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**On the Definition of Terrorism According to the
Special Tribunal for Lebanon**

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INTRODUCTION

I. General Observations

This paper will scrutinise the *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (the Decision) in the area regarding the legal definition of terrorism, issued by the Appeals Chamber of the Special Tribunal for Lebanon (STL or the Tribunal) on 16 February 2011. Given the absence of an international definition of the crime and being the STL the first international court that has been vested with jurisdiction over terrorism, the decision is not limited to set out the applicable law for the court but may be seen as having broader consequences for the conception of terrorism in the international community. The intent of the author is to analyse the most important points of the Appeals Chamber's decision on the matter as well as to provide an overview of the debate sparked among scholars.

To do so, I have divided my paper into two sections. The first one concerns the entire process leading to the issuance of the Decision. An analytical approach has been adopted, shaping the main judicial players at work. The second section analyses the main criticisms addressed to the judgement with special regard for the notion of the crime of terrorism under international customary law, identified in the Decision by the Appeals Chamber of the Special Tribunal for Lebanon.

II. Procedural Background

Mindful of the demand of the Lebanese people that all those responsible for the terrorist bombing that killed former Lebanese Prime Minister Rafiq Hariri and others be identified and brought to justice,¹

a tribunal of international character has been established on 10 June 2007 in Lebanon. Its legal basis is an agreement between the United Nations and the Government of Lebanon, to which the Statute of the Tribunal is attached. The negotiations and consultations between the parties took place between January 2006 and September 2006 and they were conducted by the

¹ UN SC Resolution 1664 (2006)

UN Secretary-General. In his Report², the legal nature and specificities of the special Tribunal are explained, such as its personal and subject-matter jurisdiction and composition.

It must be recalled the explicit request of the Lebanese authorities of international assistance addressed to the United Nations to identify the perpetrators, sponsors, organizers and accomplices of the aforementioned terrorist attack. Welcoming the Report's conclusion of a Fact-Finding Mission³ in which the Lebanese investigation process was described as seriously flawed and which therefore suggested the need of an international independent investigation, "willing to assist Lebanon in the search for the truth"⁴, the Security Council decided to establish an International Independent Investigation Commission (S/RES/1595(2005)), after which, under Chapter VII of the Charter of the United Nations, the Agreement on the Establishment of a Special Tribunal entered into force.

The Tribunal, therefore, has been preceded by the Commission, which conducted the investigative process and which "constitutes, in fact, the core nascent prosecutor's office"⁵.

The first three articles of the Statute of the STL provide the temporal, personal and subject-matter jurisdiction of the court. They clarify some essential specificities of the organ, which I consider relevant concerning the topic of the paper.

First of all, the Tribunal is vested with jurisdiction over a circumscribed event, i.e. the assassination of Rafiq Hariri and others on February 14, 2005. While the investigation of the Commission progressed, a context of other attacks bearing the same or similar features has emerged. The jurisdiction has been extended to such attacks, committed between 1 October 2004 and 12 December 2005, connected to Hariri's assassination and similar to it in nature and gravity.⁶ As explained by the Secretary-General in his Report, this extension "is not, strictly speaking, an extension of the temporal jurisdiction of the tribunal" but it rather avoids the perception of selective justice created by the "prosecution [of] one attack in a contest of

² Report of the Secretary-General on the establishment of a special tribunal for Lebanon, 15 November 2006, S/2006/893

³ Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, 25 February-24 March 2005, S/2005/203

⁴ UN SC Resolution 1595 (2005)

⁵ Report of the Secretary-General, p. 2

⁶ Article 1 of the Statute provides as follows:

"The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators." A list of the additional attacks prosecuted is included in the third report of the Commission (S/2006/161).

other similar attacks”. The novelty relates to the approach to jurisdiction adopted in the Statute: instead of starting with the categories of crimes to be prosecuted and punished, it starts with a set of specific allegations of facts to be investigated. The Prosecutor cannot therefore select cases on his own or turn to others, his task being to identify and to bring before the Tribunal those believed responsible for the aforementioned attacks. The Statute then requires the Tribunal to legally characterize those facts, according to the Lebanese law. It follows, as a second aspect of novelty, that the qualification of the crimes referred to in Article 1 is limited to common crimes under the Lebanese Criminal Code (LCC).⁷ The Tribunal must apply solely the substantive criminal law of a country, namely domestic criminal law of Lebanon, except where overridden by other provisions of the Statute. Its subject-matter jurisdiction remains national in character, yet it is nonetheless international in provenance, composition and regulation and it must regard reference materials “reflecting the highest international standards of criminal justice”. Thirdly, although the Security Council did not prescribe the personal jurisdiction of the Tribunal, Article 1 provides the prosecution of the “persons” responsible for the terrorist bombing that killed the former Lebanese Prime Minister. The modes of individual criminal liability are elaborated in Article 3.⁸ As shown in the footnote 8, the modes to be applied to domestic crimes include also those based on

⁷ Article 2(a) lists:

Acts of terrorism

- i) Crimes and offences against life and personal integrity
- ii) The crime of illicit association
- iii) The crime of conspiracy
- iv) The crime of failure to report crimes and offences

⁸ Article 3 provides as follow:

1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person: (a) Committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or (b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute *by a group of persons* acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.

2. With respect to *superior and subordinate relationships*, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes; (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. (Emphasis added)

3. The fact that the person acted pursuant to an order of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Tribunal determines that justice so requires.

international criminal law canon, namely common purpose liability and command responsibility, neither of which are expressly provided for in the LCC. This has been described by many scholars as a “logical dissonance between subject-matter jurisdiction (national) and modes of liability (international)”⁹ and as the “STL’s most grave legal defect”.¹⁰ It could be advanced here that this tension, best exemplified by the contrast between Articles 2 and 3 of the Statute, animates the questions posed by the Pre-Trial Judge, all regarding when and whether international law should inform the application of the Lebanese one.

Before addressing the core of the question, we pause to consider the provenance and purpose of the Rule 68 (G). Added to the Rules of Procedure and Evidence (RPE or the Rules) on 10 November 2010, it provides that “[t]he Pre-Trial Judge may submit to the Appeals Chamber any preliminary question, on the interpretation of the Agreement, Statute and Rules regarding the applicable law, that he deems necessary in order to examine and rule on the indictment.”¹¹ The main benefit of such a provision is the clarification in advance of the applicable law in order to help the Pre-Trial Judge issuing a decision on whether or not to confirm an indictment, thereby expediting the justice process. Neither the Appeals Chamber nor the Defence Office could see the charges (which remain at this stage under seal); that means that the Appeals judges are requested to make legal definition *in abstracto*, without any reference to facts. Making judgement on the interpretation of the statute without a specific factual context to base on avoids the risk that the Pre-Trial Judge or the Trial Chamber might adopt an interpretation of the law with which the Appeals Chamber disagrees, thus it fits the need for expediting proceedings in the interest of a good administration of justice. It furthermore achieves a better understanding of the scope of the counts for the indictees in order to let them prepare their defence accordingly, and it reduces time-consuming interlocutory appeals. A further consideration must be taken into account: both the Defence and the Prosecution Offices could file written submissions and their oral arguments are carefully heard, in order to reach a reasonable level of specificity and to avoid that any prejudice will arise against any future accused. Even if they cannot be heard at this stage, it is steadily guaranteed the right to challenge the Appeals Chamber’s conclusions in the light of specific additional evidences.

⁹ J. Powderly, “Introductory Observations on the Stl Appeals Chamber Decision: Context and Critical Remarks”, in *Criminal Law Forum* (2011)

¹⁰ M. Milanovic, “An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon”, (2007) 5 *Journal of International Criminal Justice* 1139.

¹¹ Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 68 (G).

SECTION I

THE DEFINITION OF TERRORISM APPLIED BY THE STL

The timeline of the events will help this analysis to be as complete as possible. The points of view of the different judicial players, namely the Pre-Trial Judge, the Head of the Defence, the Prosecutor, the Appeals Chamber judges, especially the President Cassese, constitute the framework within the Decision has been delivered. Their documents form the starting point and they will be taken into account in their chronological order.

On January 17, 2011, the Prosecutor submitted an indictment to the Pre-Trial Judge. On January 21, acting under Rule 68 (G), the Pre-Trial Judge requested the Appeals Chamber to issue an interlocutory decision on 15 questions of law. On the basis of the President's Scheduling Order of the same day, the Office of the Prosecutor and the Head of the Defence Office filed written submissions on these questions on January 31. They also presented oral arguments at a public hearing on February 7. Meanwhile, the Appeal Chamber announced the chance to file *amici curiae* briefs on specific issues related to the questions. As far as the definition of the crime of terrorism is concerned, on February 11, the Institute for Criminal Law and Justice of Georg-August Gottingen University (Germany) filed an "*Amicus Curiae* brief on the question of the applicable terrorism offence in the proceedings before the Special Tribunal for Lebanon, with a particular focus on a "*special*" *special intent* and/or a *special motive* as additional subjective requirements". On February 14, the Register received another *amicus curiae* brief on "The Notion of Terrorist Acts", submitted by Professor ben Saul of the Sydney Center of International Law at the University of Sydney. Since it was submitted outside time, the Tribunal was unable to take it into account.

1.1. Order on Preliminary Questions

Pursuant to rule 68, paragraph G of the Rules of Procedure and Evidence, the Pre-Trial Judge (PTJ) considers that several questions concerning the interpretation of the applicable law should be clarified by the Appeals Chamber. The ratio of this proceeding has been discussed in the Introduction above. The PTJ explains once more that "the provisions of the Statute relating to these questions are open to differing interpretations". The role of the judicial interpreting process has been, and is still today, crucial and controversial, since no discussion

could come from the applicable law, being the Lebanese criminal provisions in force undoubtedly recognized as the law to be applied.

The Order allows a clear comprehension of the matter at issue: the PTJ points the necessity to question (i) whether the Tribunal should apply conventional and customary law in defining the crime of terrorism, although the Article 2 of the Statute refers exclusively to the relevant provisions of the Lebanese Criminal Code (LCC)¹² for the prosecution and punishment of this crime. In particular, two source of international law are mentioned: the definition of terrorism sets out in Article 1 of the Arab Convention on the Suppression of Terrorism (which entered into force April 22, 1998, and was ratified by Lebanon on March 31, 1999)¹³ and those definitions drawn from customary international law. (ii) In case of positive response, how the the international law of terrorism should be reconciled with any differences in the Lebanese domestic provisions; (iii) in either cases, what are the objective and subjective elements of the crime to be applied by the Tribunal.

In support to these questions, the PTJ lists some relevant considerations.

1. The text of Article 2 of the Statute does not provide a definition of terrorism but refers to LCC, namely to Article 314. It seems consequently necessary to exclude the applicability of the international law not to breach the Tribunal's legal text;
2. The legitimation of the questions derives both from the international character of the tribunal and from the other *ad hoc* international criminal tribunals, which usually go beyond the rigid legal frameworks of their Statutes and specify the offences therein mentioned in the light of the international law;
3. The evolution of the notion of the crime at issue, taking into account that the LCC was adopted on March 1, 1943, and that, since then, many conventions have entered into force worldwide to prosecute specific terrorist offences or to combat the crime generally. An explicit reference is made to “the upsurge in terrorist acts in the last four decades”, which resulted in the adoption of several resolutions by the United Nations and in the increase of national legislations on this issue;
4. The accordance of the international notion of terrorism, if existing, with the fundamental rule of criminal law, i.e. the principle of legality (*nullum crimen sine*

¹² See Article 314 of the Lebanese Criminal Code.

¹³ See Article 1, paragraph 2 of the Arab Convention on the Suppression of Terrorism.

lege), established by most national legal systems – including Lebanese law¹⁴ - as well as by numerous instruments for the protection of human rights¹⁵.

5. The clarification on the constituent elements of terrorism, since the Lebanese provisions emphasizes on the means by which a terrorist act is committed while the main international instruments generally refer to special intent as the distinguishing feature of the crime, in a twofold dimension: the intention to coerce a State or the intention to terrorize all or part of the population (in comparison with the Lebanese generic special intent of creating a “state of terror”);
6. The harmonization of Articles 2 and 3 of the Statute, regarding the relevant interest of aligning the provisions of the Statutes relating to the offences and the modes of liability. In the PTJ’s opinion, the reference to international law expressed in Article 3 could justify the judges making use of these articles to clarify the definition of terrorism.

As analysed in the other paragraphs of the section, almost all of these considerations have been discussed by the other judicial authorities of the Tribunal.

1.2. Defence Office’s Submissions

The Defence Office supports the nonexistence of an international definition of terrorism and the irrelevance of the international conventional and customary law when applying the notion of terrorism before the Special Tribunal for Lebanon.

The basic points of its thesis can be summed up in the following steps: i) the judicial verification of statutory law; ii) the relevant principles of interpretation of the applicable law (verified); iii) the interpretative function of the principle of legality; and iv) the relevance and applicability of international law in the Lebanese criminal legal system. These arguments applied to the notion of “terrorist act” show the irrelevance of international law for the definition of that crime, giving a negative answer to the PTJ’s question about it.

Each tribunal has to verify that statutory crimes, in this case the crime of terrorism, and forms of liability are compliant to the principle of legality. It means that they existed at the relevant time and were applicable to potential defendants. The prohibitions contained in the Statute must satisfy these requirements, whatever the intentions of the parties might have been.

¹⁴ See Article 1 of LCC.

¹⁵ See Article 15 of the International Covenant on Civil and Political Rights (ratified by Lebanon on 3 November 1972 and entered into force on 23 March 1976).

In the case at issue, the Security Council did not create new criminal law when adopting Resolution 1757, since it effectively brought into force a body of rules upon which the Lebanese Government and the United Nations had agreed. Nonetheless, if it cannot be demonstrated that a statutory prohibition existed “beyond doubt” at the relevant time and that it was applicable, the Tribunal must decline to apply it.

Interpreting the Statute of the Tribunal shows that Lebanese criminal law is the only body of criminal law which the Statute permits the Tribunal to apply to¹⁶. Not all the crimes and forms of liability provided for in the Statute exist under that body of law, so - according to the Defence’s conclusion - “the Tribunal will have to refrain from applying these [modes of participation] to protect the right of the accused not to be subject to retroactive law”.

Once it has been established that Lebanese criminal law applies *ratione materiae*, the principles of interpretation applicable to that legal system will apply before the Tribunal for the purpose of identifying the elements of a crime, in order to guarantee the coherence of the regime. Namely, the fundamental principles to the interpretative process are: strict interpretation of criminal law, the prohibition of interpretation of a clear text, the prohibition of interpretation by analogy and the prohibition against extension of the text beyond the intention of the legislator. No other methods of interpretation would be sustainable.¹⁷

A further declination of the principle of legality for interpretative purpose takes place in the Submission in order to underline the peculiar nature of the interpretation in the realm of criminalized conducts. The Defence obstructs the recognition of an international crime of terrorism applicable before the Lebanese Tribunal affirming that “to be applicable in a criminal trial, a criminal offence should possess a definition that is “precise, unequivocal and unambiguous””.

Finally, the Defence considers whether international law could apply as “domesticated” Lebanese law. Broadly speaking, two requirements (judicially accepted) are necessary: the

¹⁶ I) The Statute’s provisions contain no explicit reference to international criminal law. II) The Article 2 refers to the LCC regarding the punishable offences and the “criminal participation” too, that means criminalized mode of responsibility. III) Articles 2 and 3 must be read together, according to the basic principle of interpretation which provides that: “a treaty should be interpreted as a whole”

¹⁷ The Defence describes the process whereby the Statute came to be adopted to demonstrate that the Lebanese one was the only body of law intended to be applied before the Tribunal. See the position of a participant in the drafting of the statute, C. Sader “A Lebanese Perspective on the Special tribunal for Lebanon”, (2007) 5 (5) JICJ, at 1087. See also the observations of the Representative of China during the discussion of SC Res 1757, SC 5685th Meeting, 30 May 2007, S/PV.5685, at 4.

parliamentary ratification and the implementation of treaties' provisions into domestic law. (The Appeals Chamber will contrast this last requirement in case of self-executing provisions). As far as Lebanese criminal law is concerned, the LCC is the only relevant source of norms. A treaty may not be applied in the internal penal order unless its provisions have been "domesticated". Reliance upon a treaty for the purpose of interpretation would be not permissible, except where it is done in favour of the accused. Furthermore, such a reliance may not result in the importation into the domestic legal order of new element of international law, i.e. it may not result in a displacement or an amendment of the norm it construes.

As noted above, these arguments justify a negative answer to the PTJ's question on the applicability of international law in defining the crime of terrorism before the STL.

Being the Lebanese criminal law the Tribunal's applicable law, the definition of terrorism to apply is the one given by the Article 314 of the LCC. It provides for a "sufficient clear, accessible and foreseeable outline of the elements that make up that crime": the *actus reus* is a conduct committed by "means liable to create a public danger"¹⁸. Thus, the act should go far beyond those directly targeted. The expression is followed by a not exhaustive list of means ("such as"), construed according to the principle *ejusdem generis*, i.e. in order to include as culpable conducts committed with means similar in kind and nature to those enumerated. The firearms are therefore excluded. The *mens rea* consists of two sub-elements: a general intent to commit the conduct and a special intent to "create a state of terror".

The Defence holds that "this definition has not ceased to be sufficient because an internationalized tribunal has been created". "It meets the international standard of accessibility and foreseeability", thus "it does not requires interpretative assistance".

The Defence submits that the Tribunal is not allowed to rely upon international law. Any attempt would constitute a breach of the Statute and an extension of the jurisdiction because: i) the Lebanese law of terrorism is sufficiently clear; ii) even if it were not clear, the methods of interpretation of the Lebanese legal order could work adequately; iii) there is no agreed definition of terrorism under customary international law to assist the domestic interpretation; iv) even if it existed, the absence of notice of that would render its application a violation of the principle of legality.

¹⁸ Such as "explosive devices, inflammable materials, toxic or corrosive products or infectious or microbial agents", Art. 314 LCC

1.3. Prosecutor's Brief

Since its introduction, the Prosecutor submits that reliance on international law in order to supplement the subjective or objective elements of the Lebanese domestic crimes, included the crime of terrorism, is not required, not consistent with the spirit of the Statute, nor contemplated by it, thus it must not have place.

Evidence supporting this statement is the word "shall" in Article 2 of the Statute, which clarifies that only the Lebanese criminal law must be applied, and the expression of the Preamble stating that the Tribunal "shall function in accordance with the provisions of this Statute", namely the aforementioned Article 2.

If necessary to fill any gap, the Tribunal may resort to international law only if exhausted the principles of interpretation of Lebanese law and jurisprudence.

In case of division and uncertainty among the national courts, the Tribunal must "adopt what it finds to be the proper interpretation" among them.

When interpreting the Lebanese definition of terrorism, the Statute does not offer any authority to consider other sources of law.

Furthermore, it does not contain other interpretative provisions. The Prosecutor mentions Rule 3 of the Rules of Procedure and Evidence¹⁹, which refers to the "international standards on human rights" and "the general principles of international criminal law and procedure", but these rules are of procedural nature and they could be applied to the interpretation of the RPE, not to the Statute.

Nonetheless, under the regard of three conditions, the Tribunal could fill gaps in Lebanese law on the elements of a crime by referring to international law, i.e. when the Tribunal's legislation is not definitive on a specific issue related to the definition of the crime *and* the application of international rules would offer elucidation of such issue *and* these international rules are consistent with the spirit of the Statute.

The Prosecutor states that concerning the definition of crime of terrorism the three conditions are not fulfilled. "In the factual circumstances of the assassination of Rafiq Hariri, no lacuna in the applicable Lebanese law arises". The answer to the first PTJ's question is negative: the Tribunal should not take into account the relevant applicable international law; it is neither "necessary" nor "advisable".

Furthermore, the Prosecutor makes some observations on the current state of the international law with respect to terrorism. He says that all the efforts to establish a universal definition of

¹⁹ See Rule 3 of the Rules of Procedure and Evidence.

that crime have been unsuccessful. Thus the answer to the second PTJ's question is even more radical: being not clear what the "international law" is, it cannot be "reconciled" with domestic Lebanese law nor the constituent elements of the incrimination of terrorism under this uncertain international law can be underlined.

Related to the third PTJ's consideration (on the evolution of the notion of terrorism since the adoption of Article 314 of the LCC), the Prosecutor holds that the Lebanese special intent "to create a state of terror" is sufficiently evolved, since at the international level the twofold special intent identified (to coerce a State *or* to terrorize the population) is intended in alternative. Thus the Lebanese special intent results consistent with this resolution.

Turning to the third PTJ's question (the constituents element of the crime that must be taken into consideration by the Tribunal in the light of Lebanese law), the Prosecutor analyses the material and intentional elements close to the analysis of the Defence (see above).

In addition to that analysis, the Prosecutor clarifies the meaning of the expression "state of terror", that is not *per se* defined in the LCC. The Lebanese jurisprudence however has explained that it refers to "psychological state of mind represented by fear, anxiety and psychological trauma". The intent of fomenting such a state can be inferred from particular circumstances, according to each case. A list of relevant circumstances has followed thanks to the Lebanese judicial activity. It includes "the social or religious status of the principal target; the commission of the attack in daylight in a street full of people; the collateral killing of bystanders; the use of explosives; and the destruction of residential and commercial buildings". Many of them occurred at the same time during the Hariri assassination.

1.4. Appeals Chamber's Interlocutory Decision on the Applicable Law: Terrorism

The Decision contains a judicial novelty, i.e. the definition of the crime of terrorism under the international customary law. The Appeals Chamber (AC) holds that a customary rule defining the crime has emerged. It describes both the formation process and the material and intentional elements of that international crime. It does so for the purpose of applying the international law before the Special Tribunal for Lebanon. Therefore the document could be analysed with a double intention: a) understanding the reasons why the Tribunal is allowed to take into account the international law provisions referred to the crime of terrorism, thus understanding the different (because positive) answers given to the PTJ's questions. To do so, I have divided the AC's argumentation into three parts: i) the general principles of interpretation of the Lebanese criminal law and the STL Statute; ii) the international

conventional law and its interpreting aid in defining terrorism; iii) the international customary law and its interpreting aid in defining terrorism.

Then follows the notion of terrorism to be applied before the court. This is the main purpose of the Interlocutory activity (the clarification of “any preliminary question, on the interpretation of the Agreement, Statute and Rules regarding the applicable law, that [the PTJ] deems necessary in order to examine and rule on the indictment”)²⁰.

A second intention could be b) understanding the reasons why the AC supports the existence of a customary rule defining terrorism. Even if those reasons are within a larger framework regarding the STL’s applicable law, they are relevant per se and they will be analysed deeply and separately. This b) paragraph will create a linkage between the Section I and the Section II of this paper, the latter being focused on the international reactions to the Decision.

a) Understanding why the tribunal could take into account the international law provisions referred to the crime of terrorism

i) The general principles of interpretation of the Lebanese criminal law and the STL Statute.

Mindful of the Prosecutor and Defence’s Submissions, the AC holds that interpretation is always necessary when applying legal rules. The starting point in every interpreting process is the statute’s language. But it must be read within its legal and factual contexts. *Both* the internal and external frameworks are of obvious importance. According to Bennion opinion²¹, the word “context” should refer to the “widest meaning”. Thus, the AC holds that all legitimate aids to interpretation must be embraced. In addition, it is considered relevant to take into account the so called “conditions of the day”, i.e. the tenet of construction that a statute is “always speaking” because the reality alters over time and the interpretation may evolve consequently. Thus, the context could determine meaning. Furthermore, the AC mentions the judicial duty to give consistency and homogeneity to different elements of diverging provisions. Fixed the maximum regard toward the lawmakers’ intent of adopting the Statute of the Tribunal²², nonetheless statutes and international treaties not infrequently contain conflicting interests and concerns. The AC is in charge of reducing them into a logically well-structured body of rules.

²⁰ Rule 68 (G) of the RPE

²¹ F. Bennion, “Bennion on Statutory Interpretation”, 2008

²² The lawmakers took into account by the AC are: the Parliament of Lebanon in respect to the substantial criminal law; the United Nations and Government of Lebanon in respect to the STL’s Statute; and the Judges of the Tribunal and the authors of the Lebanon Code of Criminal Procedure in respect to the Tribunal’s RPE.

For the purpose of interpretation of the Statute, the AC considers appropriate to apply to it the international law on the interpretation of treaty provisions, except for the extent that the Lebanese law may provide. It is so, whether the Statute is held to be part of an international agreement or is regarded as part of a binding UN Resolution. Indeed, in the latter case, the customary rules on interpretation would also apply. Under international law, inconsistencies in a text must be resolved by reference to Article 31 (1) of the Vienna Convention²³. It has overridden the principle of *in dubio mitius* (which calls for deference to state sovereignty and is emblematic of the old international community). With regard to the Tribunal's Statute, the principle requires an interpretation that best enables the Tribunal to achieve its goal "to administer justice in a fair and efficient manner". A second international guidance is the general principle of criminal law of *favor rei*, codified in Article 22 (2) of the ICC Statute²⁴. Furthermore, in the field of criminal law, also the principle of legality (*nullum crimen sine lege*) must be taken in consideration. These principle are applicable in both domestic and international legal contexts. The AC is therefore authorized to resort upon them.

For the purpose of interpretation of the Lebanese Law, the STL is mandated to apply national law to the facts coming within its jurisdiction *principaliter* (that is, in the exercise of its primary jurisdiction over particular allegations). The need to apply Lebanese law raises the question of how to interpret that law. Both the Prosecutor and Defence Office submit that the Tribunal has to apply Lebanese law as interpreted and applied by Lebanese courts. The AC agrees but in a less radical way. It rejects the Prosecutor's thesis that one may not look beyond a text of a statute unless there is a gap. It indeed holds that the old maxim *in claris non fit interpretatio* is fallacious because the right process "is not to construe the text initially to determine whether there is a gap and, if there is, to construe it a second time to deal with the problem created by the gap". The Tribunal has to perform a simple exercise of construction, referring to all the relevant context since the beginning. Furthermore, the Tribunal may obviously depart from the application and interpretation of national law by Lebanese courts under certain conditions, namely "when such interpretation or application appears to be unreasonable, or may result in a manifest injustice, or is *not consonant with the international principles and rules binding upon Lebanon*". In this last regard, the AC is in opposition to the Defence's argument that the Tribunal has to apply only Lebanese law as

²³ As provides by the Article 31 (1) of the Vienna Convention, rules must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

²⁴ As provides by Article 22 (2) of the ICC Statute, "in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted".

“blind” to its international character. For three reasons: firstly, the international binding law is part of the Lebanese legal context (thus is an interpretative device); secondly, the application of a national law by an international court is subjected to some limitations; thirdly, in case of conflicts among Lebanese courts, the Tribunal may apply the interpretation that best fits.

ii) The international conventional law and its interpreting aid in defining terrorism.

Before addressing the interpreting aid given by the international (conventional) law in defining the crime of terrorism, it must be clarified why such an aid is only “interpretative”. That is, why the Special Tribunal for Lebanon cannot directly apply the international sources of law. The AC at this regard reaches the same conclusions as Prosecutor and Defence. (The novelty is therefore the possibility recognized by the AC to take into consideration the international law as interpretative aid. In consequence, it means stating that an international law defining the notion of terrorism exists).

No international substantive rule on terrorism, either conventional or customary, shall be applied by the Tribunal when called to adjudicate the crimes within its jurisdiction because the Article 2 of the Statute imposes application of the specified provisions of Lebanese law.²⁵

The AC notices, however, that the international law could provide guidance to the Tribunal’s interpretation of the LCC. The main reasoning of the Chamber can be explained as follows: considering the elements of the crime of terrorism under both domestic Lebanese law and international law, some differences between the various definitions emerge; evaluating how the Lebanese legal system generally incorporates the international rules, the conclusion is that “international conventional and customary definitions of terrorism do have legal import under Lebanese law, even if they are not specifically embodied in the Lebanese Criminal Code”. Consequently, applying those definitions modifies the elements of the notion applicable before the Tribunal, precisely the objective element of the means used to perpetrate the terrorist acts.

The notion of terrorism under Lebanese law has been analysed in the paragraphs above, and at this regard the AC does not add any further observations.

Thus we could address the notion given in conventional law of that crime, with special reference to the Arab Convention for the Suppression of Terrorism (since it has been

²⁵ The Tribunal shall apply the provisions of the Lebanese Criminal Code, namely the Article 314 as well as the Articles 6 and 7 of the Lebanese law of 11 January 1958 on “Increasing the penalties for sedition, civil war and interfaith struggle”.

mentioned in the PTJ's questions).²⁶ The Arab Convention is a multilateral treaty on judicial cooperation among Arab countries in order to fight terrorism. It is different from the other conventions having the same purpose (a judicial cooperation) because it defines terrorism while carefully stressing that this definition does not replace the contracting parties' national laws on the subject. It only enjoins States to fight against the forms of terrorism defined therein.

In Article 1 it defines terrorist acts as follows:

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardise a national resource.

A comparison between the two notions shows that they have in common the requirement of a special intent which may be to spread terror (although the Convention also lists other purposes; while in some respects the Convention's definition is broader than the Lebanese one, namely it requires the act to be committed without mentioning any particular means, in other respects it is narrower, since it requires the act to be violent in nature, and it further excludes acts performed in the course of a *war of national liberation*²⁷ (while Article 314 does not distinguish between times of peace and times of war).

Contrary to the Defence, the AC holds that the Arab Convention has come to have the force of law because a) it has been ratified by Lebanon and b) its provisions are *self-executing*, that is automatically binding, without the need for implementation through national law. Generally speaking, the Chamber agrees with the Defence in that international norms criminalizing conduct are "*non-self-executing*" (to safeguard the principle of legality). Yet this is not the case, because the Convention does not create a new crime in Lebanon but "expands in some foreseeable ways the definition of an existing crime".²⁸ Nonetheless the Tribunal cannot apply the Convention directly since it is explicitly forbidden by the Statute. The conclusion is that the STL could use it as interpretative aid.

²⁶ It is the only international treaty ratified by Lebanon that provides a general definition of terrorism.

²⁷ See Article 2(a) of the Arab Convention for the Suppression of Terrorism.

²⁸ According to the AC, the foreseeability is guaranteed by the mere publication of the treaty in the Official Gazette.

iii) the international customary law and its interpreting aid in defining terrorism

A perusal scrutiny of the AC demonstrates that in fact a definition of terrorism under customary law has gradually emerged. It consists of the following three elements: i) the perpetration of or the threat to perpetrate a criminal act; ii) the intent to spread fear among the population (which generally entails the creation of public danger) or the intent to coerce a national or international authority to take some actions or to refrain from taking it; iii) and the involvement of a transnational element. Given the import of such a definition, the process of formation as well as some considerations about the elements will be described in detail in the following paragraph. Immediately below is shown the conclusive argumentation of the Appeals Chamber on the applicability of international law before the Tribunal. It is structured as follows: the customary law is generally applied by Lebanese courts; however, in penal matters a piece of national legislation must always incorporate international rules; thus, the Tribunal could take it into account solely for interpretative purpose.

The first passage concerns the general obligation directed to all States not to disregard accepted rules of customary international law. In the Lebanese legal order the statutory law does not provide for such necessary implementation and, furthermore, it does not specify the rank enjoyed by these rules within the legal system. It falls to courts to establish these relevant questions. According to the Lebanese case law, the incorporation of customary international law is automatic, it immediately produces legal effects, and their rank is that of ordinary legislation. However, despite the existence of a customary definition of terrorism, it cannot be directly applied before the Tribunal. As we have previously noted regarding the Arab convention, the Article 2 of the Statute makes clear that codified domestic law is the solely applicable law. Nevertheless, the STL is justified in interpreting and applying Lebanese law on terrorism in the light of the international definition, given that the latter is binding on Lebanon and that the allegations falling under the STL's jurisdiction were considered particularly serious acts with transnational implications.

In consequence of such a conclusion, taking into account the significant legal developments within the international community, the Appeals Chamber provides a modern interpretation of the element of the "means" of the Article 314 of the LCC. At least before the Tribunal, the expression "means liable to create public danger" must be intended as covering also all those means which are not expressly listed and which produce modest outside effects but sufficient to expose other persons to adverse consequences. According to the AC, a public danger may occur "even when a terrorist shoots at a person in a public road" or "when a political leader is

killed or wounded, even if this occurs in a house”, since the danger may consist in the violent reaction by other factions, other political assassinations and so on. Being the contemporary societies evolved, the definition has to be interpreted differently than when it was adopted in the 1940s.

b) Understanding why the AC supports the existence of a customary rule defining terrorism.

According to the Appeals Chamber of the Special Tribunal for Lebanon, the formation of a customary rule of international law regarding the international crime of terrorism in time of peace is demonstrated by both a consistent State practice and a general *opinion juris*, that is the legal conviction in the international community that such a practice be carried out to fulfill a judicial obligation. The Chamber examines the international situation looking at various elements: multilateral instruments, such as national and regional treaties and resolutions adopted by important intergovernmental bodies; the national legislation of the countries around the world; and the national courts decisions. The first two elements of the crime, i.e. the definition of terrorist act as a *criminal act* intended to *spread fear among the population* or *coerce an authority* are common to all the texts mentioned by the Chamber. Yet it is emphasised that the third element - the requirement of a cross-border element – goes not to the definition but to the character of the crime as *international* rather than domestic. This could typically be a connection of perpetrators, victims or means used, but it may also be “a significant impact that a terrorist act in one country has in one another”. It serves to exclude from the definition those crimes purely domestic in planning, execution and impact. Except for the twofold character of the crime, there is an essential convergence on the concept of terrorism in criminal law. Thus, in the AC opinion, it means that the domestic offences of terrorism begin to be regarded as an attack to universal values, to be sanctioned as international crime. Moreover, elements common across national legislations seem not to be subject to transient national interests, so that more than a mere concordance of law could be revealed. The activity of the UN Security Council is considered another important index of the emergence of a customary rule. Namely, the SC Resolutions which instructed member States to outlaw terrorism and related crimes, to ratify anti-terrorism conventions, and to report periodically to the Counter-Terrorism Committee on steps taken to bring national law aligned with the international standards. The same degree of concordance has been reached by national courts. To support this view, the AC notes how the courts’ decisions have upheld a

shared definition of terrorism even if they dealt with foreigners, and they have never received any objections by the national States of those accused.

It can be said that “there is a *settled practice* concerning the punishment of acts of terrorism, [...] at least when committed in time of peace; in addition, this practice is evidence of a *belief* of States that the punishment of terrorism responds to a social necessity and is hence obligatory by the existence of a rule requiring it”. The AC declines the identified rule in terms of international rights and obligations. It recognizes i) the obligation imposed on any State to refrain from engaging in terrorist acts, ii) the obligation to prevent and repress terrorism, and to prosecute and try persons allegedly responsible for such acts, iii) a further obligation to refrain from opposing to the prosecution of own nationals accused of terrorism abroad.

To address individual criminal responsibility, the AC acknowledges that the existence of a customary rule outlawing terrorism is not sufficient to state the existence of a criminal offence under international law. States must intend to criminalize breaches of such international prohibition. The Chamber also demonstrates how a legal view holding that is necessary and obligatory to bring to trial and punish terrorists has emerged. The criminalization has begun at domestic level, then the trend was internationally strengthened to the point that those States, which had not already criminalized terrorism, started to include the emerging criminal norm into their domestic penal legislations. Furthermore, the Council Resolution underlined the “seriousness” of terrorism characterizing it as a “threat to peace and security”.

In conclusion, a customary rule has been recognized by the Appeals Chamber of an International Tribunal during an Interlocutory Decision. It defines the crime of terrorism as the intent to commit a crime (general intent) to spread fear or coerce an authority (special intent). The objective element is the commission of an act that is criminalized by other norms, independently of the kind of means used. To be the crime international in character, the act must be transnational. This notion has a twofold dimension: it addresses itself to international subjects and to individuals.

SECTION II

DOES A CUSTOMARY DEFINITION OF THE CRIME OF TERRORISM EXIST?

This section provides an overview of the main international scholarly reactions to the STL's Decision. It has been divided in three paragraphs according to the most outspoken areas of criticism identified: critics on the AC's methodology; critics on the AC's interpretative approach; finally, critics on the AC's substantive definition of terrorism under international customary law.

2.1. Critics on the AC's methodology

Three main critical observations could be addressed to the AC in this paragraph.

The first one concerns the speed of the entire proceeding. According to Joseph Powderly,²⁹ “it is far from abundantly clear why the Appeals Chamber felt the need to accelerate the pace of the proceedings to such an unprecedented extent”.³⁰ From the submission by the PTJ of the 15 questions of law to the issuance by the AC of the 153 page decision “an astonishingly short timeframe” of 26 days has passed. The *ratio* behind this attitude has been explained by the President Antonio Cassese as consistent with the international procedural practice of expeditious proceedings. It has been possible thanks to the fact that the STL judges have prepared in advance of the parties' arguments on the various legal issues concerning the applicable law (not the guilt or innocence of an accused) during the whole 2010. According to Cassese's speech³¹, this is the only reason why the AC “[has] been able to agree upon and pen down a complex and extensive decision” in such a circumscribed period of time. As noticed by Powderly, this attitude shows, on the one hand, a “rare glimpse into the judicial process” and guarantees that a “large measure of judicial prudence was at play”; on the other hand, however, the author throws doubt about the compatibility of such an approach with the highest standards of international justice. Especially, two regretful consequences are underlined: first, the narrow submission timeframe, which limited the receipt of *amici curiae*

²⁹ Assistant Professor of Public International Law, Grotius Centre for International Legal Studies, Leiden University; Managing Editor of *Criminal Law Forum*

³⁰ J. Powderly, “Introductory Observations on the STL Appeals Chamber Decision: Context and Critical Remarks”, in *Criminal Law Forum* (2011).

³¹ UN Special Tribunal for Lebanon, Hearing transcript, STL-11-01/I, 16 February 2011

briefs, and the subsequent loss of significant assistance to the Chamber³²; second, this attitude reveals the context in which the decision has been issued, and rises misgivings on the (im)partiality of the judgment. Powderly recognizes that judges may have pre-existing opinions on a legal issue, considers the Judge Cassese's extensive literature on what he believes to be an emerging customary transnational crime of terrorism, thus concludes that "Judge Cassese is certainly partial, in the sense of being in favour of the progressive development and advancement of international law via the means of creative judicial interpretation". (On the interpretive approach, see paragraph below).

Turning to the second methodological observation, some critical remarks have been addressed to the AC by Matthew Gillett and Matthias Schuster³³ concerning a so-called "appellate overreach".³⁴ The authors argue that the introduction of rule 68 (G) of the RPE institutionalizes a new level of appellate intervention. As noticed above in this paper, the AC is asked to answer legal questions in the abstract rather than during an adversarial proceeding. This "factual vacuum" makes the decision similar to an advisory opinion and raises numerous questions about the possibility given to a criminal court to pronounce on the applicable law in the absence of a specific case. The first problem of such an approach is that "the AC decides on the interpretation of the applicable law alone and with final effect",³⁵ broadly in opposition to the AC's role defined in the Statute, i.e. the classical corrective function of any appellate body to "affirm, reverse or revise the decision taken by the Trial Chamber".³⁶ Therefore, this advisory function (and procedure) is considered *ultra vires* the Statute. The approach taken by the tribunal is emblematic of a general trend of the judges to create or amend their own criminal procedure. Gillett and Schuster highlight that "while such flexibility [...] makes trials more efficient, there is little protection against the abuse". They hold that broadening the AC's power in this way entails disenfranchising the Trial Chamber to develop its own interpretation on the applicable law in the light of the evidences before it. To dispense with the Trial Chamber's view deprives the AC of valuable analysis, notwithstanding the arguments pointed out at this regard in the Decision, namely that such a "sacrifice" expedites the trial and is balanced by the Prosecutor and Defence's Submissions. Furthermore, the

³² According to Powderly, the practical impact of this attitude is visible with respect to Professor Saul's *amicus curiae* brief received by the AC but not taken into account because submitted (a little) out of time.

³³ Masters of Law (Michigan and Sussex, respectively); Legal Officers in the Appeals Division of the Office of Prosecutor at the International Criminal Tribunal for the former Yugoslavia (ICTY).

³⁴ M. Gillett, M. Schuster, "Fast-track Justice. The Special Tribunal for Lebanon Defines Terrorism", in *Journal of International Criminal Justice* 9 (2011), 989-1020

³⁵ *Ibid.*

³⁶ Article 26(2) of the Statute of the Special Tribunal for Lebanon.

authors criticize the replacement of the accused with the Defence Office. It is remarkable firstly because it gives the Defence a role that it was not supposed to play, and secondly, because it does not give the accused the chance of participating in the genetic moment of the law.

Once more the counter-argument held by the AC - the accused could ask for reconsideration of the ruling “in the light of specific evidence”- is considered weak. The scepticism of the authors is due to the fact that this “specific evidence” has been left open to interpretation, and to the general consideration that is always difficult for a court to depart from its own jurisprudence.

Therefore, we could conclude that the Tribunal would not even had the necessity to solve all the legal issues covered by the Decision, had the classical approach been maintained, namely had the STL relied upon facts and evidences.

To bring this paragraph to a close, a third methodological remark has to be mentioned. Before addressing to the interpretation and substantive definition of terrorism, observations on the assessment of the sources upon which the AC has relied cannot be omitted. The core arguments of such observations may appear as referred to the substantive definition of the crime (analyzed in detail in the third paragraph of this section), but the intent of the author here is to question about the methodology applied in the analysis of such sources, and not about the reasoning to which the AC arrived. The reference cannot be but Professor Ben Saul³⁷, the author of a seminal monograph examining a customary definition of terrorism³⁸.

In the introductory remarks of his *amicus curiae* brief “On the Notion of Terrorist Act”, Saul described the AC’s methodology as “flawed” and “inaccurate”.

We will briefly pause on every category of source quoted in the decision, namely national legislation, judicial decisions, regional and international treaties, and UN resolutions, to bring to light Professor Saul’s opinion on how each of them “was misread, misinterpreted, exaggerated, or erroneously applied”³⁹ by the AC.

As far as the national legislation is concerned, Saul identifies at least five reasons why the AC’s analysis on the supposed “concordance” of such legislation is flawed. In the first place, the AC conflates national laws which address *domestic* terrorism with those concerning *international* terrorism, when only the latter should have been taken into account. Secondly,

³⁷ BA (Hons), LLB (Hons) Sydney, DPhil Oxford; Barrister-at-law (Australia), author and editor.

³⁸ B. Saul, *Defining Terrorism in International Law*, (Oxford University Press, Oxford, 2006).

³⁹ B. Saul, “Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism”, in *Leiden Journal of International Law*, 24 (2011), pp 677-700

the Chamber relies on the national definition of terrorism used for both *criminal* offence purposes and *not-criminal* purposes, when only the former should have been taken into account. Thirdly, Saul underlines that the AC's analysis was limited to 37 "best-example" national laws faced to the more than 160 other divergent national laws not even mentioned; fourthly, among those mentioned, what the AC considers as "peripheral variations" is recognized as "fundamental conceptual disagreements" by the author. Fifth, the Chamber invokes some national laws which violate international human-rights law, "being too vague to satisfy the principle of legality and freedom from retroactive criminal punishment"⁴⁰. Such laws are simply unlawful under international law and there is no belief suggesting that "excessive national terrorism definitions may lawfully derogate from international human-rights standard and thereby be relevant to custom formation"⁴¹.

The second category of source invoked by the AC includes nine national judicial decisions. The author re-analyzed each decision to demonstrate that none of them supports the existence of a customary crime of terrorism. Indeed, in various cases such as the *Cavallo*'s, the judgment does not express the point in customary-law terms, and more importantly, "this issue [definition of an international crime of terrorism] was not addressed at all because it was not essential to the disposal of the case".⁴² One case - *Chile v. Clavel* - did not concern terrorism at all, but it is quoted by the AC since a single judge did an incidental reference to terrorism and "the need for international cooperation on [its] repression".⁴³ The *Zrig v. Canada* decision explicitly refrains from ruling on the point, and is considered erroneously quoted since the AC did not mention the statement "it is not necessary [...] to decide the point in the case at hand". One matter - *Almog v. Arab bank* - was a civil case and did not involve criminal individual responsibility, while others refer to "national law contexts, such as extradition or exclusion from refugee status".⁴⁴ One more decision, *Suresh v. Canada*, identified the "essence" of terrorism to interpret and apply a domestic immigration-law statute (thus for a limited purpose); yet the same Court acknowledges that "there is no single definition that is accepted internationally".

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

In a further passage, Saul recognizes that one out of nine decisions ⁴⁵ appears to identify a customary crime of terrorism, but it proceeds to define such crime *differently* from the Chamber's notion, in that terrorism must be defined to include the motive element.

Furthermore, the Chamber ignored judicial decisions that explicitly find that terrorism is *not* a customary rule. At best, according to Professor Saul, some decisions accept that sectorial definitions of terrorism may have reached international consensus, but this is not sufficient to back the existence of a comprehensive, universal crime.

As regards universal treaties, numerous efforts by the international community since the 1920s have failed in reaching an agreement on a general definition of the crime. In the absence of such a definition in the treaty law, Saul holds that "no parallel customary rule can arise out of those treaties". The lack of consensus continued to be shown by the deadlock negotiations for a UN Draft Comprehensive Terrorism Convention, started in the recent 2000. Yet, there are numerous sector-specific treaties which address particular means or methods used by terrorists; indeed, the author holds that such a sectorial approach has been adopted precisely because states could not agree upon a definition of terrorism.

As regards regional treaties, enormous variation in regional conceptions of the crime emerges, thus it is not possible to identify a common definition. Additionally, some treaties do not enjoy wide participation by member-states and, even when states are parties, the treaty may not have influenced national practice or legislation.

Concerning UN Resolutions, this source is broadly invoked by the AC. The mainly quoted documents are: the 1994 Declaration on Measures against International Terrorism, the Security Council's Resolutions 1373 (2001) and 1566 (2006) and the UN Security Council's Counter-Terrorism Committee (CTC). First, the 1994 Declaration reflects a *political* agreement on the wrongness of terrorism, consequently it does not evidence a customary crime. Second, Resolution 1373 did not define terrorism for the purpose of international criminalization, but was directed to all states to criminalize terrorist acts in domestic law. Third, Resolution 1566 offered a working definition of terrorism, but was not binding and did not uniform definition of terrorism at national level. Last, the CTC did not pay due regard for human-rights implications of national definitions, and sent a message of "encouragement" to states with rights-violation definitions. Thus, it should not be taken into account.

⁴⁵ *Bouyahia Maher Ben Abdelaziz et al.*, Judgment of 11 October 2006, Corte di Cassazione.

2.2. Critics on the AC's interpretative approach

The interpretive approach chosen by the Appeal Chamber has been defined as “unconventional”⁴⁶, “diverging from the traditional approach”⁴⁷, “semiotic”⁴⁸, distant from “an ordinary textual interpretation”.⁴⁹ The argument is discussed in a specific paragraph since, as noticed by Gillett and Schuster, the “detailed discussion of interpretation [held by the Appeal Chamber] proved crucial to the ensuing substantive holdings, particularly in relation to terrorism”. As previously affirmed in Section I, the AC followed partially the Lebanese courts’ interpretation of the notion of the crime, namely the interpretation of the word “means” of the Article 314 of the Lebanese Criminal Code. It demonstrates in its reasoning to have perfectly understood the core and limits of that domestic interpretation of terrorism. Yet, instead of concluding its analysis at this stage and following the Lebanese judges, as advocated by both the Prosecutor and the Defence, the AC chose to continue the analysis and identify instruments of international law in order to depart from the Lebanese approach.

This paragraph contains different scholarly opinions on the matter.

According to Michael P. Scharf,⁵⁰ the AC departed from the traditional approach of treaty interpretation as reflected in Article 52 of the Vienna Convention on the Law of Treaties, namely that a Tribunal is called upon to apply the ordinary meaning of the terms of the Statute, unless the text appears ambiguous or obscure or would lead to a manifestly unreasonable interpretation.

Since this is clearly not the case, the Chamber adopted a “semiotic” approach, rejecting the maxim *in claris non fit interpretatio*. As explained by the author, “semiotics begin with the assumption that terms such as “terrorism” are not historic artifacts whose meaning remains static over time.”⁵¹ Rather, the meaning of such terms is influenced by the social changes that occur over time; hence, it is explained the need of the judicial interpretative approach to keep pace and not to be static. This justifies the reliance upon the international law by the AC. Furthermore, such an approach is read by Scharf as preliminary to the definition of an international customary offence of terrorism. It is desirable to see the STL’s Decision itself as a “Grotian moment”, expression used by the author “to denote a transformative development

⁴⁶ See footnote 34.

⁴⁷ M. P. Scharf, “Special Tribunal for Lebanon: Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging. Introductory Note by M. P. Scharf”, in *International Legal Materials*, Vol. 50, No. 4 (2011), pp. 509-602

⁴⁸ *Ibid.*

⁴⁹ B. Saul, “*Amicus Curiae* Brief for the Notion of Terrorist Acts”, in *Criminal Law Forum* (2011)

⁵⁰ John Deaver Drinko-Baker & Hostetler Professor of Law, and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law.

⁵¹ See footnote 47.

in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance”.

Different observations are advanced by other scholars. According to Prakash Puchooa,⁵² notwithstanding the guidance provided for the Article 2 of the Statute, nor the Agreement or the Statute of the Tribunal have elaborated a definition of terrorism. This task was left to the judge, in accordance to the Lebanese Criminal Code. Hence, two modes of adjudication would have been possible before the AC, depending on its perception of the judicial role. Whether the STL’s judges perceived their role as domestic or international law judges, consequently the scope of law of terrorism and its defining elements would comply solely to the LCC or to a complementary reliance upon international law. The author holds that there is not a general theory of judging in the international context. Defining the judicial role of a court could be practically difficult, if no assistance is offered by the Statute. That is exactly the case of the STL, where the characterizations of domestic and international are unhelpful in explaining its nature. Therefore, Puchooa turns to the judgment, identifies an important remark at paragraph 39 of the AC’s Decision, stating as follows:

[The] starting point is the criminal law of Lebanon but as an international court, we may depart from the application and interpretation of national law by national courts under certain conditions...⁵³

and holds that the permissive term ‘may’ indicates that the judges were not under an obligation to depart from the national law but that they exercised their discretion in deciding so. They additionally justified such a discretion by listing three conditions under which they could depart, namely unreasonableness, manifest injustice and lack of consonance with the international rules binding upon Lebanon. The necessity of incorporating international law within the interpretive Lebanese framework explained the adoption of a non-domestic role of the judges. That means that the AC expressed a preference for the inclusion of international law. It backed its reasoning on the basis of principles of interpretation such as the teleological principle of interpretation, the principle of effectiveness and the general principle of construction that one should construe the national legislation of a State in such a manner to be aligned as much as possible to the international legal standards.

⁵² Graduate Student in International Law at the University College of London (UCL)

⁵³ UN Special Tribunal for Lebanon (Appeals Chamber), *Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging*, STL-11-01/I, 16 February 2011, par. 39

Turning to another interpretative remark, Gillett and Shuster offer their analysis on the issue. The Appeals Chamber's departure from the Lebanese definition of terrorism has been possible thanks to the interpretative methodology adopted. As remarked by Scharf, the Decision expresses the consideration that all adjudication involves interpretation, no matter how clear the provisions in question are. The traditional two-step model, i.e. the resorting to interpretative aids solely whether the provisions contain ambiguity, is declared 'fallacious' and a one-step method of simply interpreting the provision at the beginning is preferred. Two main considerations follow. Firstly, the Chamber emphasized the distinction between *applying* legal (international) instruments and *interpreting* Lebanese law in the light of such instruments, but this distinction is considered by the authors a 'distinction in principle', since the practical effect of that approach is "to blur the line between interpretation and application".⁵⁴ Thus, "the Appeals Chamber's 'interpretation' of the Lebanese Criminal Code in the light of international law could equally be seen as the application of international law under the Statute".⁵⁵ To paraphrase these esteemed scholars, the main fruition of the interpretive process is to free the Chamber from the constraint of stopping at the literal meaning of Article 314. It justified a broader interpretation of that provision in opposition with the Statute. This departure is worrying because it brings into question the legality of the crime and has direct impact on the proceeding before the Tribunal. An example best illustrates the consequent implications with regard to who will be indicted and what charges they will face:

For example, Pierre Gemayel, the Lebanese Ministry of Industry, was killed by gunfire in what appears to have been a targeted assassination just after the Lebanese Cabinet approved the final draft STL Agreement and Statute. Whereas that crime would not have qualified as terrorism according to the Lebanese courts' established understanding of Article 314, it would *prima facie* fall within the Appeals Chamber's interpretation of Article 314.⁵⁶

Secondly, this interpretive approach could be intended as "pre-textual" and "designed to justify setting out a definition of terrorism under customary international law". The authors, as already mentioned, recognize the importance of the AC's discussion on the interpretation as mainly related to the ensuing substantive aspects of the Decision.

⁵⁴ See footnote 34.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* p. 1002

A similar critical remark comes from J. Powderly. He admits the possibility for the AC to recourse to international law binding upon Lebanon in the interpretation of Lebanese law. But, in the author's opinion, this should be "close to a last resort", while the Chamber disregards this regime "to jump straight to conventional and perceived customary international law in arriving at the understanding to be given to the means of terrorism."⁵⁷ Powderly holds that this approach is, first of all, unnecessary given the 'non-exhaustive' nature of the means element according to Article 314 (which adopts the phrasing 'such as'). The recourse to a "teleological interpretation would have led the same result, [avoiding] much of the criticism based on the principle of legality argument".⁵⁸ Secondly, and more importantly, the AC's interpretive approach seems a method to "have successfully admitted international law into Article 2 of the STL Statute via the back door".⁵⁹ The judicial discretion is accused to have gone too far, as we can read in the following Powderly's passage:

The Decision of the Appeals Chamber with respect to the definition of terrorism is a clear instance of judicial creativity that goes beyond the mere progressive development of the law and enters the territory of naked judicial law-making.⁶⁰

2.3. Critics on the AC's substantive definition of terrorism under international customary law

With respect to the specific elements of the definition of terrorism identified by the Appeal Chamber, numerous observations must be taken into account.

Before addressing to the most important of them, it is helpful to remind the notion elaborated by the STL Appellate Chamber.

The elements of a customary transnational crime of terrorism emerged according to the AC are the following:

- 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 a public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it;

⁵⁷ See footnote 30.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* p. 360

iii) when the act involves a transnational element.⁶¹

The first category of observations, according to the Gillett and Schuster's paper broadly quoted above, can be defined as the one concerning the "overinclusive" elements of that definition.

The first 'overinclusive' remark refers to the 'enumerated purpose requirement', i.e. the question of whether the political, religious, racial or ideological purpose is part of the definition. The AC holds that this requirement is not included. The authors, however, criticize this approach, which considers the requirement a mere 'discrepancy' in states practice. They hold the need to give a heavier weight to it in order to include it in the definition. The reasons are the following: first, it would have significantly strengthened the foundation for this notion of terrorism, considering the essential nature of such requirement for those states that have included it in their national definitions; secondly, there should be more awareness of the several international players which take care of it, namely numerous common law states, some civil law states and some of the UN Terrorism Conventions. The inclusion into the definition by the AC could have underlined its importance, partially recognized in the fact that those countries link the individual liability to the satisfaction of that requirement, which, thus, appears to be absolute. The Appellate Chamber would have marked deeply the international community, adding that element, and would have solved the sharp international disagreement about its role; thirdly, consequently, it would have been less exposed to the criticism known as 'the search of the lowest common denominator definition of terrorism'.

The second 'overinclusive' remark refers to the open-ended formulation of the underlying criminal conduct, especially due to the word 'and so on' at the end of the list of serious crimes that could be qualified as terrorism. Such a formulation implies a risk of overcriminalization. The authors criticize the vagueness of this objective element, raising the alarm on a possible expansive interpretation of the crime. They stress the need to clarify (e.g. in future proceeding) the meaning of such expression to reduce the potential ambiguities of the judicial interpretation.

The third 'overinclusive' remark refers to the double special intent of the definition (to terrorize the population *or* to coerce an authority). Even if the authors admit that the AC's approach is consistent with many sources of international law, they nonetheless criticize the overinclusive potential of the second 'bifurcation' in that it may extend the crime to conduct

⁶¹ STL AC Decision, par. 85

“that would not typically considered terrorism in everyday parlance”. Once more, an example clarifies the concept:

Examples such as political protests in support of dissidents like Aung San Suu Kyi of Myanmar could possibly fall within this definition [as actions against the authority] if they involved criminal conduct.⁶²

Therefore, the authors consider this definition as a ‘powerful legal tool’ to governments against political dissent. “It can only be hoped that it will not be misused in this respect”.

Turning to the second category of observations, we can analyse the ‘underinclusive’ aspect of the definition, i.e. that it excludes the application of the crime in times of armed conflict. A general consideration is made by the authors stating that “terrorism does not stop when armed conflict starts.” They criticize the limited analysis of the sources upon which the AC has relied at this regard. Obviously, high reservations are expressed by many countries -especially the Arabic ones - about the legality of the conduct of the ‘freedom fighters’, namely combatants engaged in liberation wars. Such reservations are based on the view that a ‘freedom fighter’ performance cannot be considered as terrorism. Gillett and Schuster focus their attention on the criminal nature of (potential) terrorist acts committed by non-‘freedom fighters’ during armed conflict. Furthermore, they hold that the position shared by the AC constitute a minority of the relevant state practice and *opinion juris* supporting the application of the crime in wartime.

A further category of observations concerns the third requirement of the AC’s definition, namely the involvement of a *transnational* element. According to the analysis of Manuel J. Ventura⁶³, this element has “a far greater impact than simply to distinguish between international and domestic terrorism”⁶⁴. It should be taken into account that the AC acted for the purpose of finding a customary rule reflecting the corresponding rule in the relevant instruments and jurisdictions; in doing so, it looked to various sources to establish the commonly accepted elements of terrorism, and identified the first two requirements of the definition (the criminal conduct and the special intent of terrorize or coerce) as the ‘lowest common denominator’. Ventura holds that the cross-border element cannot be limited to a characterization of the crime as international rather than domestic, yet it “*is* part of the

⁶² See footnote 34.

⁶³ BA/LLB, University of Western Sydney; Law Clerk to Chief Justice Mogoeng Mogoeng of the Constitutional Court of South Africa; (previously) Legal Intern to President Cassese at the STL’s Appeals Chamber.

⁶⁴ M. J. Ventura, “Terrorism According to the STL’s Interlocutory Decision on the Applicable Law”, in *Journal of International Criminal Justice* 9 (2011), p. 1021-1042.

definition”⁶⁵. He supports that the transnational *effect* of terrorism recognized by the various international players has been crucial in the formation of a convergent *opinio juris*. It truly separates terrorism from the other criminal phenomena nationally outlawed. Yet the AC did not sufficiently clarify the contours of this element, since it stated that it solely requires a “connection of perpetrators, victims or means [...] across two or more countries” or “a significant impact [on] international peace and security”.⁶⁶ Ventura holds that a further requirement should have been mentioned, namely the condemnation/attention of the international community. As stated in his paper, “it would be an odd result to, on the one hand, rely on international condemnation of and attention to terrorism to extract the requirement of a transnational element, and on the other hand, not to demand similar international attention or condemnation (such a Security Council or general Assembly Resolution) when seeking to satisfy this same element in a particular case.”⁶⁷

This requirement has a ‘tangible’ and ‘profound’ impact for the prosecution of the crime. The AC recognizes that terrorism at international level consists of three elements: two of them already criminalized in many legal systems ‘plus’ a third one not yet provided for nationally. It implies at least two considerations: first and foremost, human rights considerations emerge. Since the Article 15 of the International Covenant on Civil and Political Rights provides for an exception to the principle of legality whether a crime has reached the ‘international crime status’ and whether it is proved that it existed at the relevant time of the criminal conduct, “states would only need to [...] add a transnational element to their existing definitions (provided they include the other two identified elements) in order to be able to prosecute persons retroactively”.⁶⁸ Second, this consequently calls for the identification of the exact date as to when the crystallization of terrorism took place. Many authors⁶⁹ hold that it is reasonable to assume that it has already taken place at the date of Hariri assassination, i.e. the early 2005. Yet, nothing is said about it in the Decision, and is not clear whether the crime has been crystallized *before* the Hariri bombing attack.

To match a sufficient level of completeness, one last consideration on the substantive definition of terrorism established by the Appeals Chamber of the Special Tribunal for

⁶⁵ *Ibid.*

⁶⁶ STL AC Decision, par. 90

⁶⁷ See footnote 64.

⁶⁸ *Ibid.*

⁶⁹ Ventura and Saul raise the question in their papers.

Lebanon, must be brought to light. This consideration concerns the ‘twofold’ dimension of the customary rule of terrorism, as identified according to the AC:

[the customary rule of terrorism] addresses itself to *international subjects*, including rebels and other non-state entities, by imposing or conferring on them rights and obligations to be fulfilled in the international arena; at the same time, it addresses itself to *individuals* by imposing them the strict obligation to refrain from engaging in terrorism, an obligation to which corresponds as correlative the right of any state to enforce such obligation at the domestic level.⁷⁰

A peculiar analysis in partial opposition to the AC’s view is offered by Kai Ambos⁷¹. Peculiar in that many scholars reject the status of customary rule of the notion of terrorism in both the dimensions, simply stating that such a crime does not exist at the international level. Whereas, others criticize various elements of the definition, yet stating that the authority of an UN-Treaty-based Tribunal could be part of the formation process of a new custom. Differently, Kai Ambos holds that it exists a customary rule outlawing terrorism, and the ensuing obligations of states in its prevention and suppression, yet it cannot be inferred “from this prohibition, without further ado, the existence of an international crime of terrorism”.⁷²

Thus, solely the *individual* dimension is rejected, according to an analysis of the current international status of the crime. The author makes a distinction between mere treaty-based crimes and ‘true’ or core international/supranational crimes. The former are essentially transnational offences, and their criminalization is provided for in sectorial conventions, thus they can only be enforced by states at domestic level. Whereas, the latter are directly binding upon individuals, thus they create international individual criminal responsibility. In Ambos’s opinion “terrorism is a ‘special’ transnational offence that may come closer to a true international crime than ‘ordinary’ transnational offences”.⁷³ The reasoning is justified according to the Tadic criteria, namely the three criteria to be met in order to speak about a crime under international law.⁷⁴ Terrorism fulfills the first two but not the third, since the

⁷⁰ STL AC Decision, par. 105 (*emphasis added*)

⁷¹ Professor of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August Universität Göttingen; Judge at the District Court Göttingen.

⁷² K. Ambos, “Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?”, in *Leiden Journal of International Law*, 24 (2011), p. 655-675

⁷³ *Ibid.*

⁷⁴ According to Ambos, these are the three Tadic criteria to be fulfilled by an international crime:

- i) the respective underlying prohibition (primary norm) must be part of international law;
- ii) a breach of this prohibition must be particularly serious, namely it must affect important universal values; and
- iii) the breach must entail individual criminal responsibility in its own right, namely independently of any criminalization in domestic criminal law.

existence of an independent criminal individual liability related to the terrorist conduct is not backed by any States and intergovernmental organizations' declarations. That means that "the world community [does not] consider the offence at issue as amounting to an international crime".⁷⁵

⁷⁵ See footnote 72.

CONCLUSION

The final section of this paper evaluates the relevance of the Appeals Chamber's Decision in international law. Different comments can be proposed, taking into account the significance and the possible influence of this judgment on other tribunals and international community. It is necessary to remind that its application is circumscribed to the jurisdiction of the Special Tribunal for Lebanon, as explicitly noted by the AC itself:

This [ruling] is not binding *per se* on courts other than the Special Tribunal for Lebanon, although it may of course be used as an interpretation of the applicable legal provisions in other cases where terrorism is charged.⁷⁶

First of all, it can be recognized that the identification of a general notion of terrorism under the customary law is the real breakthrough of the Decision. The impact of such a definition depends on its international acceptance. Two are the main indicators of such an acceptance: i) how deeply it could influence state practice and *opinio juris* and, ii) how collectively the community estimates its strength, conferring or not to it a certain level of authority.

As far as the first indicator is concerned, it is difficult at this moment in time to make a prediction, needing the state behaviors a long-time range to be analyzed. Instead, turning to the second guidance, numerous remarks can be exposed.

As first reaction, a debate sparked among scholars and surely the Decision will be subject of discussion for some more time to come. It is to be hoped that it will have relevance to the work of the UN Counter-Terrorism Committee, domestic parliamentary committees and regional counter-terrorist organizations.

In particular, the STL Appeals Judgment may be seen (and has been seen) according to two perspectives in opposition: as an 'important turning point' in international law, an 'accelerator', a 'vital contribution' and a 'guiding light' on the one hand and, on the other hand, as a 'damage to human rights', a 'damage to public confidence' in international criminal justice, a 'provocation' and a 'bad decision' tending to 'take a life' on its own (due to the 'incantatory power' of an international tribunal).

The first perspective backs that "the [D]ecision provides judges with guidance and authority in different ways".⁷⁷ Firstly because it relies upon the identified customary definition of

⁷⁶ STL AC Decision, par. 144.

⁷⁷ P. Puchooa, "Defining Terrorism at the Special Tribunal for Lebanon", in *Journal of Terrorism Research*, 2011

terrorism. In accordance to the role given to the international customary law as binding upon all nations, each reliance upon this source strengthens the judgment's legitimacy. (The opposite perspective, however, marks the generally inconsistent and controversial use that can be made of that source and marks how this is exactly the case, in the STL's context). Moreover, such a decision "offers an account of widespread state practice and convincing *opinio juris*".⁷⁸ A second benefit may occur in relation to the development of a broadly acceptable definition of terrorism. Since the international community has been unable to reach consensus on that issue, there are various separate counter-terrorism conventions. The practical result is that there are significant gaps in the coverage of the notion of terrorism (e.g. the cyber-terrorism acts or the acts of psychological terror that do not involve physical injury). "Cases falling within the gaps"⁷⁹ could be prosecuted according to the customary definition established by the AC.

Furthermore, facilitating a more effective implementation of the UN Counter-Terrorism Resolutions could be seen as a third huge benefit for the international community, derived from the Decision. A conclusive acknowledgment could state as follow: "Observers will continue to be critical [...], and challenges arising during the trials may require a revisiting of questionable aspects of the Decision. However, it cannot be denied that the debate has moved from the academic sphere into practice".⁸⁰

The second and different perspective discredits the judicial capacity of the Appeals Chamber. The controversial context, within which the Decision has been issued, has produced two contradictory opinions, the AC's reasoning holding that a customary definition of terrorism exists, and the Professor Saul's research demonstrating it does not. "Collectively, these views of CIL [Customary International Law] undermine the strength of the judgment".⁸¹

A further criticism is due to the fact that it depends upon the discretion of the judges of other international tribunals whether to decide to incorporate reference to the STL's Decision, being the latter not *per se* binding.

In conclusion, despite of the perspective one could feel closer, this paper is aimed at strengthening the engagement of the international community in a fight against terrorism, in the highest regard for the human rights of any accused, yet in the absolute belief of the author

⁷⁸ *Ibid.*

⁷⁹ See footnote 47.

⁸⁰ See footnote 34.

⁸¹ See footnote 77.

that “public confidence in international criminal justice is also undermined if there are gaps in the law big enough for terrorists to attack through with impunity.”⁸²

⁸² See footnote 39.

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*To my father,
Who made me love Lebanon.*

*To my mother,
Always by my side.*

*And to my English friend
Maria.*

