U.S. case *Doe v. Karadzic* the court stated, "we doubt that the acts of even a state official, taken in violation a nation's fundamental law and wholly ungratified by that nation's government could properly characterized as an act of state."[285] As previously discussed in this memo, Syria ratified the Convention against Terrorist Bombings and consequently accepted this treaty into their domestic law.[286] Accepting the reasoning used by the court in the U.S. Karadzic case the facilitation of the Hariri car bombing by Syrian Officials is in violation of a treaty both Syria and Lebanon are signors to. The Ratification of the Treaty is a reflection of their domestic laws, and invalidates claim from officials that the attack occurring in an "official capacity." It is unlikely that former high-ranking state officials will be able to claim the Hariri assassination

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[283] *Id.*

[284] *Id.*

[285] Diego A. Archer, MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR -ISSUE 5: HEAD OF STATE DOCTRINE AND INTERNATIONAL LAW VIOLATIONS, Case Western Reserve University School of Law War Crimes Research Project 35 (2003). [Reproduced in accompanying notebook 52]

[286] *Supra* Memorandum Section titled, *Syrian Waiver of High-Ranking State Official Immunities through the Ratification of the Convention Against Terrorist Bombings*.

was part of an "official" act required by their position, accordingly claims by former high-ranking state officials will not stand before the STL.

IV. CONCLUSION

Individuals bringing claims before the Special Tribunal for Lebanon will be afforded their claimed immunities unless the tribunal is, 1) considered an "international" tribunal, 2) the government has waived their immunities through a treaty, or 3) the government has waived their immunities either implicitly or explicitly. The subject matter jurisdiction of the tribunal will be the biggest impediment for it being considered an "international" tribunal, however it is likely that because the Security Council created the STL the definition of "international" will be afforded to it. If the tribunal is not considered international, immunity claims may be eliminated because Syria has ratified the International Convention for the Suppression of Terrorist Bombing. This is the strongest exception to immunity claims, however the STL will face problems with obtaining accused individuals even with Security Council backing. It is unlikely that Syria will relinquish the immunity protections of high-ranking officials either implicitly or explicitly to the Special Tribunal for Lebanon because of the violent past the two countries share. The STL will not encounter difficulties trouncing claims from former high ranking state officials because it is unlikely that a terrorist bombing act that took the lives of not only Mr. Hariri but also 22 other individuals will be considered an "official act". Overall, the tribunal will be able to overcome all claims of immunity from all lower ranking state officials, and likely all former high-ranking state officials. Claims of immunity from current high ranking state officials will be the strongest, and defeating those claims will be completely dependent on one of the aforementioned exceptions for the STL.