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## Tipping the Scale: Is the Special Tribunal for Lebanon International Enough to Override State Official Immunity

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**TIPPING THE SCALE: IS THE SPECIAL TRIBUNAL FOR LEBANON  
INTERNATIONAL ENOUGH TO OVERRIDE STATE OFFICIAL IMMUNITY?**

*Heather Noël Ludwig\**

*The political environment in Lebanon is one plagued with a tumultuous history of violence and power struggles. This turmoil climaxed on February 14, 2005, when the former Lebanese Prime Minister, Rafiq Hariri, was assassinated in a terrorist attack. The Special Tribunal for Lebanon was subsequently created by the U.N. Security Council to try those responsible for Hariri's assassination. Previous international U.N.-created tribunals have successfully eliminated head of state immunity protections of the accused. However, the Special Tribunal for Lebanon's unique characteristics prompt a weighty legal question, one whose positive answer is vital for the Tribunal's existence, especially if it is found that those responsible for the attack appear to be high-ranking state officials: Is the Special Tribunal for Lebanon "international" enough to eliminate head of state immunity claims?*

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## I. INTRODUCTION

After the assassination of Former Prime Minister Rafiq Hariri in Lebanon, the United Nations, at the request of the Lebanese government, did something it had never done before. It created a tribunal to try a possible event of “terrorism.”<sup>1</sup> The validity of this judicial body as an “international” tribunal is highly debated, specifically because in contrast to other international U.N.-created tribunals before it, the Special Tribunal for Lebanon (STL) (1) will only try cases of terrorism and terrorism-related offenses; (2) has a subject matter jurisdiction framed only with references to domestic

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<sup>1</sup> The concept of creating an international definition for the crime of terrorism is addressed *infra* Part III.C.6

law; and (3) has a statute that does not explicitly eliminate state official immunity.<sup>2</sup>

The counsel of the accused before the STL may claim the tribunal is not a legitimate “international” court. If the Chambers of the STL concludes that the court is not an “international” tribunal, the STL prosecution may be unable to eliminate any high-ranking state immunity protections of the accused. Without circumventing immunity protections, the success of the STL to try those responsible for the Hariri assassination and related attacks may be in jeopardy. However, both the characteristics the STL shares with other ad-hoc and hybrid tribunals and the international trend to define terrorist acts as the most egregious crimes in the world aids in tipping the scale to favor the STL being categorized as “international.” This categorization of “international” will equip the court with the ability to eliminate any state official immunity protections of the accused. More importantly, it will redefine the scope of crimes that future U.N.-created tribunals will be permitted to try, as well as the scope of the sovereign rights nations possess with respect to trying crimes of terrorism.

This Note begins by exploring the background and legal history surrounding the creation of the STL in Part II. Part III provides a legal analysis that evaluates the factors used in determining if the STL is an “international” court, including: (1) the authority vested to the court; (2) the characteristics of the court; and (3) the subject matter jurisdiction of the court. A visual comparison of the characteristics analysis completed in Part III is appended to the note in Annex 1 for reader reference. Finally, this Note examines how the crimes being tried before the STL affect the ability of both the STL and future U.N.-created tribunals in trying crimes of “terrorism.” Specifically, it answers the question whether crimes of “terrorism” can be considered “international” enough for courts to eliminate high-ranking state official immunities.

## II. THE BACKGROUND AND LEGAL HISTORY OF THE SPECIAL TRIBUNAL FOR LEBANON

### A. *The Historical Development of International Criminal Tribunals*

The creation of international tribunals to try criminals for crimes so heinous that they offend the conscience of humankind began after World War II when a group of ambitious lawyers, along with the aid of the Allied Powers, tried Nazis at the International Military Tribunals at Nuremberg.<sup>3</sup>

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<sup>2</sup> See Melia Amal Bouhabib, *Power and Perception: The Special Tribunal for Lebanon*, 3 BERK. J. MIDDLE E. & ISLAMIC L. 173, 191–95 (2009).

<sup>3</sup> See Lindsey Raub, Note, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 N.Y.U. J. INT’L L. & POL. 1013, 1013–14 (2009).

The Nuremburg trials established that individuals have duties under international law, and that responsibility will attach to individuals when they commit such heinous crimes.<sup>4</sup> The international legal environment continued to evolve since the Nuremburg trials, and eighteen years ago, the first U.N.-based international criminal tribunal was created.<sup>5</sup> Today, U.N.-hybrid and ad-hoc courts prosecute, as well as sentence, criminals from a variety of different countries.<sup>6</sup> The international community continually faces new challenges in upholding justice and defining global norms of responsibility. These new challenges require the creation of innovative types of U.N.-tribunals. One tribunal addressing a subject matter never employed by previous UN-created courts is the STL.

“International” crimes, also referred to as *stricto sensu* crimes, fall within the subject matter jurisdiction of all international U.N.-created tribunals except the STL.<sup>7</sup> In general, *stricto sensu* crimes are forms of conduct so egregious that those who engage in the acts are considered “enemies of all mankind.” Accordingly, all nations of the world have an interest in ensuring the responsible individuals are prosecuted.<sup>8</sup> The idea that certain crimes are “international” stems back to the Nuremburg trials when 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.”<sup>9</sup> Jackson relied on historic precedent from The Hague Conventions of 1907, the Kellogg-Briand pact of 1928, and the Geneva Protocol of 1924 to define the scope of *stricto sensu* crimes.<sup>10</sup> Since Nuremburg, several other tribunals have voiced opinions about the power of tribunals both national and international to try international *stricto sensu* crimes.

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<sup>4</sup> *Id.*

<sup>5</sup> Larry D. Johnson, Lecture, *UN-Based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L. & POL'Y 275, 276 (2008).

<sup>6</sup> *Id.* (countries include the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, and Lebanon).

<sup>7</sup> See Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1107, 1107–08, 1111 (2007); see also *infra* Part III.C.6.b for a further discussion of international *stricto sensu* crimes.

<sup>8</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH L. REV. 2129, 2133–34 (1999).

<sup>9</sup> U.S. DEPT. OF STATE BULLETIN, *Report of Robert H. Jackson to the President on Atrocities and War Crimes* (June 7, 1945), available at [http://avalon.law.yale.edu/imt/imt\\_jack01.asp](http://avalon.law.yale.edu/imt/imt_jack01.asp).

<sup>10</sup> See MICHAEL P. SCHARF & MICHAEL A. NEWTON, *Terrorism and Crimes Against Humanity*, in LEILA SADAT, *CRIMES AGAINST HUMANITY* (forthcoming) (discussing prosecuting war crimes as a part of the “laws of humanity” in the Hague Conventions, renouncing war in the Kellogg-Briand Pact, and declaring wars of aggression as international crimes in the Geneva Protocol).

*Stricto sensu* international crimes include genocide, war crimes, and crimes against humanity.<sup>11</sup> In contrast, the STL may only try cases of crimes of “terrorism,” offenses against life and personal integrity, illicit associations, and failure to report crimes and offenses that stem from the car bombing of former Prime Minister Rafiq Hariri and twenty-two others.<sup>12</sup> Additionally, the explicit subject matter jurisdiction of the STL statute encompasses only Lebanese domestic law.<sup>13</sup> While the statutes of other U.N.-created tribunals provide for jurisdiction over a mix of international and domestic crimes, none outside the STL has ever tried only domestically defined crimes.<sup>14</sup> Finally, the STL’s statute does not explicitly eliminate state official immunity, while the statutes of other U.N.-created tribunals before it explicitly eliminate immunity protections.<sup>15</sup> Combined, these issues may cause significant problems for the court if those responsible for the Hariri attack appear to be high-ranking state officials, who would normally have official immunity from prosecution in a national court.<sup>16</sup> The aforementioned divergences between the STL and traditional international courts provoke heated debate in the international legal community about which factors are required for a court to be considered “international” enough to remove the immunity of an accused state official.

*B. The History of the Creation of the Special Tribunal for Lebanon*

Two years after the Hariri attack, Lebanon signed an agreement with the United Nations to create the STL.<sup>17</sup> The tribunal will try individuals deemed responsible for the attack and for subsequent related events, which occurred between October 1, 2004, and December 12, 2005, and resembled the Hariri Attack in manner and purpose.<sup>18</sup> The Lebanese Parliament failed to ratify the agreement for the tribunal by June 10, 2007, through its domestic legislative process.<sup>19</sup> However, the Security Council

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<sup>11</sup> *Id.*

<sup>12</sup> Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007). The STL may try these crimes as they are defined under the Lebanese Criminal Code.

<sup>13</sup> *Id.* art. 2.

<sup>14</sup> Aptel, *supra* note 7, at 1107–08, 1111.

<sup>15</sup> *Id.* at 1110.

<sup>16</sup> *See generally* Bouhabib, *supra* note 2.

<sup>17</sup> *See generally id.* (The STL was created by Security Council Resolution 1757 on May 30, 2007, and the agreement between Lebanon and the United Nations is annexed to Resolution 1757); *see also* Statute of the Special Tribunal for Lebanon *supra*, note 12.

<sup>18</sup> Bouhabib, *supra* note 2, at 12; *see also* Statute of the Special Tribunal for Lebanon, *supra* note 12.

<sup>19</sup> U.N. Secretary-General, *Rep. of the Secretary-General pursuant to Security Council Resolution 1757 (2007) of 30 May 2007*, U.N. Doc. S/2007/525 (Sept. 4, 2007).

desired to establish the tribunal immediately. Accordingly, the Security Council disregarded the Lebanese legislative stalemate and authorized the formation of the tribunal under its Chapter VII powers, with a vote of ten members approving and five abstaining.<sup>20</sup>

The United Nations also initiated a fact-finding mission to investigate the attacks and the adequacy of the subsequent investigation by Lebanese authorities. The Security Council welcomed the commission's report, which stated that there was probable cause that high-ranking state officials were involved in the Hariri assassination especially considering the complexity of the attacks.<sup>21</sup>

Although no indictment has been made public yet,<sup>22</sup> the involvement of high-ranking state officials, if any, would potentially lead to several future claims of state official immunity before the STL. If the claims for immunity are recognized, the tribunal would be prevented from prosecuting any high-ranking state officials involved with the attacks.<sup>23</sup> On the other hand, if it is determined that the STL is an "international" court, immunity claims of the accused will be circumvented.<sup>24</sup> The complexity of this issue is compounded by the several attributes of the STL that are unique from any other U.N.-created court.<sup>25</sup> As previously mentioned in this Note, these

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<sup>20</sup> *Id.*; see also U.N. SCOR, 62nd Sess., 5685th mtg., U.N. Doc. S/PV.5685 (May 30, 2007).

<sup>21</sup> S.C. Res. 1636, U.N. Doc. S/RES/1636 (June 31, 2005) (responding to the report of the United Nations International Independent Investigation Commission (S/2005/662) concerning its investigation into the February 14, 2005 terrorist bombing in Beirut, Lebanon, that killed former Lebanese Prime Minister Rafiq Hariri and 22 others, and caused injury to dozens of people).

<sup>22</sup> Press Release, Radhia Achouri, Special Tribunal for Lebanon Office of the Prosecutor, The Office of the Prosecutor of the Special Tribunal for Lebanon Responds to Speculations on its Work, Special Tribunal for Lebanon Press Release No.2010/003 (Mar. 26, 2010), available at <http://www.stl-tsl.org/sid/183> (stating that any information regarding the indictment reported by individuals other than the Prosecutor or his Official Spokesperson is solely speculation); see also Arthur Blok, *Exclusive to NOW Lebanon: Bellemare: No Indictment in September* (Aug. 31, 2010), <http://www.nowlebanon.com/NewsArchiveDetails.aspx?ID=198004> (In this interview, Bellamare asserted that he is the only one who knows about the information on the indictment. He also referred to claims made by media sources regarding the indictment as "outrageous" and stated that unless, "they can read into my brain, everything else is just speculation.").

<sup>23</sup> 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, 527 (2008).

<sup>24</sup> *Id.*

<sup>25</sup> See generally *id.* at 514 (looking to the subtopic's of Schabas's article for direction on factors used in determining if a court is "international"); see also INT'L CTR. FOR TRANSITIONAL JUSTICE PROSECUTIONS PROGRAM, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON 9–31 (2008), available at <http://www.ictj.org/images/content/9/1/914.pdf> (comparing and contrasting the STL to other international ad-hoc and hybrid tribunals, and displaying

attributes include the STL being the first tribunal of international character that: (1) will hear solely cases of crimes of terrorism and terrorism-related offenses; (2) has subject matter jurisdiction framed only with references to domestic law; and (3) has a statute that does not eliminate state official immunity, a provision that was included in the statutes of all other U.N.-created tribunals before it.<sup>26</sup> Limiting the subject matter jurisdiction of STL the will play a major role in defining the tribunal. It will either contribute to its downfall or will allow the STL to blaze a groundbreaking legal path by redefining the current doctrine of international criminal law, specifically concerning international crimes of “terrorism.”

To determine if the STL is an international tribunal, a comparison must be completed of the STL and previous international U.N.-created tribunals. The individual attributes of each U.N.-created tribunal are first individually analyzed in a legal context. A visual comparative representation of the STL, previous U.N.-created hybrid and ad-hoc tribunals, and the International Criminal Court (ICC) is appended in an Annex to this Note for ease of comparison.<sup>27</sup> This Note will then evaluate if the subject matter jurisdiction of the STL, the Hariri assassination, and related attacks are acts of terrorism so egregious that they may be considered crimes against humanity. Specifically, this Note focuses on how this categorization of the attacks may further tip the scale in favor the STL being international enough to eliminate head of state immunity protection.

### III. LEGAL ANALYSIS

#### A. *Defining an “International” Court*

The Nuremburg Tribunal first explained that restrictive immunity is required for individuals being tried for *stricto sensu* crimes before an international court.<sup>28</sup> Additionally, the Tribunal established that high-ranking state official immunity claims must be eliminated for all international courts.<sup>29</sup> This groundbreaking international court stated that “[c]rimes

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that there exists a strong precedent in international law for eliminating immunity claims when the accused individuals are being tried before international courts).

<sup>26</sup> Schabas, *supra* note 23 at 524–27. The author disagrees with Schabas and argues that provisions eliminating state official immunity and withdraw of the defense of official capacity are different concepts, specifically because both provisions protect high ranking officials from possible prosecution before the court as Schabas pointed out occurred in the *Yeroida* (Arrest Warrant Case - ICJ), *Milosevic* (ICTY), and *Taylor* (SCSL) cases (noting that some tribunals including the ICTY and SCSL have provisions eliminating the “official” defense).

<sup>27</sup> See app. 1.

<sup>28</sup> International Military Tribunal (Nuremburg) Judgment and Sentences, *as reprinted in* 41 AM. J. INT’LL. 172, 221 (1946).

<sup>29</sup> *Id.*

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.”<sup>30</sup>

More recently, the International Court of Justice (ICJ) echoed the Nuremberg sentiment in the *Arrest Warrant* case when it stated that although courts of a third state are barred from trying heads of state, “certain international criminal courts” can try high-ranking state officials if the international courts have jurisdiction.<sup>31</sup> The *Arrest Warrant* court did not define the criteria required for identifying “international courts,” but distinguished international courts from courts of “foreign jurisdiction” or of “one state.”<sup>32</sup> Additionally, the court listed examples of international courts including the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the future ICC.<sup>33</sup> The examples enumerated by the court in *Arrest Warrant* case are all U.N.-created tribunals, and like the STL, were formed under the Security Council’s Chapter VII powers.<sup>34</sup>

The Special Court of Sierra Leone (SCSL) is a further example of a U.N.-created tribunal capable of eliminating high-ranking state official immunity claims. Specifically, the SCSL removed immunity protections from Liberia’s former President in *Prosecutor v. Charles Taylor*.<sup>35</sup> The SCSL supported its decision to remove Charles Taylor’s (Taylor) immunities by

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<sup>30</sup> *Id.*

<sup>31</sup> *Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belgium) [hereinafter Arrest Warrant]*, Judgment of 14 February 2002, ICJ Rep. 3 para. 61 (2002) (citing throughout how 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. The Democratic Republic of Congo claimed that immunity protections for Yerodia must be upheld because he was a current Minister of Foreign Affairs. The International Court of Justice enumerated positions that receive immunity protections including; Diplomats, Heads of State, Heads of Government, and Ministers of Foreign Affairs. Holding, 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. Restricting the scope of immunity from criminal jurisdiction for an incumbent Minister for Foreign Affairs on the basis of international customary law.); *See also* Schabas, *supra* note 23, at 514.

<sup>32</sup> *Arrest Warrant, supra* note 31; *see also* *Arrest Warrant*, Judgment of 14 February 2002 (2001) (After defining the scope of immunities afforded to current high-ranking state officials, the court enumerated the exceptions to claims of immunity for both current and former high-ranking officials, including powers afforded to “certain international criminal courts.”).

<sup>33</sup> *Id.* (stating that these courts do have jurisdiction over individuals from a third party state).

<sup>34</sup> *Id.* para. 61.

<sup>35</sup> *Prosecutor v. Charles Taylor*, Case No. SCSL-2003-01-I, para. 53 (May 31, 2004) [hereinafter Taylor].

relying on the tribunal's status as an "international court."<sup>36</sup> In the case, Taylor, the former President of Liberia, was indicted for crimes against humanity, war crimes, and other serious violations of both national and international law, including acts of terrorism.<sup>37</sup> Taylor challenged the validity of his indictment, claiming the charges were issued while he was still in office, and that the indictment was contrary to the immunity afforded to a head of state under international law.<sup>38</sup> The SCSL 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 to immunity protections taken by the ICC; and the holdings in the *Arrest Warrant* and *Pinochet* cases.<sup>39</sup> The SCSL chambers stated—concerning the immunities afforded to high-ranking officials—that “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.”<sup>40</sup>

While strong authority exists for denying the immunity claims of individuals being tried before U.N.-created “international” courts, no bright line rule for defining “international” courts currently exists. A survey of relevant case law reveals there are several factors courts balance to determine if a court is “international” enough to eliminate head of state immunities: (1) the authority vested to the court; (2) the characteristics of the court; and (3) the subject matter jurisdiction of the court.<sup>41</sup> The STL's attributes that are distinctive from other U.N.-created tribunals create a challenging

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<sup>36</sup> *Id.* para. 54.

<sup>37</sup> Taylor, Case No. SCSL-2003-01-I, Indictment, paras. 32–59 (March 7, 2003) (Count one of the indictment charged Mr. Taylor with Acts of Terrorism in violation of article 3 Common to the Geneva Conventions and of Additional Protocol II, allowing him to be punished under Article 3.d of the SCSL Statute.).

<sup>38</sup> *Taylor*, Case No. SCSL-2003-01-I, paras. 1–8 (May 21, 2004).

<sup>39</sup> *Id.* paras. 34–60; *see also generally Arrest Warrant*, *supra* note 31 (describing facts and holding of case); *see also generally Regina v. Bow Street Magistrate, Ex parte Pinochet*, [1999] 2 W.L.R. 827 (H.L.) (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. United Kingdom (UK) officials arrested Pinochet while he was visiting the UK and Spain then requested his extradition. 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.).

<sup>40</sup> *Taylor*, Case No. SCSL-2003-01-I, para. 52 (May 31, 2004).

<sup>41</sup> *See generally Schabas*, *supra* note 23 (looking to the subtopic's of Schabas's article for direction on factors); *See also generally INT'L CTR. FOR TRANSITIONAL JUSTICE*, *supra* note 25 (comparing and contrasting the STL to other international ad-hoc and hybrid tribunals throughout the handbook leading to several evaluative factors that are similar to those Schabas points out in his article).

task for those attempting to determine if the STL is international enough to eliminate high-ranking official immunities.<sup>42</sup> Each of the factors used to determine the level of a court's "international" character, as well as the presence of these factors in the STL, will be addressed, beginning with the level of authority vested to a tribunal.

*B. Level of Authority Vested by the International Community to the Special Tribunal for Lebanon*

The level of authority vested to a tribunal is determined by evaluating (1) the specific mode of establishment used to create the court; (2) the explicit powers granted to the court through its statute; (3) the level of support expressed by the Security Council during the court's creation; and (4) the general evolution of tribunal at the United Nations during its establishment. When examining these factors in relation to the STL, it becomes apparent that the STL has a level of vested authority similar in scope to other U.N.-established international tribunals.

*1. Mode of establishment of the Special Tribunal for Lebanon*

The mode of establishment used to create a court is one factor weighed when determining if the STL is a legitimate international court, and if the level of authority vested in the court mirrors the level afforded to other international courts by the international community.<sup>43</sup> The STL was created through Security Council Resolution 1757 (Resolution 1757), which enacted an agreement negotiated between the United Nations and the Lebanese government. Resolution 1757 was adopted under the Security Council's Chapter VII enforcement powers.<sup>44</sup> This mode of establishment is unique from the methods used to form other ad-hoc and hybrid international tribunals, because it integrates two traditional methods of establishment.<sup>45</sup> The forms of establishment for previous U.N.-created international tribunals include (1) a Security Council Resolution passed under Chapter VII "peace-keeping" enforcement powers; (2) an agreement to establish the tribunal between the United Nations and the nation the tribunal is created for; and (3) a multilateral treaty.<sup>46</sup>

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<sup>42</sup> See *supra* Part II.B. (referring to the STL as the first United Nations endorsed tribunal 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 U.N.-created tribunals before it.).

<sup>43</sup> Johnson, *supra* note 5, at 276–77.

<sup>44</sup> Statute of the Special Tribunal for Lebanon, *supra* note 12.

<sup>45</sup> Johnson, *supra* note 5, at 276–77.

<sup>46</sup> *Id.*

Through a Security Council Resolution, states may choose to bring alleged perpetrators of international crimes before an international tribunal instead of a national court.<sup>47</sup> The Security Council represented the will of the international community and established two U.N.-backed ad-hoc tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), under its Chapter VII peacekeeping enforcement powers.<sup>48</sup> Establishing a tribunal through a Security Council Resolution under the Council's Chapter VII peacekeeping enforcement powers is a valid method of creating an international court.<sup>49</sup> The option to bring perpetrators of crimes of international law before a U.N.-sponsored tribunal is recognized in Article VI of the Genocide Convention, the commentary to the 1949 Geneva Conventions, and throughout the Nuremburg Judgment.<sup>50</sup>

Alternatively, a tribunal may be created through a bilateral treaty between the United Nations and the tribunals' respective countries. Two U.N.-backed hybrid tribunals, the SCSL and Extraordinary Chambers in the Courts of Cambodia (ECCC), were established by a bilateral agreement. The SCSL was established when Sierra Leone signed a treaty with the Security Council.<sup>51</sup> The ECCC was created through a treaty between Cambodia and the U.N. General Assembly.<sup>52</sup> These tribunals were not imposed on the countries concerned like the ICTY and ICTR were with Yugoslavia and Rwanda, respectively. Instead, they were created with the consent and at the request of each nation.<sup>53</sup> In contrast, the STL was created when the Security Council through its Chapter VII peacekeeping enforcement powers unilate-

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See VIRGINIA MORRIS AND MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 82,87–88 (Transnational Publishers Inc. New York, NY 1998) (this peacekeeping power is consistent with the powers granted to the Security Council through the United Nations Charter).

<sup>50</sup> VIRGINIA MORRIS AND MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 37 (Transnational Publishers Inc. New York, NY 1995).

<sup>51</sup> See generally Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Jan. 16, 2002), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3D&tabid=176>.

<sup>52</sup> See generally Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (June, 6 2003), available at [http://www.eccc.gov.kh/english/agreement\\_image.aspx](http://www.eccc.gov.kh/english/agreement_image.aspx).

<sup>53</sup> Johnson, *supra* note 5, at 277.

rally passed an agreement it had formed earlier with Lebanon.<sup>54</sup> To date, Lebanon has not ratified the agreement for the STL.<sup>55</sup>

Critics claim this unique method of creating a U.N.-backed tribunal may not be valid, and that the Security Council overstepped its powers. Especially if the Security Council considered the method of creation for the STL to be a treaty forcibly passed through its “peacekeeping” powers.<sup>56</sup> Additionally, critics assert that because the Lebanese Parliament has yet to ratify the STL agreement, the tribunal is unconstitutional and not endorsed by the Lebanese population.<sup>57</sup> In November 2006, the United Nations Legal Counsel, Nicolas Michel, addressed this issue, telling the Security Council:

[T]he 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.<sup>58</sup>

Regardless of this difficulty, like the ICTY, ICTR, ECCC, and the SCSL before it, the STL was created after careful consideration of the various options for establishment.<sup>59</sup> The Security Council was forced to create the STL unilaterally using its Chapter VII powers because of the Lebanese legislative stalemate. It likely did not intend to bring the agreement into force as an international treaty binding Lebanon, but instead implemented Lebanon’s request to create a tribunal.<sup>60</sup> Prime Minister Fouad Siniora first

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<sup>54</sup> *Id.*; see also Statute of the Special Tribunal for Lebanon, *supra* note 12.

<sup>55</sup> PressTV, ‘Justice, Main victim in Hariri tribunal’ (Thursday January 13, 2011 9:38AM) (this article is a transcript of Press TV’s interview with Daoud Khairallah, Georgetown University professor of law), available at <http://www.presstv.ir/detail/159941.html>.

<sup>56</sup> See Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1091, 1093 (2007) (discussing the necessity of a country’s formal parliamentary approval of an agreement in order for ratification to be valid); see also U.N. Charter ch. VII, available at <http://www.un.org/en/documents/charter/chapter7.shtml> (describing the peacekeeping powers of the Security Council).

<sup>57</sup> See Fassbender, *supra* note 56, at 1091–1104 (discussing how the Security Council intended to create a treaty by entering into force the U.N.-Lebanese annexed agreement to Resolution 1757, which created a court to try the Hariri assassination, and that this treaty is not valid because the Lebanese Parliament never actually ratified the agreement).

<sup>58</sup> U.N. Secretary-General, *Rep. of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, Addendum*, U.N. Doc. S/2006/893/Add.1 (Nov. 21, 2006).

<sup>59</sup> MORRIS & SCHARF, *supra* note 49, at 79–82, 88–89 (discussing the Security Council’s consideration of the disadvantages of each method of establishment when creating a tribunal).

<sup>60</sup> See Fassbender, *supra* note 56, at 1097–1100 (arguing that this is the only legally permissible method to create a tribunal when the events leading up to the creation of the STL are taken into consideration).

approached the United Nations and requested that a tribunal be created.<sup>61</sup> Lebanon has not yet accepted the agreement for the STL through its constitutional process only because the Lebanese Parliament has not approved the STL's plan.<sup>62</sup> The lack of legislative approval is only due to the fact the Lebanese Parliament speaker, Nabih Berri, refuses to convene the chamber to address the tribunal's creation.<sup>63</sup>

In *Taylor*, the appeals chamber of the SCSL faced a similar scenario. The defense argued that a court formed through an agreement between the Security Council and the Sierra Leone government was not a valid court, specifically because it does not have the Chapter VII enforcement powers that ad-hoc tribunals possess.<sup>64</sup> However, the court held that the SCSL is indeed an international court. In its decision, the *Taylor* Chambers explained that the one must look beyond the SCSL enforcement powers of a court to determine if it is a valid international court. The *Taylor* Chambers pointed to a court's mode of establishment as an additional factor when determining if a court is "international." Specifically, it named a previous SCSL case referred to as the "Decision on Constitutionality," in which the defense argued that although the Sierra Leone government ratified the agreement between the United Nations and Sierra Leone for the SCSL, the agreement was not approved by a popular referendum because no such referendum was held. The defense in the "Decision on Constitutionality" case claimed a lack of referendum support made the SCSL an unconstitutional creation because approval by referendum is required for bringing a treaty into force under the Sierra Leone Constitution.<sup>65</sup> Ultimately, the "Decision on Constitutionality" court rejected the defense argument and held that a referendum was not required to validate the SCSL because it was (1) an international court established by a treaty between the United Nations and

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<sup>61</sup> Chargé d'affaires a.i, Letter dated 13 Dec. 2005 from the Chargé d'affaires a.i of the Permanent Mission of Lebanon to the U.N. addressed to the Secretary-General, U.N. Doc. S/2005/783 (Dec. 13, 2005).

<sup>62</sup> See Press Release, Security Council, Security Council Authorized Establishment of Special Tribunal to Try Suspects in Assassination of Rafiq Hariri, U.N. Press Release SC/9029 (May 30, 2007) (describing the Lebanon Parliament's efforts to convene and approve the tribunal).

<sup>63</sup> See *id.*

<sup>64</sup> Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶¶ 6–8 (May 31, 2004) [hereinafter Decision on Immunity from Jurisdiction].

<sup>65</sup> See *id.* ¶ 34 (stating that the legal status of the Special Court is a main issue in the motion); see also Prosecutor v. Kallon, Norman & Kamara, Case No. SCSL-2004-15-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, ¶¶ 3, 8, 10, 15 (Mar. 13, 2004) [hereinafter Decision on Constitutionality] (arguing that the Government of Sierra Leone acted unconstitutionally and had no lawful authority to enter into an agreement for the tribunal because it failed to secure the ratification by popular referendum: a process required by the country's constitution to bring a treaty into force).

Sierra Leone outside of the Sierra Leone court system and is not part of the Sierra Leone Judiciary,<sup>66</sup> and (2) is distinctive from domestic courts because the SCSL has powers that domestic courts do not possess.<sup>67</sup>

The *Taylor* Chambers added to the holding of the “Decision on Constitutionality” court and stated that an agreement to create the tribunal between Sierra Leone and the United Nations was the equivalent of an agreement between Sierra Leone and *all* members of the United Nations.<sup>68</sup> Additionally, the creation of the binding United Nations 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.<sup>69</sup> Under these lines of reasoning, the *Taylor* court defined the tribunal as a “truly international.”<sup>70</sup> Like the SCSL, the STL was also created by the United Nations at the request of a national government and an agreement reflecting this request was created. However, unlike Sierra Leone, the Lebanese government has not approved the creation of the tribunal through any portion of its legislative process.

Answering the arguments of critics cited above, it appears Lebanon does not expressly disapprove of the STL. Although, Lebanese legislative action regarding the STL has not yet taken place, the will of the Lebanese people is unknown only because Nabih Berri is refusing to convene parliament, thereby purposefully freezing the political process.<sup>71</sup> Additionally, the Lebanese government was actively involved in creating the STL statute and agreement.<sup>72</sup> Adhering to Lebanon’s requests, the Security Council adopted the STL’s Resolution under its Chapter VII Article 39 powers of “promoting international peace and security.”<sup>73</sup> Lebanon has also since signed a

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<sup>66</sup> See Decision on Constitutionality, *supra* note 65, ¶¶ 42–43, 49, 52–53 (stating that the Special Court is a treaty-based generic court of mixed jurisdiction and therefore not part of Sierra Leone’s judiciary).

<sup>67</sup> See *id.* ¶ 50 (citing Article 11(d) of the Special Court Agreement which allows the Special Court to “enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Special Court.”, allowing the Special Court to conclude treaties, a power that is unavailable to the national Sierra Leone courts.).

<sup>68</sup> See Prosecutor v. Taylor, *supra* note 64, ¶ 38 (“It is to be observed that in carrying out its duties under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations.”).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> 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).

<sup>72</sup> See INT’L CTR. FOR TRANSITIONAL JUSTICE, *supra* note 25, at 9, 13–14 (discussing the origins of the Special Tribunal for Lebanon and the events leading to Security Council Resolution 1757).

<sup>73</sup> U.N. Charter art., *supra* note 56, art. 39.

Memorandum of Understanding (“MOU”) with the STL. The MOU promises cooperation between Office of the Prosecutor (“OTP”) and the “Lebanese Ministries, Lebanese juridical authorities and other official institutions, as necessary,” and specifically guarantees that the Lebanese Government will provide the OTP with all necessary assistance from Lebanon to fulfill its mandate.<sup>74</sup> These collaborative efforts between the United Nations and Lebanon exemplify the Lebanese government’s further support for the STL.

Additionally, the STL agreement uses the same language as the SCSL agreement, which was cited by the “Decision on Constitutionality” court, giving the STL powers that Lebanese courts do not possess. Specifically, the STL and SCSL agreements provide the tribunals the ability to conclude treaties with States as needed for the function and operation of the court.<sup>75</sup> Like the SCSL, the STL was created by the United Nations, outside of the Lebanese Judiciary system, at the request of a national government, and has powers afforded to it unique from the national Lebanese courts. The inability of the Lebanese government to ratify the agreement for the STL, while unfortunate, does not affect its validity as a U.N.-created tribunal. Although, the mode of establishment will not affect the legitimacy of the STL, the documents created during its establishment will affect the enforcement powers the tribunal is afforded.

The agreement and statute for the STL obligate Lebanon to comply with tribunal decisions. However, the documents are silent as to the tribunal’s powers to require other states to comply with its orders and requests.<sup>76</sup> 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.<sup>77</sup> In contrast, establishing a tribunal through a Security Council-imposed resolution binds all United Nations member states to the resolution, and requires nations to comply with the tribunal’s orders under the Security Council’s Chapter VII enforcement powers. It also allows the Security Council to impose sanctions on states that do not comply with a tribunal request.<sup>78</sup> The Security Council’s Chapter VII enforcement powers

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<sup>74</sup> Memorandum of Understanding Regarding the Modalities of Cooperation, Leb.-Off. of the Prosecutor of the STL, SPECIAL TRIB. FOR LEB., available at [http://www.stl-tsl.org/x/file/TheRegistry/Library/Cooperation/mou\\_otp-lebanon\\_en.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/Cooperation/mou_otp-lebanon_en.pdf) (last visited Apr. 17, 2011).

<sup>75</sup> Decision on Constitutionality, *supra* note 65, ¶ 50; see also Statute of the Special Tribunal for Lebanon, *supra* note 12, art. 7 (specifically these courts may, “enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Special Court.”).

<sup>76</sup> See INT’L CTR. FOR TRANSITIONAL JUSTICE, *supra* note 25, at 35–36; see also Statute of the Special Tribunal for Lebanon, *supra* note 12.

<sup>77</sup> See INT’L CTR. FOR TRANSITIONAL JUSTICE, *supra* note 25, at 37 (discussing the limitations of enforcement powers for “hybrid” tribunals).

<sup>78</sup> *Id.* at 35–36.

on third party states apply to the entire tribunal resolution for the ICTY and ICTR. This is reflected by the use of the word “*shall*” before the listing of the third party states obligations. For example, the ITCR statute states that under the Security Council Chapter VII powers:

[A]ll 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.<sup>79</sup>

Alternatively, when evaluating the wording used in the STL statute, it appears that Security Council Chapter VII enforcement powers apply only to the paragraph that established the STL within Resolution 1757, and to the paragraph that explains the Republic of Lebanon’s compliance requirements when presented with requests by the STL. The first paragraph, with the use of the word *shall*, does not address the ability of the STL to require third party states to comply with the court’s decisions and requests. This paragraph states:

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 (1) of the annexed document before that date;
  - (b) If the Secretary-General reports that the Headquarters Agreement has not been concluded as envisioned under Article 8 of the annexed document, the location of the seat of the Tribunal shall be determined in consultation with the Government of Lebanon and be subject to the conclusion of a Headquarters Agreement between the United Nations and the State that hosts the Tribunal;
  - (c) If the Secretary-General reports that contributions from the Government of Lebanon are not sufficient to bear the expenses described in Article 5 (b) of the annexed document, he may accept or use voluntary contributions from States to cover any shortfall.<sup>80</sup>

Following the above paragraph in the STL’s Establishment Resolution, the Security Council attached the previously created agreement be-

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<sup>79</sup> Statute of the International Criminal Tribunal for Rwanda para. 2, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (emphasis added).

<sup>80</sup> Statute of the Special Tribunal for Lebanon, *supra* note 12, at 2 (emphasis added).

tween the Council and Lebanon. In the Establishment Resolution, the requirements for states to comply with the tribunals requests is discussed in Article 15 which states:

1. The Government *shall* cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defense counsel, at all stages of the proceedings. It *shall* facilitate access of the Prosecutor and defense counsel to sites, persons and relevant documents required for the investigation.
2. The Government *shall* comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to:
  - (a) Identification and location of persons;
  - (b) Service of documents;
  - (c) Arrest or detention of persons;
  - (d) Transfer of an indictee to the Tribunal.<sup>81</sup>

While the word *shall* is used, it is only used in reference to “The Government,” meaning Lebanon.<sup>82</sup> The cooperation of third party states is not addressed in the STL Agreement like it is in the agreements of the other Security Council mandated tribunals. This seems to suggest that the language of the agreement only affords the Security Council’s Chapter VII enforcement powers to the establishment of the tribunal, requiring the agreement for the STL be entered into force and with Lebanese cooperation, nothing further.

Lack of enforcement powers may cause problems for the tribunal if it needs a nation to extradite their high-ranking state 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.<sup>83</sup> It is possible that third party states to the tribunal might choose not to carry out the requests of the court. Accordingly, although the STL’s mode of establishment vests authority to the court to do away with high ranking official immunities, problems may still arise concerning completing arrests or achieving the surrenders of high ranking officials for trial.

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<sup>81</sup> *Id.* art. 15 (emphasis added).

<sup>82</sup> *See id.* para. 4.

<sup>83</sup> *See id.* art. 15.

2. Presence of an explicit provision that eliminates high ranking official immunities in the Special Tribunal for Lebanon's Statute

The explicit powers granted to the STL through its statute to eliminate head of state immunities is another reflection of the overall authority vested in the court when compared to other international tribunals. Prior to the STL, all international jurisdictions, including, the ICTY, ICTR, SCSL, the ECCC, and the ICC, included a provision in their statutes that explicitly eliminated Head of State and high-ranking state official immunity protections of the accused.<sup>84</sup> This provision is derived from the Statute of the International Military Tribunal (Nuremburg).<sup>85</sup> Article 7 of the Nuremburg Charter is known as the "Nuremburg Principle" and states that "[t]he 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."<sup>86</sup> The Nuremburg Principle has since been restated in the 1946 Resolution of the General Assembly.<sup>87</sup> The 1946 Resolution affirmed the principles of international law recognized by both the entire charter of the Nuremburg Tribunal, and the Tribunal's final judgments.<sup>88</sup>

The presence of the Nuremburg Provision in the charters of international U.N.-created tribunals enforces the idea that individual responsibility should be required of accused high-ranking state officials before international tribunals. Individual responsibility is established by barring immunity

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<sup>84</sup> See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 7, UN SCOR, 48th Sess., 3217th mtg., Annex, UN Doc. S/Res/827/Annex (May 25, 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. . ."); see also Statute of the International Criminal Tribunal for Rwanda, *supra* note 79, art. 6; see also Statute of the Special Court for Sierra Leone, *supra* note 51, art. 6. (The Statute of the Special Court for Sierra Leone (2000) is annexed to this Agreement, *available at* <http://www.scsl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>); see also Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 29; see also The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 27(July 17, 1998)[hereinafter The Rome Statute].

<sup>85</sup> Aptel, *supra* note 7, at 1110–11.

<sup>86</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal art. 7, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280.

<sup>87</sup> ROSANNE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* 209 (Oxford University Press Inc., New York 2008).

<sup>88</sup> *Id.*

from both prosecution and punishment of high-ranking state officials.<sup>89</sup> Article 6 of the statute for the STL states that amnesty will not be a reason to bar prosecution for high-ranking officials; however, it mentions nothing about completely excluding state official immunities.<sup>90</sup> This may have been done deliberately, with the intention of reserving the ability to eliminate state official immunity protections for only traditional *stricto sensu* international crimes.<sup>91</sup> No traditional *stricto sensu* crimes are being tried before the STL, however. The crimes of terrorism being tried at the STL are arguably so egregious that they should be considered *stricto sensu*, and the issue will be addressed in a later portion of this Note.<sup>92</sup>

Some commentators opine that the lack of a provision in the STL statute explicitly eliminating state official immunities grants high-ranking officials the immunities by default. However, the previous unflinching and frequent presence of an immunity-eliminating clause in prior ad-hoc and hybrid U.N.-created tribunals signifies a consensus in the international community that all international tribunals should be afforded the ability to eliminate immunities whether or not the tribunal is specifically afforded the right. Reflecting this trend, the Rome Statute of the ICC also eliminated all immunities for those individuals accused of all international crimes. Article 27(1) of the Rome 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.<sup>93</sup>

In addition, Article VII of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind further reflects the need for a universal elimination of high-ranking state official immunities when international crimes are committed.<sup>94</sup> It states that "[t]he official position of an individual who commits a crime against the peace and

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<sup>89</sup> Agreement for the Prosecution and of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, *supra* note 86, art. 7.

<sup>90</sup> Aptel, *supra* note 7, at 1108–11.

<sup>91</sup> See *supra* Part II (including in the list of *stricto sensu* crimes, genocide, war crimes, and crimes against humanity).

<sup>92</sup> Aptel, *supra* note 7, at 1111; see also *infra* Part III.C.6.e.

<sup>93</sup> The Rome Statute, *supra* note 84, art. 27(1).

<sup>94</sup> 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) (explaining that although the Draft Code is not binding authority in international law it is authoritative in defining international customary law); see also Article 7 of the International Law Commission's (ILC's) Draft Code of Crimes Against the Peace and Security of Mankind (1996) [hereinafter ILC Draft Code].

security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.”<sup>95</sup>

The above consensus indicates that customary international law<sup>96</sup> now requires all individuals accused of committing the most heinous crimes to face justice before an international tribunal, regardless of the individual’s official position.<sup>97</sup> Appropriately, it was unnecessary for the drafters of the STL statute to include an explicit provision that excluded head of state immunities.<sup>98</sup> The lack of an explicit provision in the STL does not reduce the authority vested to the tribunal by the international community to eliminate all high-ranking state official immunity protections of the accused.

3. The level of Security Council support for the creation of the Special Tribunal for Lebanon as exemplified through the Security Council voting record

The level of support from the Security Council during the creation of the STL is also reflective of the implicit authority vested to it by the international community.<sup>99</sup> Five Security Council members abstained from voting on the adoption of Resolution 1757.<sup>100</sup> It may be contested that the five abstentions reflect apprehensions that the Security Council is exceeding its authority, and interfering into strictly domestic Lebanese issues by instituting the STL. Additionally, some may view the voting record as proof the STL is not a legitimate international tribunal created from a Security Council resolution with complete support. Specifically, critics may point out that in contrast to the STL, the ICTY is a truly legitimate tribunal, which was established through Resolution 827 under Chapter VII of the U.N. charter and by a unanimous vote in the Security Council.<sup>101</sup> However, the Security

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<sup>95</sup> ILC Draft Code, *supra* note 94.

<sup>96</sup> Customary international law norms are those principles which: (1) are broadly accepted by the international community and (2) require the legal obligations of enforcement from all nations. See Jerrold L. Mallory, *Resolving the Confusion Over Head-of-State-Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 176–77 (1986).

<sup>97</sup> Mark A. Summers, *Immunity of 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 BROOK. J. INT’L L. 463, 485–86 (2006) (referring to the most heinous *stricto sensu* crimes).

<sup>98</sup> Alebeek, *supra* note 87, at 209.

<sup>99</sup> The Security Council must vote to establish a tribunal under its Chapter VII powers. See U.N. Charter, *supra* note 56, art. 39.

<sup>100</sup> U.N. SCOR, 62nd Sess., 5685th mtg., U.N. Doc. S/PV.5685 (May 30, 2007).

<sup>101</sup> United Nations Bibliographic Information System, S.C. Res. 827 (1993) on establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (May 25, 1993) (stating that the United Nations voting record

Council also created other “legitimate” international tribunals under its Chapter VII powers without achieving a unanimous Security Council vote. For example, the Security Council passed Resolution 955 creating the ICTR, even with one member voting against its creation and one abstaining.<sup>102</sup> It is arguable that the ICTR Security Council vote of no support, coupled with an abstention, is stronger evidence of the lack of Security Council agreement for the tribunal, than the five abstentions present in the creation of the STL.

Critics will also likely point out that in addition to the five votes of abstention, the Security Council members, while voting, cautioned that the implementation of the STL could have serious political repercussions.<sup>103</sup> Despite these concerns, Resolution 1757 was pushed forward and legitimately passed through the process required to bring the international tribunal into force, just as the ICTY and ICTR before it experienced. This compliance with the process required for bringing international tribunals into force, coupled with a complete affirmative Security Council vote from those members who did vote, enforces the claim that like the ICTY and the ICTR before it, the United Nations views the STL as a legitimate Security Council backed international tribunal.<sup>104</sup> A further examination of the history behind the STL’s creation aids in better defining the scope of authority vested in the STL.

#### 4. The evolution of the events leading up to the establishment of the Special Tribunal for Lebanon by the United Nations

The events leading up to the establishment of the STL also contribute to the conclusion that the STL was intended to be an “international” tribunal capable of eliminating state official immunity claims. First, in his letter to the Secretary-General of the United Nations (Secretary-General), which launched the process of creating the tribunal, the prime minister of Lebanon referred to the STL as a “tribunal of an international character.”<sup>105</sup> The Se-

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was Yes: 015, No: 000, Abstentions: 000, Non-Voting: 000, Total voting membership: 015), available at <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=129C2Q9040Y97.6203&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=&index=.VW&term=resolution&matchopt=0|0&oper=AND&x=18&y=3&aspect=power&index=.VW&term=827+&matchopt=0|0&oper=AND&index=.AD&term=&matchopt=0|0&oper=AND&index=BIB&term=&matchopt=0|0&uloper=%3D&ullimit=&uloper=%3D&ullimit=&sort=>.

<sup>102</sup> 3377 Meeting Record, Security Council, The Situation Concerning Rwanda, S/PV.3377 (May 16, 1994).

<sup>103</sup> U.N. SCOR 62nd Sess., *supra* note 100.

<sup>104</sup> *Id.*

<sup>105</sup> See generally Charge d’affaires a.i. of the Permanent Mission of Lebanon to the U.N., Letter Dated December 13, 2005 from the Charge d’affaires a.i. of the Permanent Mission of

curity Council and the Secretary-General continued to refer to the STL as a “tribunal of an international character” in a range of other official documents and reports.<sup>106</sup> For example, in a Report of the Secretary General to the Security Council, the Secretary-General specifically stated that a “purely national tribunal” could not effectively prosecute those accused of the crimes in the STL’s jurisdiction.<sup>107</sup> However, in the report, the Secretary-General also stressed that a purely “international tribunal” would not assign the level of responsibility to Lebanon that is required to achieve justice for crimes that primarily affect the nation.<sup>108</sup> The Secretary-General’s report designated the tribunal as a hybrid form of court, but did little to clarify the scope of powers the STL—a court of “international character”— would possess. A further examination of the history of the Resolution 1757 leading to the court’s creation aids in defining the court’s designated authority.

After reviewing the first Secretary-General report, the Security Council requested that the Secretary General negotiate with Lebanon for the establishment of a tribunal of “international character.”<sup>109</sup> The Secretary-General acted accordingly and published a second report that included the draft agreement between the United Nations and Lebanon for the STL.<sup>110</sup> In this document, the Secretary-General directly addressed the concept of developing a “tribunal of international character.”<sup>111</sup> The Secretary-General stated that although features of international character were not specifically discussed in the statute for the STL,

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.

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Lebanon to the U.N. addressed to the Secretary-General, U.N. Doc. S/2005/783 (Dec. 13, 2005).

<sup>106</sup> *Id.* (proposing Lebanon should have a UN backed court that is an “international or internationally assisted” tribunal based on an agreement between the United Nations and Lebanon to try those individuals responsible for the Hairy assassination.).

<sup>107</sup> Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005) U.N. Doc. S/2006/176 (2006).

<sup>108</sup> *Id.*

<sup>109</sup> Schabas, *supra* note 23, at 515.

<sup>110</sup> *Id.*

<sup>111</sup> *See generally* Report of the Secretary-General on the establishment of a special tribunal for Lebanon U.N. Doc. S/2006/893 (2006) (first mentioned in para.2 but discussed throughout the document).

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.<sup>112</sup>

This statement emphasized the several attributes of the STL that mirror other international criminal tribunals. However, it also indicated that the subject matter of the tribunal and the applicable substantive law are national in character.<sup>113</sup>

These combined events demonstrate the United Nation's belief that the authority vested to the STL is similar to other international U.N.-created tribunals. The following sections of this Note will evaluate how the STL's limited subject matter jurisdiction and applicable Lebanese law affects its ability to be considered "international" enough to eliminate high-ranking state official immunity claims. Specifically, the sections below will address how the STL's "international" characteristics outweigh the tribunals' "national court" traits. Additionally, how the egregious nature of the crimes being tried by the STL will aid in tipping the scales to allow the tribunal to be considered "international" enough to eliminate high-ranking state official immunity claims.

### C. *Characteristics of the Special Tribunal for Lebanon*

In addition to the "international" level of authority vested in the STL, the "characteristics" of the court reflect that the STL is an "international" tribunal capable of eliminating high-ranking official immunity claims. The characteristics of a court include: (1) its title; (2) the composition of its judges and staff; (3) its sources of funding; (4) its location; (5) the procedural methods used by the court; and (6) the courts subject matter jurisdiction.<sup>114</sup> A comparison of the characteristics of the STL and other international U.N.-created tribunals must be completed to determine the level of "international" traits the STL possesses.<sup>115</sup>

#### 1. Title of the Special Tribunal for Lebanon

The first characteristic used to evaluate if the STL is international enough to eliminate high ranking state official immunities is the STL's title. Since several U.N.-sponsored criminal tribunals use the word "internation-

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<sup>112</sup> *Id.*

<sup>113</sup> Schabas, *supra* note 23, at 516 (including in the subject matter terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences and referring to the Lebanese Criminal Code as the substantive law used by the court).

<sup>114</sup> *See generally* INT'L CTR. FOR TRANSITIONAL JUSTICE, *supra* note 25, at 9-31 (comparing and contrasting the STL to other international ad-hoc and hybrid tribunals).

<sup>115</sup> A visual comparison of the analysis in this section is available in Ann. 1.

al” in their title, some may argue the lack of this term in the STL’s title indicates it is not a truly international tribunal. Examples of U.N.-sponsored courts with “international” in their titles include the ICJ, the ICC, the ICTY, and the ICTR.<sup>116</sup>

In *Prosecutor v. Taylor*, a similar argument was brought before the Appeals Chamber of the SCSL, a U.N.-sponsored court which along with the ECCC, does not use “international” in its title.<sup>117</sup> In its overall decision, the *Taylor* Appeals Chamber attached little to no significance to distinctions in the titles of the tribunals when it analyzed those attributes, which make a tribunal “international.”<sup>118</sup> The *Taylor* Court held that a “Special Court” is equivalent in status to other U.N.-backed tribunals, even those that have the word “international” in their title.<sup>119</sup> Similarly, the STL uses the designation of “special” in its title and was created by the United Nations. The lack of the term “international” in the STL’s title will not reduce the courts ability to be considered “international” enough to eliminate head of state immunities.

## 2. Composition of the Judges Chambers Prosecutors, Registrar, and Defense Office in the Special Tribunal for Lebanon

The second factor used to evaluate if the STL is a characteristically “international” tribunal is the composition of its judges, prosecutors, registrar, and defense office. A comparison of the judicial composition of the STL reveals that it is similar to other U.N.-created hybrid tribunals. The STL statute requires its chambers to be composed of at least eleven independent judges and no more than fourteen judges in total.<sup>120</sup> Additionally, the judges in the STL Chambers 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 (5) there must be two

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<sup>116</sup> See Schabas, *supra* note 23, at 514.

<sup>117</sup> *Id.*; see also Decision on Immunity from Jurisdiction, *supra* note 64.

<sup>118</sup> The court looked to several factors but did not mention that the name had any significance in distinguishing an “international” court from one that was not “international.” See Decision on Immunity from Jurisdiction, *supra* note 64 (May 31, 2004); see also Schabas, *supra* note 23, at 514.

<sup>119</sup> Decision on Immunity from Jurisdiction, *supra* note 64, ¶ 42.

<sup>120</sup> This ensures that at least three-quarters of the judges in the Chambers of the STL are individuals from countries other than Lebanon. See Statute of the Special Tribunal for Lebanon, *supra* note 12, art. 8.

alternate judges available at all times, one who is Lebanese and one who is international.<sup>121</sup>

Some commentators argue that because the judicial staff (Chambers) of the STL is not entirely international, the STL is not a characteristically international tribunal. These individuals claim that the ICTY and the ICTR ad-hoc tribunals are truly legitimate international courts, and that every judge composing the Chambers in the ICTY and ICTR are international. However, the hybrid U.N.-created tribunals, the ECCC and SCSL,—like the STL—do not have an entirely international Chambers. Yet these tribunals are considered international enough to eliminate head of state immunities.<sup>122</sup> In the SCSL Chambers, the majority of the judges are international, with the minority being from Sierra Leone.<sup>123</sup> In the ECCC Chambers, the majority of the judges are national and the minority is international.<sup>124</sup> It is noteworthy that like the SCSL, the majority of judges in both the trial and appeals Chambers of the STL must be international. In addition, the STL Chambers employ more “international” judges than the ECCC, and the STL’s judicial composition mirrors the SCSL and ensures the STL is characteristically “international.”

Further comparisons of the STL’s Registry, Prosecutor, and Defense offices to other U.N.-created international tribunals reveal that the STL is characteristically “international” in these areas as well.<sup>125</sup> There is no requirement that the STL’s head register be a Lebanese national, but instead he must only be an international employee from the United Nations who is appointed by the Secretary-General.<sup>126</sup> This is consistent with the selection methods of other U.N.-sponsored international tribunals, tribunals that must meet the needs of the international community. Alternatively, if the STL were a tribunal domestic in nature, a Lebanese registrar would be required to meet solely national Lebanese needs.

A selection panel of individuals who were appointed by the Secretary-General chose the STL’s Prosecutor.<sup>127</sup> 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.<sup>128</sup> Critics claim the selection of a

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<sup>121</sup> *Id.*

<sup>122</sup> Johnson, *supra* note 5, at 275.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See generally Statute of the Special Tribunal for Lebanon, *supra* note 12 (defining, throughout the different bodies of the tribunal and their functions).

<sup>126</sup> *Id.* art. 4.

<sup>127</sup> *Id.* art. 3.

<sup>128</sup> The STL panel included international judges, a U.N. Legal Counsel and the former president of the ICTR. INT’L CTR. FOR TRANSITIONAL JUSTICE, *supra* note 25, at 19.

prosecutor through a panel is not a transparent process.<sup>129</sup> However, the use of a selection panel is designed to ensure the selection of a more impartial and professional tribunal staff occurs.<sup>130</sup> Unlike the process of selecting the Prosecutor, the task of choosing STL's Deputy-Prosecutor was assigned to the Lebanese government.<sup>131</sup> Commentators maintain that the presence of a national deputy prosecutor is evidence that the STL is not an international tribunal. Yet, a domestic deputy prosecutor was used in the ECCC and proposed for usage at the SCSL.<sup>132</sup> The characteristics the STL's prosecutors share with other legitimate international tribunals indicate that the STL's prosecutor selection process and composition is similar to other international tribunals.

The Secretary-General, in consultation with the STL's President, Judge Antonio Cassese, appoints the head of the STL defense office.<sup>133</sup> This selection process mirrors that used by other U.N. tribunals, however, the STL is the first U.N. tribunal to include the Defense Office as a fourth "organ" of the court.<sup>134</sup> Under the STL statute, the STL defense office is afforded the same status as the Office of the Prosecutor, the Chambers, and the Registry.<sup>135</sup> Including the Defense Office as an organ of the court ensures defendants will be afforded more access to court finances and resources.<sup>136</sup> Overall, the Defense Office is arguably more international in nature than the defense offices of other U.N.- backed tribunals because the office is included as an official organ of the court.

### 3. Funding sources for the Special Tribunal for Lebanon

The funding scheme for the STL is the third characteristic that is weighed when determining if the tribunal is characteristically "international" enough to eliminate head of state immunity protections. 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 U.N. General Assembly.<sup>137</sup> The ICTY and ICTR ad-hoc tribunals are subsidiary bodies of

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Statute of the Special Tribunal for Lebanon, *supra* note 12, art. 3(3) (The Lebanese Government must consult the Secretary-General and the Prosecutor in their selection process for the deputy prosecutor).

<sup>132</sup> INT'L CTR. FOR TRANSITIONAL JUSTICE, *supra* note 25, at 22.

<sup>133</sup> *See also* Statute of the Special Tribunal for Lebanon, *supra* note 12, art. 13.

<sup>134</sup> *See* INT'L CTR. FOR TRANSITIONAL JUSTICE, *supra* note 25, at 24.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *See also* Statute of the Special Tribunal for Lebanon, *supra* note 12, art. 5.

the U.N. Security Council and report directly to it.<sup>138</sup> Accordingly, the same budget processes used in other established U.N. program activities are used to fund the ICTY and ICTR.<sup>139</sup> Like other U.N. funded programs, every expense recorded by the ICTY and ICTR is reviewed and reimbursed by the member states of the United Nations collectively.<sup>140</sup> Alternatively, the STL's funding scheme is similar to the funding systems used by the SCSL and the ECCC. The SCSL and the ECCC are funded by voluntary contributions of U.N. member states, and do not receive contributions from the general U.N. budget.<sup>141</sup> Fifty-one percent of the STL's funding will be by voluntary contributions of U.N. member states, and forty-nine percent by the Lebanese government. Additionally, if the required amount of voluntary funding cannot be raised, the Security Council may explore other means of financing the STL's work.<sup>142</sup>

Commentators claim that a tribunal, which receives forty-nine percent of its monies from the Lebanese government, may run into problems if a change in power leads to the Lebanese government choosing to halt or undermine a large portion of the STL's funding.<sup>143</sup> Although a change in power in the Lebanese government is a likely possibility, these criticisms are ultimately unfounded. Both the SCSL and the ECCC have experienced difficulties obtaining the required amount of funding to run the tribunals and have prevailed through support from other financial avenues.<sup>144</sup> Faced with financial uncertainty, the SCSL previously requested and received funding from the U.N. general fund to minimize delays in the court.<sup>145</sup> It is likely that the U.N. Security Council included a provision in the STL statute that allows the court to pursue alternate funding sources to allow for funding from the U.N. general fund to be used to support the tribunal if a stalemate occurs in the Lebanese government. The funding percentage set up may also be in place to allow other interested U.N. member donors to contribute to the STL's justice process if they become interested in the future.<sup>146</sup> The STL funding scheme is similar to hybrid tribunals, and requiring Lebanon to

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<sup>138</sup> Johnson, *supra* note 5, at 279.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (A budgetary body in the General Assembly determines the exact percentage of the tribunal's reimbursement each member state must contribute).

<sup>141</sup> *Id.*

<sup>142</sup> Statute of the Special Tribunal for Lebanon, *supra* note 12, art. 5 (describing the financing of the Tribunal).

<sup>143</sup> AMNESTY INT'L, THE SPECIAL TRIBUNAL FOR LEBANON: SELECTIVE JUSTICE? 7 (2009), available at <http://www.amnesty.org/en/library/info/MDE18/001/2009>.

<sup>144</sup> Johnson, *supra* note 5, at 280.

<sup>145</sup> *Id.*

<sup>146</sup> INT'L CTR. FOR TRANSITIONAL JUSTICE, *supra* note 25, at 15–16 (using similar reasoning for new member participation in the Management Committee).

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 U.N. hybrid tribunals have faced.

Critics also argue that the large contribution of funding to the STL by the Lebanese government reduces the accountability and impartiality of the court. Accordingly, Lebanese, not international, interests will largely guide prosecutions and convictions before the STL. However, like the SCSL, the STL has a Management Committee composed of major international donors that provides policy advice and direction for the non-legal aspects of the court.<sup>147</sup> This body ensures that the use of funding by the court reflects the needs of the international community that created the tribunal.<sup>148</sup> Current members of the STL Management Committee include the United Kingdom (the Committee chair); Germany; the Netherlands; the United States; France; and Lebanon.<sup>149</sup> The Secretary-General also serves as an ex-officio member of the Committee, adding an additional degree of impartiality and international character to the STL.<sup>150</sup>

The STL Management Committee is required to report on a regular basis to the “Group of Interested States.”<sup>151</sup> The “Group of Interested States” is an assembly of nations who are interested in the happenings of the STL, but may not necessarily support its work.<sup>152</sup> Any U.N. member state concerned with the financial influence of the STL’s funding scheme may join this group. The Management Committee may also expand its member composition if any additional donors wish to participate and the donor agrees to contribute a considerable amount of money to the tribunal.<sup>153</sup> 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 forty-nine percent 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. Ensuring the funding factor of the tribunal will remain more “international” than national in character.

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<sup>147</sup> Statute of the Special Tribunal for Lebanon, *supra* note 12, art. 6; *see also* INT’L CTR. FOR TRANSITIONAL JUSTICE, *supra* note 25, at 15–16.

<sup>148</sup> INT’L CTR. FOR TRANSITIONAL JUSTICE, *supra* note 25, at 16.

<sup>149</sup> *Id.* at 15.

<sup>150</sup> *Id.* (stating that the Secretary-General does not vote on Management Committee Decisions, but adds his advice to decisions and aids in overseeing the process).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> INT’L CTR. FOR TRANSITIONAL JUSTICE, *supra* note 25, at 15.

4. Location of the Special Tribunal for Lebanon's headquarters and offices

The location of the STL headquarters in The Hague, Netherlands is the fourth factor that indicates the tribunal is characteristically “international” and able to eliminate high-ranking state official immunities. The principal judicial organs of the United Nations, the ICJ and the ICC, are all located in The Hague, Netherlands.<sup>154</sup> The ICTY is also located in The Hague.<sup>155</sup> The decision to place the ICTY in The Hague was influenced by the placement of the aforementioned judicial organs and the inability to effectively run a court in a war torn nation.<sup>156</sup> Like the ICTY, the ICTR was established soon after a war and its main office is located outside of the nation where the crimes relevant to the tribunal occurred, in Arusha, Tanzania. However, the ICTR still staffs a field office in Kigali, Rwanda, and its appeals chamber is located in The Hague.<sup>157</sup> In contrast, the SCSL and the ECCC are located completely within the borders of the concerned countries with one exception.<sup>158</sup> Even with an entirely domestically located court, the SCSL has found it necessary to try high profile cases in The Hague in the ICC's court room to ensure impartiality and safety of its participants.<sup>159</sup>

The STL's location most resembles the ICTR, with its headquarters stationed outside of Lebanon in The Hague, Netherlands, and a field office located in Beirut, Lebanon.<sup>160</sup> Article 8 of the Security Council Resolution for the STL states the tribunal shall specifically have its “seat” outside of Lebanon to insure “fairness, security and administrative efficiency.”<sup>161</sup> The tribunal consequently signed a “headquarters agreement” with the Netherlands through the U.N. legal counsel to ensure the headquarters of the STL remains in The Hague throughout its existence.<sup>162</sup> Although the STL has an office in Lebanon, the Security Council agreement to create the STL states that the purpose of the Lebanon office is only to further investiga-

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<sup>154</sup> Johnson, *supra* note 5, at 278.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 279 (noting that “the trial of Charles Taylor in the Sierra Leone tribunal is being held in The Hague, not in Freetown, the site of the tribunal”).

<sup>159</sup> *Id.* (Referring to the *Charles Taylor* case being held in The Hague, Netherlands.)

<sup>160</sup> INT'L CTR. FOR TRANSITIONAL JUSTICE, *supra* note 25, at 12; *see also* Agreement between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the Special Tribunal for Lebanon, Dec. 21, 2007, *available at* <http://www.stl-tsl.org/sid/130> [hereinafter Headquarters Agreement].

<sup>161</sup> *See* Statute of the Special Tribunal for Lebanon, *supra* note 12 (including upholding the rights of witnesses and victims).

<sup>162</sup> *See generally* Headquarters Agreement, *supra* note 160.

tions.<sup>163</sup> It is necessary for international tribunals to keep the trials of high-ranking officials with active supporters outside of the affected nation's borders for safety and security reasons. The need to conduct trials in a location outside of a nation was addressed during the Charles Taylor's trial at the SCSL.<sup>164</sup> The decision to move Taylor's trial from Sierra Leone to The Hague occurred because the court was concerned that Taylor supporters in Sierra Leone would use violent means to delay Taylor's trial, or enable to the trial from occurring altogether.<sup>165</sup> In addition to the Security Council explicitly designating the Hague as the Special Tribunal for Lebanon's "seat" for conducting trials<sup>166</sup>, potential tensions in Lebanon during the proceedings may disable the court from completing its assigned tasks, if trials were to be held inside Lebanese borders. Both of these factors suggest STL trials will never be conducted in Lebanon. Accordingly, the location of the court further lends to the STL's "international" characteristics.

#### 5. Procedural methods used by the Special Tribunal for Lebanon

The fifth factor that makes the STL more international than domestic in nature are the STL's procedural methods. All of the U.N.-created tribunals listed in the visual comparison Annex section of this Note use procedural laws very similar to the STL. Each tribunal's procedural laws are based on the international standards of justice and due process inspired by the International Covenant on Civil and Political Rights.<sup>167</sup> Although the STL is the first U.N.-backed international tribunal to apply only domestic law, the procedural rules of the tribunal are required to replicate international standards of justice and due process.<sup>168</sup> This factor weighs favorably in the determination that the STL is an international tribunal capable of eliminating head of state immunities.

When comparing STL to other U.N.-created tribunals, it is evident that the aforementioned five characteristics of the STL are very similar to other U.N.-created tribunals before it. The traits of the STL, as discussed above will not likely give rise to concerns that characteristically it is not an international tribunal. However, the sixth characteristic, the subject matter

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<sup>163</sup> Statute of the Special Tribunal for Lebanon, *supra* note 12, art. 8, ¶ 3.

<sup>164</sup> Johnson, *supra* note 5, at 275.

<sup>165</sup> *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.").

<sup>166</sup> See Statute of the Special Tribunal for Lebanon, *supra* note 12 (including upholding the rights of witnesses and victims).

<sup>167</sup> Johnson, *supra* note 5, at 278.

<sup>168</sup> *Id.*; see generally Statute of the Special Tribunal for Lebanon, *supra* note 12.

jurisdiction of the court, may become a seriously contested factor in determining if the STL is an international criminal tribunal capable of eliminating immunity claims of the accused.

#### 6. Subject matter jurisdiction for the Special Tribunal of Lebanon

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.”<sup>169</sup> The STL may be characteristically similar to a hybrid tribunal, however, the scope of its subject matter jurisdiction is unlike any previous U.N.-created international tribunal.<sup>170</sup> The STL’s jurisdiction covers crimes defined *only* by a domestic source, the Lebanese Penal Code (LPC).<sup>171</sup> Additionally, the tribunal is trying no traditional “international” crimes under the LPC.<sup>172</sup> Included in the jurisdiction of the STL are: acts of terrorism; crimes, and offenses against life and personal integrity; illicit associations; and failure to report crimes and offenses defined under the LPC.<sup>173</sup>

Like the STL, SCSL and the ECCC have jurisdiction over domestic crimes.<sup>174</sup> However, in addition to their domestic subject matter jurisdiction, the SCSL and the ECCC also have jurisdiction over international crimes.<sup>175</sup> No international court decision has directly addressed the question of whether a U.N.-created tribunal only prosecuting non-universally recognized “international” crimes could be one that has the power to eliminate claims of immunity.<sup>176</sup> In the *Arrest Warrant Case*, the ICJ stated it is “too new to admit of any definite answer” on what exactly what constitutes an “international court.”<sup>177</sup>

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<sup>169</sup> Schabas, *supra* note 23, at 516–17.

<sup>170</sup> *Id.* at 517.

<sup>171</sup> *Id.* at 519; *see also* Statute of the Special Tribunal for Lebanon, *supra* note 12, art. 2.

<sup>172</sup> Schabas, *supra* note 23, at 517.

<sup>173</sup> *See generally* Statute of the Special Tribunal for Lebanon, *supra* note 12.

<sup>174</sup> Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1125, 1126 (2007); *see also* Johnson, *supra* note 5, at 277–78 (the SCSL does have subject matter jurisdiction over domestic crimes, but 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. The domestic subject-matter jurisdiction of the SCSL has played a very small role in the court’s trials).

<sup>175</sup> *See* Johnson, *supra* note 5, at 278 (the ECCC and the SCSL are a part of the their nations domestic court system. In contrast, the STL is a judicial body independent from the Lebanese legal system).

<sup>176</sup> *See* Schabas, *supra* note 23, at 516 (referring to the reference by the court of “certain international criminal courts” capable of eliminating high-ranking state official immunities).

<sup>177</sup> *See Arrest Warrant*, *supra* note 31 (dissenting opinion of Judge Oda, ¶ 14).

The STL's lack of jurisdictional power over international crimes may create problems for the STL's Office of the Prosecutor because high-ranking state official immunities have not historically been waived for individuals that commit domestic crimes.<sup>178</sup> Critics claim that defining the STL as an international tribunal impedes on the sovereign rights of nations because the STL subject matter jurisdiction is solely domestic. However, Judge Christine van den Wyngaert's dissent in the *Arrest Warrant Case* supports the concept that allowing characteristically hybrid tribunals like the STL to exercise universal jurisdiction and eliminate state official immunities is valid.<sup>179</sup> Van den Wyngaert stated that eliminating high-ranking state official immunities is valid if doing so ensures "the whole recent movement in modern international criminal law towards recognition of the principle of individual accountability for international crimes" is not ignored.<sup>180</sup> This is especially important for the STL, where the accused before the tribunal may be current or former high-ranking state officials who may be afforded complete immunity if it is held the tribunal is inherently domestic and not "international." However, emerging trends in international law suggest that the acts of terrorism being tried before the STL are international in nature. Accordingly the tribunal is "international" enough to eliminate claims of high-ranking official immunities.

a. Terrorism defined under the Lebanese Penal Code

The portions of the LPC included in the subject matter jurisdiction of the STL are those "relating to the prosecution and punishment of acts of terrorism, crimes and offences life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy."<sup>181</sup> The portion of the LPC that defines terrorist acts explains that they are 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."<sup>182</sup> Hariri's assassination was committed with explosives, and the attack will be consi-

<sup>178</sup> See Summers, *supra* note 97, at 486–89.

<sup>179</sup> See Schabas, *supra* note 23, at 516.

<sup>180</sup> See *Arrest Warrant*, *supra* note 31 (dissenting opinion of Justice Van den Wyngaert, ¶ 27) (although she notes a narrow approach is often taken in respect to immunity protections).

<sup>181</sup> Statute of the Special Tribunal for Lebanon, *supra* note 12, art. 2; see also Jurdi, *supra* note 174, at 1129 (specifically 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).

<sup>182</sup> 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) (citing Legislative Decree 340 of 1943 (Leb.), art. 314), available at <http://www.loc.gov/law/help/hariri/hariri.pdf>.

dered 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.<sup>183</sup> Assuming the Hariri assassination was an act of terrorism as defined by the LPC, the STL will be considered international enough to eliminate head of state immunities if the assassination is classified as an international crime, either independently or under the broader subset of crimes against humanity.

b. Terrorism as an independent international crime defined by a treaty or through customary international law

A crime may be defined as “international” either because a treaty labels it as such, or because it is universally accepted as “international” through customary international law.<sup>184</sup> As previously mentioned in the “A Historical Development of International Criminal Tribunals” Part II.A of this Note there are currently three widely recognized “international” or *stricto sensu* international crimes: genocide, war crimes, and crimes against humanity.<sup>185</sup> The crimes being tried before the STL include: terrorist acts, crimes of illicit association, and offenses against life and personal integrity. Such crimes are generally not considered part of the historic list of *stricto sensu* crimes.<sup>186</sup> However, an international trend is emerging that suggests terrorism should also be included on the list of *stricto sensu* crimes. This coupled with a recent STL appeals chamber decision suggests that crimes of terrorism will be “international” crimes before the Special Tribunal for Lebanon.<sup>187</sup>

c. Terrorism - an international crime as defined by treaties

In addition to the universal jurisdiction granted to *stricto sensu* crimes, treaties authorize universal jurisdiction over further offenses. Crimes that are granted universal jurisdiction by treaties include: torture, hostage apprehension, and hijacking transgressions.<sup>188</sup> The grant of universal jurisdiction by treaties indicates that perpetrators of treaty-defined crimes are “enemies of mankind” and are condemned by the international

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<sup>183</sup> *Id.* (for a further discussion of how the Hariri attack created a state of fear among the Lebanese Population *See infra* Part III.C.6.e).

<sup>184</sup> Schabas, *supra* note 23, at 517.

<sup>185</sup> Aptel, *supra* note 7, at 1111; *See supra* Part II.A.

<sup>186</sup> *Id.* (as defined by the Lebanese criminal code).

<sup>187</sup> Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I (Feb. 16, 2011), *available at* [http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216\\_STL-11-01\\_R176bis\\_F0010\\_AC\\_Interlocutory\\_Decision\\_Filed\\_EN.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216_STL-11-01_R176bis_F0010_AC_Interlocutory_Decision_Filed_EN.pdf) [hereinafter Interlocutory Decision].

<sup>188</sup> Bradley & Goldsmith, *supra* note 8, at 2134.

community.<sup>189</sup> In addition to the crimes of torture, hostage apprehension, and hijacking defined by treaties, several conventions and treaties exist that grant nations jurisdiction for crimes of terrorism.

International support through treaties for combating acts of terrorism began in 1926 when the International Congress of Penal Law recommended a Permanent Court of International Justice should be granted the power to “judge individual liabilities” that occur as a result of international offenses which are “a threat to world peace.”<sup>190</sup> Although this idea died, and there currently is no universally recognized definition for terrorism,<sup>191</sup> similar requests to include certain acts of terrorism as international crimes have been expressed in the international forum.<sup>192</sup>

One example occurred in 1994, when the U.N. General Assembly passed a Resolution named “Measures to Eliminate International Terrorism.”<sup>193</sup> This Resolution provided a general definition of terrorism and stated:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.<sup>194</sup>

In the preface to this Resolution, the U.N Secretary General, Kofi Annan, emphasized how important it is for the international community to

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<sup>189</sup> *Id.* at 2133–34.

<sup>190</sup> SCHARF & NEWTON, *supra* note 10 (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, UN Doc. A/CN.4/7Rev.1 (1949) (translating the original French text found in *Premier congres international de droit penal, Actes du congres* 634)).

<sup>191</sup> Kevin J. Greene, *Terrorism as Impermissible Political Violence: An International Law Framework*, 16 VT. L. REV. 461, 462 (1992) (“Terrorism has ‘no precise or widely accepted definition.’”).

<sup>192</sup> *Id.* (These requests have occurred on several occasions. One 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. 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. Although this treaty was rejected the idea before it was ratified, every 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.).

<sup>193</sup> SCHARF & NEWTON, *supra* note 10.

<sup>194</sup> Measures to Eliminate International Terrorism, G.A. Res. 49/60, (Dec. 9 1994), para. I.3 [hereinafter Measures to Eliminate International Terrorism].

try acts of terrorism.<sup>195</sup> Additionally, it appears from the “Measures to Eliminate International Terrorism” Resolution that the U.N. General Assembly believes that to properly combat terrorist acts, universal jurisdiction must be provided over terrorist criminals regardless of their position.<sup>196</sup> The Security Council again deplored acts of terrorism in Resolution 1373 on the international cooperation to combat threats to international peace and security caused by terrorist acts. The resolution condemns international acts of terrorism and reinforces the idea that acts of terrorism constitute a threat to “international peace and security.”<sup>197</sup>

Currently, several multilateral anti-terrorism conventions exist that focus on the domestic enforcement of terrorism through international cooperation.<sup>198</sup> Additionally, acts of transnational terrorism, like the Hariri assassination, are becoming a serious problem.<sup>199</sup> Accordingly, defining terrorism as an international crime in an effort to bring offenders to justice is now a priority in nations across the globe.<sup>200</sup> However, none of the mentioned conventions specifically refer to terrorism as an international criminal offense.<sup>201</sup> Although terrorism is not explicitly defined as an international crime through treaties, the international condemnation of terrorist crimes described above suggests a trend in customary international law is emerging that defines certain egregious acts of terrorism as international crimes.

d. Terrorism as defined through customary international law

As previously mentioned, principles that are considered customary international law are those which are broadly accepted by the international community, and require the legal obligations of enforcement from all nations.<sup>202</sup> Combating grave crimes through customary international law reflects the international community’s interest in protecting higher norms of justice when these norms come into conflict with the rules of state official

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<sup>195</sup> *Id.* at Preface.

<sup>196</sup> *Id.* at I.1-2 (stating “the methods and practices of terrorism [are] criminal and unjustifiable-whoever commits them and wherever they occur.”)

<sup>197</sup> See U.N. SCOR, 56th Sess., 438th mtg., U.N. Doc. S/RES/1373 (Sept. 28, 2001) (confering about states’ obligations to combat terrorism).

<sup>198</sup> Greene, *supra* note 191, at 467–71 (included but not limited to the European Convention on the Suppression of Terrorism, the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, and the Convention Against the Taking of Hostages.).

<sup>199</sup> SCHARF & NEWTON, *supra* note 10.

<sup>200</sup> *Id.*

<sup>201</sup> Saliba, *supra* note 182, at 5.

<sup>202</sup> See Mallory, *supra* note 96, at 176–77.

immunity.<sup>203</sup> Part III.C.6.c of this Note provided several examples of when the international community accepted the need to combat terrorism.<sup>204</sup> In addition, the U.N. General Assembly stated “any acts of terrorism are criminal and unjustifiable regardless of motivation, whenever and by whomsoever committed and are unequivocally condemned.”<sup>205</sup> There were also proposals to include terrorist crimes in the ICC statute.<sup>206</sup> Currently, the Security Council requires member nations of the United Nations to “accept and carry out” resolutions that combat “terrorism,” but have yet to define what those terms mean.<sup>207</sup>

A few national courts have also recently expressed support for an exception to state official immunity protections when crimes are so egregious that not prosecuting the individuals allegedly responsible would violate widely understood norms of justice.<sup>208</sup> These domestic court cases lend support to the ability to define terrorism as a *stricto sensu* international crime. Included in these national cases is a case from the United States, *Siderman de Blake v. Republic of Argentina*, the United States 9<sup>th</sup> Circuit Court of Appeals held that international law does not recognize an act of torture as a sovereign act with immunity protections.<sup>209</sup> However, critics may point to the *Qaddafi* case<sup>210</sup> and claim that unlike the torture in the *Siderman* case, the Hariri attack, which took the lives of 22 individuals by car bomb, is not extreme enough to be defined as “international.”

In the *Qaddafi* case, the leader of Liberia, Muammar Qaddafi (Qaddafi), was sued in France for his government’s participation in a terrorist

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<sup>203</sup> See generally Arrest Warrant, *supra* note 32.

<sup>204</sup> See *supra* Part III.C.6.c.

<sup>205</sup> Measures to Eliminate International Terrorism, *supra* note 194.

<sup>206</sup> Schabas, *supra* note 23, at 520.

<sup>207</sup> SCHARF & NEWTON, *supra* note 10.

<sup>208</sup> See Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law*, 15 EUR. J. INT’L L. 97, 106 (2004) (including other cases where sovereign immunity has been dissolved for especially heinous crimes. In *Prefecture of Voiotia v. Federal Republic of Germany*, a Greek court upheld a compensation claim against Germany for the massacre of 218 civilians and the destruction of their property by members of the S.S. in June 1944); see also Pasquale De Sena & Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 EUR. J. INT’L L. 89 (2005) (where an Italian court in *Ferrini v. Federal Republic of Germany* upheld an Italian citizen’s claim against German government officials for an incident where he was captured by German troops in the province of Arezzo and deported to Germany where he was forced to work for the war industry, considering this a war crime).

<sup>209</sup> *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (1992).

<sup>210</sup> See generally *Gaddafi Case*, Cour de cassation [Cass.][supreme court for judicial matters] crim., Mar. 13, 2001, 125 I.L.R. 490 (Fr.).

bombing.<sup>211</sup> The attack, which was claimed to be lead by the Liberian Government, resulted in the crash of a French UTA aircraft over Africa, and the loss of the 171 lives.<sup>212</sup> The court held that no matter how severe Qaddafi's terrorist charge was, the act did not fall into one of the exceptions to immunity claims for current foreign Heads of State.<sup>213</sup> However, the court in its decision failed to give any explanation to why terrorism is not an international crime.<sup>214</sup> The lack of reasoning behind the court's decision reduces the weight of this case when used to determine if universal jurisdiction should be provided to try egregious acts of terrorism. Apart from of the *Qaddafi* case, a general trend towards expanding the traditional list of *stricto sensu* crimes to include additional grave offenses such as torture and particularly abhorrent acts of terrorism is emerging in national courts.

The *obiter dictum* of a recent unanimous Interlocutory Decision by the STL's Appellate Chamber supports the trend of categorizing terrorism as a *stricto sensu* crime, and suggests that the Hariri assassination may be considered an "international" act of terrorism before the Special Tribunal for Lebanon, removing any immunity protections it's perpetrators would have otherwise been afforded.<sup>215</sup> The STL Statute dictates that the STL Chambers shall define crimes of terrorism using domestic Lebanese law.<sup>216</sup> However, the STL Appeals Chamber in the February 2011 Interlocutory Decision stated that the STL Justices may read the Lebanese law contained in the subject matter jurisdiction of the tribunal in the context of "international obligations undertaken by Lebanon with which, in the absence of very clear language, it is presumed any legislation complies."<sup>217</sup>

In the decision, the STL court also stated that although some critics claim otherwise, terrorism *is* a crime defined under international law, and this is reflected in the current widely accepted customary definition of terrorism, which is drawn from state practice and *opino juris*.<sup>218</sup> The STL In-

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<sup>211</sup> Salvatore Zappalà, *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, 595–96 (2001) (specifically charged with murder for complicity in a terrorist act); *see also id.*

<sup>212</sup> *Id.*; *see also* Gaddafi Case, *supra* note 210.

<sup>213</sup> *Id.* at 596; *see also* Gaddafi Case, *supra* note 210.

<sup>214</sup> *Id.* at 598; *see also* Gaddafi Case, *supra* note 210.

<sup>215</sup> Interlocutory Decision, *supra* note 187.

<sup>216</sup> Statute of the Special Tribunal for Lebanon, *supra* note 12, art. 1.

<sup>217</sup> Interlocutory Decision, *supra* note 187, ¶¶ 19–20; *see also* Michael Scharf, *Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation*, 15 ASIL Insights (March 4, 2011), [http://www.asil.org/insights110304.cfm#\\_ednref5](http://www.asil.org/insights110304.cfm#_ednref5) (last visited Apr. 17, 2011).

<sup>218</sup> *See* Interlocutory Decision, *supra* note 187, ¶¶ 83, 102 (stating that, "although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of the marked difference of views on some issues,

terlocutory Decision marks the first time that an international tribunal distinctly established a universal definition of terrorism under international law,<sup>219</sup> and the Decision set out three elements in this new “customary law” definition of terrorism:

- (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.<sup>220</sup>

When applying the facts of the Hariri assassination to the customary international law definition of terrorism provided in the Interlocutory Decision, it appears that the car bombing that took the life of Rafiq Hariri and 22 others satisfies the first element of the definition, which requires the “perpetration of a criminal act”.<sup>221</sup> Additionally, that the first option of the second element of the definition, requiring the intent of the perpetrators to be the creation fear among the population, will likely be satisfied. Specifically, because the car bomb resulted in the death of 22 individuals in addition to Hariri, and this causality toll could possibly be considered the creation of a “public danger.”<sup>222</sup> The court held that the means of attack used in crimes being tried before the STL need not be evaluated when deciding if an attack is considered terrorism or murder under the STL’s jurisdiction.<sup>223</sup> This will provide the court expansive discretion when determining if crimes under the STL’s jurisdiction meet the first option of the second element. Specifically, because the holding now allows those crimes committed using rifles or handguns which that at first glance appear do not cause a danger to the general population, to meet the first option of the second element. Something that is contrary to domestic Lebanese case law defining terrorism.<sup>224</sup>

Alternatively, the second option of the second element may be satisfied under this definition if the perpetrators intended to use the attack to

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closer scrutiny reveals that in fact such a definition has gradually emerged.”); *see also* Scharf, *supra* note 217.

<sup>219</sup> Scharf, *supra* note 217.

<sup>220</sup> Interlocutory Decision, *supra* note 187, ¶ 85.

<sup>221</sup> *Id.*

<sup>222</sup> *See id.* (stating that the first option of the second element would generally entail the creation of a public danger); *see also generally*, Statute of the Special Tribunal for Lebanon, *supra* note 12 (describing how the Hariri Assassination took the life of Rafiq Hariri and 22 others).

<sup>223</sup> Interlocutory Decision, *supra* note 187, ¶ 147; *see also* Scharf, *supra* note 217.

<sup>224</sup> Interlocutory Decision, *supra* note 187, ¶¶ 59, 138, 145; *see also* Scharf, *supra* note 217.

directly or indirectly coerce the Lebanese Government to take some form of action.<sup>225</sup> The actual intent of the perpetrators as required in both options of element two ultimately would only be determined when evidence is produced at trial. Finally, the third element of the “international” terrorism definition expressed by the Interlocutory Decision requires that the Hariri assassination involved a transnational element.<sup>226</sup> The ability of the Hariri attack to meet this element, like the second element of the definition, is something that will only be determined after the production of evidence at trial.

Additionally, although it appears that the STL Appellate Chamber through the Interlocutory Decision confirmed a general definition of terrorism under international law,<sup>227</sup> the extent that the Chamber will read the Lebanese Law in the context of the customary international law definition of terrorism for the Hariri attack, will only be determined by subsequent STL jurisprudence.<sup>228</sup>

Even if the Hariri act of terrorism does not fall into the customary international law definition of terrorism created by the STL Chambers in the Interlocutory Decision, some acts of terrorism may also be considered international crimes against humanity. This categorization occurs because the acts of terrorism are intrinsically grave and have particularly odious consequences on the lives and assets of innocent civilians.

- e. The Hariri assassination: Can terrorism be considered a crime against humanity?

While the STL does not explicitly include crimes against humanity in its subject matter jurisdiction, certain egregious acts of terrorism, like the Hariri assassination, can be categorized as a crime against humanity under the category of “other inhumane acts” and should be considered *stricto sensu* international crimes that are not afforded immunity protections.<sup>229</sup> In *Prosecutor v. Stanislav Galic*, the ICTY 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 customary international law.”<sup>230</sup> This holding supports the idea that singular acts of

<sup>225</sup> Interlocutory Decision, *supra* note 187, ¶¶ 59, 138, 145; *see also* Scharf, *supra* note 217.

<sup>226</sup> Interlocutory Decision, *supra* note 187, ¶ 85.

<sup>227</sup> Scharf, *supra* note 217.

<sup>228</sup> Interlocutory Decision, *supra* note 187, ¶¶ 19–20.

<sup>229</sup> *See generally* Statute of the Special Tribunal for Lebanon, *supra* note 12 (the term “Crimes Against Humanity” is never explicitly used); *see also* SCHARF & NEWTON, *supra* note 10.

<sup>230</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment and Opinion, ¶ 98 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), *available at* <http://www.icty.org/x/>

terrorism which are a part of a greater widespread systematic attack on a civilian population may be considered crimes against humanity.

In order for the Hariri assassination to be considered a crime against humanity, it must have been part of a greater set of criminal acts that when taken together equate to (1) a “widespread *or* systematic” attack that is (2) “directed against [a] civilian population.”<sup>231</sup> The established international jurisprudence considers a “widespread attack” as one directed against a multiplicity of victims. In contrast, the term “systematic attack” has a higher threshold and for acts to fall under the definition of a “systematic attack,” the crimes must be orchestrated by virtue of a preconceived plan or policy.<sup>232</sup> The policy does not have to be adopted formally as the policy of a state, but there must exist some kind of preconceived plan or policy for terror or violence at a high level of state politics.<sup>233</sup>

It is not clear whether the Hariri assassination was part of a larger widespread “systematic attack.” In any case, this attack could only be qualified as such if it is proven that it was directed against the Lebanese people as part of a larger political policy of repression and fear.

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cases/galic/tjug/en/gal-tj031205e.pdf.

<sup>231</sup> *Id.* ¶¶ 40–48; see also Rome Statue, *supra* note 84 (listing the following 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 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); see also Agreement for the Prosecution and of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, *supra* note 86 (defining “crimes against humanity” as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”).

<sup>232</sup> Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11<sup>th</sup> Era: Should Acts of Terrorism Qualify as Crimes Against Humanity*, 19 AM. U. INT'L L. REV. 1009, 1071–72 (2004) (the *Akayesu* decision defined the concept of “widespread,” stating that it is “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.” The court stated that a systematic crime “is thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources”).

<sup>233</sup> *Id.* at 273–74 (noting that even classified terrorist groups such as al-Qaeda could be held responsible for crimes against humanity).

A set of factors can be used to determine if the Hariri assassination truly was “systematic in nature.” The factors established by international jurisprudence include: (1) The existence of a underlying policy of terror that targets a specific community as defined by the scale or the repeated, unchanging, and continuous nature of violence committed against a particular civilian population; (2) the creation of specific institutions to implement the policy of terror; (3) an extensive level of involvement of high-level political or military authorities in the underlying plan and the specific attack; and (4) the employment of considerable financial, military, or other resources to implement the policy and attack.<sup>234</sup>

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, for example, an isolated political event. They may also additionally argue that the ICTY—a truly international tribunal—requires that crimes against humanity must take place in “armed conflict.”<sup>235</sup> However, the U.N. Secretary General states in his report on the ICTY statute that crimes against humanity are “prohibited regardless of whether they are committed in an armed conflict, international or internal in character.”<sup>236</sup> This statement supports the idea that no matter the surrounding circumstance, acts that meet a certain level of atrocity should be considered crimes against humanity. The report also observes that inhumane acts have to be “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds,”<sup>237</sup> countering any argument that a political attack cannot be considered a crime against humanity.

The ICTY supported the ideas expressed in the U.N. Secretary General’s report in the *Galic* holding. In *Galic*, the ICTY held that an attack that is expressly intended to provoke terror in the civilian population or the

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<sup>234</sup> Prosecutor v. Goran Jelisić, Case No. IT-95-10-T, Judgment, ¶ 53 (Dec. 14 1999). The ICTY defined four factors used to determine the systematic character of an attack: (1) the existence of a political objective; (2) a plan pursuant to which the attack is perpetrated or an ideology behind the attack to destroy, persecute or weaken a community; (3) the undertaking of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; (4) the preparation and use of significant public or private resources, whether military or other; the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

<sup>235</sup> Statute for the International Criminal Tribunal for the Former Yugoslavia, *supra* note 84, at 5 (enumerating the crimes of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, and religious grounds, and other inhumane acts for which the Tribunal shall have the power to prosecute).

<sup>236</sup> U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 47, U.N. Doc. S/25704 (May 3, 1993).

<sup>237</sup> *Id.* ¶ 48.

political structure of a nation does not comport with the laws and customs of war, and is a crime against humanity.<sup>238</sup> The ICTR likewise echoed this sentiment in the *Akayesu*. In *Akayesu*, the ICTR stated that acts of violence intended to create terror in the civilian population are crimes against humanity and do not require special intent.<sup>239</sup> Specifically, these types of acts “are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.”<sup>240</sup> The violent car bomb attack that took the life of the Lebanese public figure former Prime Minister Hariri, may be considered part of a greater scheme of attacks that were meant to provoke terror both in the Lebanese civilian population and in the Lebanese political scheme.<sup>241</sup> In addition, several Lebanese journalists who are public figures in the nation, amongst other victims of targeted and non-targeted attacks that occurred in Lebanon, have been maimed or murdered in attacks.<sup>242</sup> According to certain sources, these journalists were known for supporting Lebanese independence through their journalistic mediums.<sup>243</sup> The resulting feelings from these attacks may also have contributed to creating widespread fear and self-censorship among journalists and Lebanese citizens.<sup>244</sup> Former Lebanese Prime Minister Fouad Siniora expressed to global news outlets that “there is no doubt” that the attacks on the journalists and others are related in some manner to the Hariri assassination.<sup>245</sup>

Although crimes against humanity are not an explicit charge provided for in the STL statute, it appears that the Hariri terrorist attack may possess several of the characteristics required for this form of international crime. The underlying possible policy of terror orchestrated by an undetermined group, the potential amount of resources exerted to commit the attacks leading up to Hariri’s attack, and Hariri’s assassination itself, may

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<sup>238</sup> Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgment and Opinion, ¶¶139–42 (Dec. 5 2003).

<sup>239</sup> Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 565, 568 (Sept. 28, 1998).

<sup>240</sup> *Id.*

<sup>241</sup> *Akayesu*, Case No. ICTR-96-4-T, *supra* note 239, ¶ 565; Statute of the Special Tribunal for Lebanon, *supra* note 12.

<sup>242</sup> Ann Cooper Committee to Protect Journalists, *CPJ Urges UN to Expand Lebanon Inquiry to Include Journalist Attacks*, COMMITTEE TO PROTECT JOURNALISTS (Oct. 11, 2005), available at <http://cpj.org/2005/10/cpj-urges-un-to-expand-lebanon-inquiry-to-include.php> (presenting the attacks against Samir Qassir who, on June 2, 2005 was killed in a car bombing outside of his home in Beirut and May Chidiac who, on Sept. 25, lost her leg and arm in a car bombing near the city of Jounieh, Lebanon).

<sup>243</sup> *Id.* (presenting the fact that bombing victim, Samir Qassir, had highlighted President al-Assad’s inability to bring about real political reform in his writings and accordingly supported Lebanese independence).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

fulfill the threshold for the first and second factors required for the assassination to be considered a crime against humanity. Only factual evidence brought before the court at the STL will determine if these factors, and in particular factor three, an extensive level of involvement of high-level political or military authorities from any country in the underlying plan and the specific attack, in fact is met, should a crime against humanity be charged. The possibility that the Hariri assassination and other associated attacks being tried by the STL are crimes against humanity would allow for the STL Chambers to rule that the assassination was an international crime of terrorism. Allowing for the STL to eliminate claims of high-ranking state official immunities, if necessary.

#### IV. CONCLUSION

The STL should be considered “international” enough to eliminate high-ranking state official immunities. The tribunal has a parallel level of authority vested to it, and is characteristically very similar to international U.N.-created hybrid tribunals. Although terrorism is not a universally recognized “international” crime to date, and has never been the sole international criminal subject matter jurisdiction of a U.N.-sponsored tribunal, the STL is a groundbreaking international criminal court. Considering the circumstances surrounding the Hariri assassination and the recent developments in international law, it is likely that this institution will pave the way in creating an international definition for crimes of terrorism. This will allow for the prosecution of perpetrators of acts of terrorism equally egregious as the Hariri assassination and surrounding attacks to be prosecuted, regardless of the official rank the perpetrators hold. Allowing U.N.-created tribunals to eliminate immunities for high-ranking state officials that commit extreme crimes of terrorism will ensure other global leaders are deterred from committing heinous crimes against innocent people in the future, further instilling the overall goals of justice underlying international law.

APPENDIX 1 – INTERNATIONAL U.N.-CREATED TRIBUNALS: A  
COMPARISON CHART

	<i>STL (2007)</i>	<i>ICTY (1993)</i>	<i>ICTR (1994)</i>	<i>SCSL (2002)</i>	<i>ECCC (2003)</i>	<i>ICC (2002)</i>
<b>Mode of Establishment</b>	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, endorsed by Security Council Resolution.	Bilateral Agreement/Treaty between the General Assembly and Cambodia, endorsed by Security Council Resolution	Multilateral Treaty, No Parties – “Rome Statute of the International Criminal Court”
<b>Provision Eliminating High Ranking Official Immunities in Charter</b>	No	Yes	Yes	Yes	Yes	Yes
<b>Security Council Voting Record</b>	10 Approve, 5 Abstain	15 Approve	13 Approve, 1 Abstains, 1 Disapproves	N/A	N/A	N/A
<b>Title and Description</b>	“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
<b>Judicial Composition</b>	Majority International, Minority National	All International	All International	Majority International, Minority National	Majority National, Minority International	All International
<b>Funding</b>	Voluntary Contributions: 49% Lebanon	Contributions by All Member	Contributions by all Member States of the	Voluntary Contributions of UN Member	Voluntary Contributions of UN Member	Contributions by All Member

	& 51% Other States	States of the UN as decided by budgetary bodies of the General Assembly	UN as decided by budgetary bodies of the General Assembly	States	States	States of the UN as decided by budgetary bodies of the General Assembly
<b>Location</b>	<u>Headquarters:</u> The Hague, Netherlands <u>Field Office:</u> Beirut, Lebanon	The Hague, Netherlands	<u>Headquarters:</u> Arusha, Tanzania <u>Field Office:</u> Kigali, Rwanda	Freetown, Sierra Leone <u>Exception:</u> <i>Charles Taylor Trial:</i> The Hague, Netherlands	Phnom Penh, Cambodia	The Hague, Netherlands
<b>Procedural Methods of the Court</b>	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
<b>Subject Matter Jurisdiction</b>	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, Crimes Against Humanity, and Crimes of Aggression

Special Tribunal for Lebanon,<sup>246</sup> The International Criminal Tribunal for the Former Yugoslavia,<sup>247</sup> International Criminal Court for Rwanda,<sup>248</sup> Special Court for

<sup>246</sup> See Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. Doc. S/RES/1757; see also U.N. SCOR, 62nd Sess., 5685th mtg., U.N. Doc. S/PV.5685 (May 30, 2007); see also Johnson, *supra* note 5, at 275–79 (2008); see also Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1125, 1126 (2007).

<sup>247</sup> See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 7, UN SCOR, 48th Sess., 3217th mtg., Annex, UN Doc. S/Res/827/Annex (May 25, 1993); see also United Nations Bibliographic Information System, S.C. Res. 827 (1993) on establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (May 25, 1993) (stating that the United Nations voting record was Yes: 015, No: 000, Abstentions: 000, Non-Voting: 000, Total voting membership: 015), available at

Sierra Leone,<sup>249</sup> Extraordinary Chambers in the Courts of Cambodia,<sup>250</sup> and International Criminal Court.<sup>251</sup>

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<sup>248</sup> See Statute of the International Criminal Tribunal for Rwanda para. 2, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); see also 3377 Meeting Record, Security Council, The Situation Concerning Rwanda, S/PV.3377 (May 16, 1994); see also Larry D. Johnson, Lecture, *UN-Based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L. & POL'Y 275-79 (2008).

<sup>249</sup> See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Jan. 16, 2002), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3D&tabid=176>; see also Larry D. Johnson, Lecture, *UN-Based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L. & POL'Y 275-79 (2008); see also Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1125, 1126 (2007).

<sup>250</sup> See Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (June, 6 2003), available at [http://www.eccc.gov.kh/english/agreement\\_image.aspx](http://www.eccc.gov.kh/english/agreement_image.aspx); see also Johnson, *supra* note 5, at 275-79 (2008); see also Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1125, 1126 (2007).

<sup>251</sup> See The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 27(July 17, 1998); see also Johnson, *supra* note 5, at 275-79.