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## The Expense of Expansion: Judicial Innovation at the Special Tribunal for Lebanon

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# THE EXPENSE OF EXPANSION: JUDICIAL INNOVATION AT THE SPECIAL TRIBUNAL FOR LEBANON

ERIK STIER\*

**Abstract:** The Special Tribunal for Lebanon (STL) is a hybrid international tribunal tasked with prosecuting and punishing those responsible for the 2005 bombing that killed former Lebanese Prime Minister Rafik Hariri. As the first international tribunal to try purely domestic crimes, the STL is a unique judicial body that employs a number of novel procedures. One such procedural rule allowed the STL Pre-Trial Judge to submit questions on applicable law to the Appeals Chamber prior to confirming any indictments. Responding in the form of an interlocutory decision, the Appeals Chamber made the groundbreaking assertion that customary international law on terrorism had finally emerged, and that it stood to impact provisions of the Lebanese Criminal Code, which the tribunal was mandated to apply.

## INTRODUCTION

In a provocative interlocutory decision issued on February 16, 2011, the Special Tribunal for Lebanon (STL) became the first court to recognize customary international law<sup>1</sup> on terrorism.<sup>2</sup> But on its path to declaring a definition that has eluded the international community for

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<sup>1</sup> See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, T.S. 993 (defining international custom, for the purposes of the International Court of Justice). In addition to general principles of law and treaties, the International Court of Justice (ICJ) considers custom, “as evidence of a general practice accepted as law,” a source of international law. *Id.* To illustrate the growth of customary law, Charles de Visscher compared it “to the gradual formation of a road across vacant land.” MALCOLM N. SHAW, *INTERNATIONAL LAW* 79 (2008) (“After an initial uncertainty as to direction, the majority of users begin to follow the same line which becomes a single path . . . accepted as the only regular way . . .”).

<sup>2</sup> See Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Leb. Appeals Chamber, Case No. STL-11-01/1 ¶ 83, Disposition ¶ 15 (Feb. 16, 2011), <http://www.stl-tsl.org/en/the-cases/stl-11-01/rule-176bis/filings/orders-and-decisions/appeals-chamber/f0010>.

nearly a century,<sup>3</sup> the STL Appeals Chamber exceeded the bounds of the tribunal's fundamental mandate to apply Lebanese law.<sup>4</sup> Moreover, the court's decision to resort to customary law on terrorism was unnecessary, its justification grounded in contentious methodology, and its pronouncement on applicable law expansive.<sup>5</sup>

Article 2 of the STL founding statute (Article 2) instructs the court to apply the provisions of the Lebanese Criminal Code to the prosecution and punishment of terrorism.<sup>6</sup> The relevant provision of the Lebanese Criminal Code, Article 314, is unambiguous and does not require interpretation *per se*.<sup>7</sup> Yet as a means to introduce international law, the court employed a pre-textual approach that considered sources of interpretation prior to considering the plain meaning of the statute.<sup>8</sup> In other words, the court's interpretive methodology opened the door to its definition of terrorism under customary law.<sup>9</sup>

After diverting to define an international crime of terrorism, the court then overstepped the bounds of its Article 2 mandate by applying an international interpretation of the Lebanese Code over the clear interpretive guide found in Lebanese case law.<sup>10</sup> Consequently, the tri-

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<sup>3</sup> See *id.* ¶; Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23, 35–36 (2006) (noting that the international community has been attempting to reach agreement on the definition of terrorism since the issue first appeared before the League of Nations in 1937). After the attacks of September 11, 2001, the United Nations (U.N.) Security Council stated that “acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century.” S.C. Res. 1377, Annex, U.N. Doc. S/RES/1377 (Nov. 12, 2001). An accepted definition of international terrorism would improve international cooperation and strengthen coalition building against perpetrators and sponsors of terrorist acts. Young, *supra*, at 32.

<sup>4</sup> See S.C. Res. 1757, Attachment art. 2, U.N. Doc. S/RES/1757 (May 30, 2007); Matthew Gillett & Matthias Schuster, *Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism*, 9 J. INT'L CRIM. JUST. 989, 1001 (2011).

<sup>5</sup> See Gillett & Schuster, *supra* note 4, at 998–99, 1003; Stefan Kirsch & Anna Oehmichen, *Judges Gone Astray: The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon*, DURHAM L.R. (May 13, 2011), 6, [http://durhamlawreview.co.uk/attachments/article/26/Judges gone astray.pdf](http://durhamlawreview.co.uk/attachments/article/26/Judges%20gone%20astray.pdf).

<sup>6</sup> S.C. Res. 1757, *supra* note 4, Attachment art. 2.

<sup>7</sup> See Kirsch & Oehmichen, *supra* note 5, at 6.

<sup>8</sup> See Gillett & Schuster, *supra* note 4, at 1000–01; Kirsch & Oehmichen, *supra* note 5, at 6; Ben Saul, *Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism*, 24 LEIDEN J. INT'L L. 677, 680 (2011).

<sup>9</sup> See Gillett & Schuster, *supra* note 4, at 1006–07; Saul, *supra* note 8, at 679.

<sup>10</sup> See Interlocutory Decision, Case No. STL-11-01/1 ¶¶ 51–52 (noting that Lebanese case law on this issue establishes a strict reading of the Lebanese Criminal Code); Kai Ambos, *Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism Under International Law?*, 24 LEIDEN J. INT'L L. 655, 658–59 (2011) (“[D]eference to the sover-

bunal's approach expanded the scope of the Lebanese provision to encompass liability not previously found in domestic law.<sup>11</sup> Trials under these charges now risk violating the fundamental principle of *nullum crimen sine lege*, which holds that persons should be tried or punished only for an act considered a criminal offense under applicable law at the time it was committed.<sup>12</sup>

The STL's effort to develop international customary law thus comes at great expense.<sup>13</sup> In pursuit of an international definition of terrorism, the court has provided solid grounds for appeal that threaten to undermine its own trial decisions.<sup>14</sup>

Part I of this Comment provides a background of the formation of the STL and the unconventional procedures that guided it towards recognition of customary international law on terrorism. Part II examines the tribunal's methodology and application of international law as an interpretive aide to Lebanese law. Part III shows that the STL's definition of terrorism is the product of these unusual constructs and argues that the dramatic expansion of scope threatens to compromise the integrity of forthcoming decisions.

## I. BACKGROUND

On February 14, 2005, a massive explosion killed former Lebanese Prime Minister Rafik Hariri when a car bomb detonated in central Beirut.<sup>15</sup> The blast killed nine others and injured dozens more.<sup>16</sup> In response to a request from the Lebanese government, the United Nations (U.N.) Security Council established the Special Tribunal for Lebanon on May 30, 2007.<sup>17</sup>

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eignty of Lebanon [is] explicitly demanded in Resolution 1757."); Gillett & Schuster, *supra* note 4, at 1003.

<sup>11</sup> See Interlocutory Decision, Case No. STL-11-01/1 ¶ 130.

<sup>12</sup> See Ambos, *supra* note 10, at 661; Gillett & Schuster, *supra* note 4, at 1003.

<sup>13</sup> See Ambos, *supra* note 10, at 661; Gillett & Schuster, *supra* note 4, at 1003; Saul, *supra* note 8, at 699.

<sup>14</sup> See S.C. Res. 1757, *supra* note 4, Attachment art. 26 (delineating the court's appellate procedures); Ambos, *supra* note 10, at 661; Gillett & Schuster, *supra* note 4, at 1003; Saul, *supra* note 8, at 699.

<sup>15</sup> See *Explosion Kills Former Lebanon PM*, BBC NEWS, [http://news.bbc.co.uk/2/hi/middle\\_east/4263893.stm](http://news.bbc.co.uk/2/hi/middle_east/4263893.stm) (last updated Feb. 14, 2005, 19:31 GMT).

<sup>16</sup> *Id.*

<sup>17</sup> S.C. Res. 1757, *supra* note 4, Annex pmbl.

The STL was set up as a hybrid tribunal<sup>18</sup> with the primary task of prosecuting and punishing those responsible for the Hariri attack.<sup>19</sup> But the Hariri bombing proved to be just the first of many similar attacks on Lebanese politicians.<sup>20</sup> Accordingly, the STL's jurisdiction can be extended beyond the Hariri attack if the tribunal decides that other attacks occurring between October 1, 2004 and December 12, 2005 were connected to the Hariri bombing.<sup>21</sup> Crimes taking place after December 12, 2005 may also fall under the jurisdiction of the STL, if jointly decided by the Lebanese government and the U.N. and approved by the Security Council.<sup>22</sup>

Article 2 of the Security Council statute establishing the tribunal requires the STL to apply the "provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity . . . ."<sup>23</sup> Accordingly, the STL trials mark the first instance of an international criminal court trying persons accused of violating purely domestic, and not international, criminal law.<sup>24</sup>

Before issuing its interlocutory decision, the court was occupied with administrative operations and establishing its Rules of Procedure and Evidence (RPE).<sup>25</sup> Although mandated to apply Lebanese law,<sup>26</sup> a pair of procedures in the RPE allowed the STL to incorporate international law without violating the parameters of applicable law set out in Article 2.<sup>27</sup>

Rule 68(G) of the RPE provides that the Pre-Trial Judge may submit to the Appeals Chamber any preliminary questions regarding ap-

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<sup>18</sup> Matthew Gillett & Matthias Schuster, *The Special Tribunal for Lebanon Kicks Off: The Special Tribunal for Lebanon Swiftly Adopts Its Rules of Procedure and Evidence*, 7 J. INT'L CRIM. JUST., 885, 886 (2009). The STL is a hybrid tribunal in the sense that it is an international court primarily applying domestic national law. *Id.* Though seated in the Netherlands, the tribunal it is composed of both Lebanese and international judges, as well as a mixed Lebanese and international staff. *Id.*

<sup>19</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶ 14.

<sup>20</sup> See *Timeline: Lebanon Assassinations*, Al Jazeera, <http://www.aljazeera.com/news/middle-east/2012/10/2012101921429610991.html> (last modified Oct. 20, 2012).

<sup>21</sup> S.C. Res. 1757, *supra* note 4, Annex art. 1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Attachment art. 2.

<sup>24</sup> Marco Milanovic, *An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1139, 1139 (2007).

<sup>25</sup> See generally Gillett & Schuster, *supra* note 18, at 885-909 (discussing the STL's process of forming its Rules of Procedure and Evidence).

<sup>26</sup> S.C. Res. 1757, *supra* note 4, Attachment art. 2.

<sup>27</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶¶ 7, 129.

plicable law it deems necessary to rule on an indictment.<sup>28</sup> Rule 176 *bis* is the counterpart to Rule 68(G), providing that the Appeals Chamber must issue an interlocutory decision on any question raised by the Pre-Trial Judge.<sup>29</sup> Through this mechanism, the Appeals Chamber established the substantive law to be applied by the Trial Chamber.<sup>30</sup> And because this procedure took place prior to the Trial Chamber's confirmation of the first indictment, the Appeals Chamber necessarily made final pronouncements on applicable law in the abstract, without reference to facts.<sup>31</sup>

These procedures mark a departure from other recent hybrid tribunals.<sup>32</sup> Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), ruled against such advisory processes.<sup>33</sup> International criminal tribunals traditionally limit the appellate role to affirming, reversing, and revising decisions of the trial chamber.<sup>34</sup> The STL splits from this model, granting the Appeals Chamber an advisory role in addition to its corrective one.<sup>35</sup>

Such practice is unconventional, as the tribunal itself acknowledges.<sup>36</sup> No other international court or tribunal allows a higher court to issue an interpretation of substantive law applicable in criminal proceedings pending before a lower court.<sup>37</sup> This unique procedure allowed the Appeals Chamber to expound on questions of law that may never come before it.<sup>38</sup>

Taking advantage of this procedure, the STL Pre-Trial Judge submitted 15 questions to the Appeals Chamber when it received the first indictment on January 17, 2011.<sup>39</sup> Most significant were three questions relating to the substantive crime of terrorism to be applied by the Trial Chamber:

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<sup>28</sup> *Id.* ¶ 1.

<sup>29</sup> Spec. Trib. for Leb. R. P and Evid. ¶ 176 *bis*, [http://www.stl-tsl.org/images/RPE/RPE\\_EN\\_February\\_2012.pdf](http://www.stl-tsl.org/images/RPE/RPE_EN_February_2012.pdf) (last amended Feb. 8, 2012).

<sup>30</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶ 7.

<sup>31</sup> *Id.* ¶ 8.

<sup>32</sup> See Gillett & Schuster, *supra* note 4, at 996.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 992.

<sup>35</sup> *Id.*

<sup>36</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶ 8.

<sup>37</sup> Gillett & Schuster, *supra* note 4, at 996.

<sup>38</sup> *Id.* at 997. See Interlocutory Decision, Case No. STL-11-01/1 ¶ 8.

<sup>39</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶ 1.

i) Taking into account the fact that Article 2 of the Statute refers exclusively to the relevant provisions of the Lebanese Criminal Code in order to define the notion of terrorist acts, should the Tribunal also take into account the relevant applicable international law?

ii) Should the question raised in paragraph i) receive a positive response, how, and according to which principles, may the definition of the notion of terrorist acts set out in Article 2 of the Statute be reconciled with international law? In this case, what are the constituent elements, intentional and material, of this offense?

iii) Should the question raised in paragraph i) receive a negative response, what are the constituent elements, material and intentional, of the terrorist acts that must be taken into consideration by the Tribunal, in the light of Lebanese law and case law pertaining thereto?<sup>40</sup>

Pursuant to Rule 176 *bis*, the Appeals Chamber addressed these questions in its interlocutory decision.<sup>41</sup> This allowed the Appeals Chamber to determine the impact of international law on the applicable law of the STL.<sup>42</sup> Moreover, these questions led directly to the Appeals Chamber's pronouncement on the existence of customary international law on terrorism.<sup>43</sup>

## II. DISCUSSION

As indicated by the Pre-Trial Judge's questions, Article 2's mandate to apply Lebanese criminal law raises fundamental concerns about the relevance of international law to the Special Tribunal for Lebanon proceedings.<sup>44</sup> In establishing the applicable law, Article 2 refers only to the Lebanese Criminal Code, and makes no mention of international law at all.<sup>45</sup>

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<sup>40</sup> *Id.* ¶ 42.

<sup>41</sup> Spec. Trib. for Leb. R. P. and Evid. ¶ 176 *bis*; Interlocutory Decision, Case No. STL-11-01/1, ¶ 43.

<sup>42</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶ 45.

<sup>43</sup> *See id.* ¶ 85.

<sup>44</sup> *See* Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Leb. Appeals Chamber, Case No. STL-11-01/1 ¶ 42, (Feb. 16, 2011), <http://www.stl-tsl.org/en/the-cases/stl-11-01/rule-176bis/filings/orders-and-decisions/appeals-chamber/f0010>.

<sup>45</sup> *See* S.C. Res. 1757, *supra* note 4, Attachment art. 2.

The Appeals Chamber stated that in accordance with Article 2, the tribunal would “apply the provisions of the Lebanese Criminal Code, and not those of international treaties ratified by Lebanon or customary international law to define the crime of terrorism.”<sup>46</sup> It then proceeded to justify the use of international law not through direct application, but as an interpretive aide.<sup>47</sup>

The foundation of its interpretive approach rests on the assertion that all adjudication, regardless of a statute’s clarity, requires interpretation.<sup>48</sup> Instead of applying interpretation to specific ambiguities in domestic statutes, the Appeals Chamber embraced a broad method by which all domestic legislation would be construed within the parameters of binding international obligations.<sup>49</sup> Thus international law, composed of ratified treaties and customary law, constitutes part of the legal context relevant to consideration of any domestic statutory language.<sup>50</sup> Under this methodology, the court remains within the boundaries of Article 2 because it is not applying international law, but merely interpreting Lebanese law in light of it.<sup>51</sup>

The Appeals Chamber considered treaty law and customary law as interpretive guides before setting out the applicable reading of Article 314.<sup>52</sup> Both treaty law and the Appeals Chamber’s definition of terrorism under customary law exhibit broader definitions of terrorism than the Lebanese provision.<sup>53</sup>

#### *A. The Definition of Terrorism in Treaty Law Binding on Lebanon*

The Arab Convention for the Suppression of Terrorism (Arab Convention) is the sole treaty ratified by Lebanon that provides a general definition of terrorism.<sup>54</sup> That convention, designed to encourage judicial cooperation, emphasizes that it does not intend to replace con-

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<sup>46</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶ 44.

<sup>47</sup> *Id.* ¶ 45.

<sup>48</sup> *See id.* ¶ 19.

<sup>49</sup> *See id.*

<sup>50</sup> *See id.* ¶¶ 40, 46.

<sup>51</sup> *Id.* ¶ 45.

<sup>52</sup> *See* Interlocutory Decision, Case No. STL-11-01/1 ¶ 129.

<sup>53</sup> *See id.* ¶¶ 129–130.

<sup>54</sup> Arab Convention on the Suppression of Terrorism, League of Arab States, Apr. 22, 1998, *reprinted in* INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM, at 179, U.N. Sales No. E.08.V.2; Interlocutory Decision, Case No. STL-11-01/1 ¶ 63.



tracting parties' national terrorism laws.<sup>55</sup> Article 1(2) of the Arab Convention provides the following definition of terrorist acts:

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 jeopardize a national resources (sic).<sup>56</sup>

The Arab Convention definition is broad because it does not require that an act employ particular means to be considered an act of terrorism.<sup>57</sup> Article 2(b) of the convention further expands the scope of Article 1(2) by providing that attacks on individual government officials are considered terrorist acts and not political offenses.<sup>58</sup>

#### B. *The Definition of Terrorism in Customary International Law*

Moving to customary international law, the court asserted that consensus on the definition of terrorism had finally emerged.<sup>59</sup> Conceding that scholars, legal experts, and even the STL Prosecution and Defense Offices held that no definition of terrorism exists, the Appeals Chamber nonetheless declared that customary law on terrorism *in time of peace* had crystalized.<sup>60</sup> The finding additionally stands to leave a broad and binding impact on all subjects of international law.<sup>61</sup>

Deriving a general practice accepted as law from treaties, U.N. resolutions, and the legislative and judicial practices of States, the Appeals Chamber held that customary law on the international crime of terrorism in time of peace comprises three core elements:

(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 popula-

<sup>55</sup> Arab Convention on the Suppression of Terrorism, *supra* note 54, art. 3; Interlocutory Decision, Case No. STL-11-01/1 ¶ 64.

<sup>56</sup> Arab Convention on the Suppression of Terrorism, *supra* note 54, art. 1.

<sup>57</sup> *See id.*

<sup>58</sup> *Id.* arts. 2(c), (d), (e).

<sup>59</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶ 83.

<sup>60</sup> *Id.* ¶¶ 83, 85.

<sup>61</sup> *Id.* ¶ 102.

tion (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.<sup>62</sup>

Like the Arab Convention definition, the Appeals Chamber's definition of terrorism under customary international law is broad because it lacks a means requirement.<sup>63</sup>

### C. *The Definition of Terrorism in the Lebanese Criminal Code*

Turning to Article 314 of the Lebanese Criminal Code, the differences between terrorism as defined in international law and Lebanese law become clear.<sup>64</sup> As the tribunal noted, "Article 314 . . . states: Terrorist acts are all acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents."<sup>65</sup> The Lebanese Code's concept of means liable to create a public danger distinguishes it from the definitions of terrorism in treaty and customary law.<sup>66</sup> The inclusion of the term "such as" indicates that the Lebanese Criminal Code does not intend the enumerated list to be exhaustive, but requires that to be considered a terrorist act, the act must be committed by a particular class of means—those inherently liable to create a public danger.<sup>67</sup>

The Arab Convention differs from the Lebanese Code by providing a broader definition of terrorism.<sup>68</sup> It does not include an enumerated list of means and is further broadened by encompassing individual attacks on government officials.<sup>69</sup> Yet in other respects it is narrower than its Lebanese counterpart—it requires that a terrorist act actually be violent as opposed to merely intending to cause a public danger.<sup>70</sup>

The definition of terrorism under customary international law is also broader than the Lebanese provision.<sup>71</sup> Like the Arab Convention, customary law provides no enumerated means by which a terrorist act

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<sup>62</sup> *Id.* ¶ 85.

<sup>63</sup> *See id.*; Arab Convention on the Suppression of Terrorism, *supra* note 54, art. 1.

<sup>64</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶ 113.

<sup>65</sup> *Id.* ¶ 47.

<sup>66</sup> *Id.* ¶ 129.

<sup>67</sup> *Id.* ¶ 50; Kirsch & Oehmichen, *supra* note 5, at 6.

<sup>68</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶ 69.

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

<sup>70</sup> *Id.* ¶ 70.

<sup>71</sup> *Id.* ¶ 113.

may be committed.<sup>72</sup> Instead, it incorporates—but does not require—the creation of public danger within the intent element.<sup>73</sup> In necessitating that an act be committed with “the intent [*either*] to spread fear among the population (which would generally entail the creation of public danger) or . . . coerce a national or international authority” the court’s definition encompasses a much broader scope of liability than Article 314.<sup>74</sup>

#### D. *The Definition of Terrorism Applied by the Appeals Chamber*

Having established its interpretive aides, the Appeals Chamber held that for the purposes of the tribunal, Article 314 of the Lebanese Criminal Code would be read to contain the following elements: “a. the volitional commission of an act; b. through means that are liable to create a public danger; and c. the intent of the perpetrator to cause a state of terror.”<sup>75</sup> Though employed only for the purposes of interpretation, these expansive definitions of terrorism in international law broaden the scope of the Lebanese provision by eliminating the required use of the type of means envisioned in Article 314.<sup>76</sup>

The Appeals Chamber was not mandated to bring the Lebanese provision closer in line with its interpretation of international law.<sup>77</sup> Its expansion of the means requirement was guided by its understanding of how Lebanese law uses international law in the interpretation of its criminal code.<sup>78</sup>

But Lebanese courts have interpreted their terrorism provision differently.<sup>79</sup> Lebanese case law has consistently used a narrow interpretation, holding that although the enumerated list of means is not exhaustive, it is limited to those likely to create a danger to the general public *per se*.<sup>80</sup> The Appeals Chamber noted the clarity of the Lebanese interpretation, stating that “[t]he means or implements which under this approach are not envisaged in Article 314 include [means such as] a gun, a semi-automatic or automatic machine gun, a revolver, or a

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<sup>72</sup> *See id.* ¶ 85.

<sup>73</sup> *See id.*

<sup>74</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶ 85.

<sup>75</sup> *Id.* ¶ 147.

<sup>76</sup> *Id.* ¶¶ 45, 130.

<sup>77</sup> Saul, *supra* note 8, at 679.

<sup>78</sup> *Id.*; *See* Interlocutory Decision, Case No. STL-11-01/1 ¶ 46.

<sup>79</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶¶ 52-55.

<sup>80</sup> *Id.* ¶ 52.

knife and perhaps even a letter-bomb.”<sup>81</sup> Domestic courts have further demonstrated their interpretation of the means element by categorizing acts utilizing unenumerated means simply as murder.<sup>82</sup>

Although numerous cases examined by the Appeals Chamber establish the narrow interpretation of the Lebanese courts, the Appeals Chamber made a deliberate choice to interpret Article 314 broadly to more closely align it with international law.<sup>83</sup> It openly acknowledged the broadening effect such an interpretation would have on criminal liability.<sup>84</sup>

### III. ANALYSIS

The Appeals Chamber’s expansion of Article 314 is the problematic result of a flawed process of appellate overreach.<sup>85</sup> By choosing to interpret Article 314 broadly, the Special Tribunal for Lebanon took an unjustified departure from the guide of Lebanese courts and the mandate of the STL statute.<sup>86</sup> As the jurisdiction of the STL grows to encompass additional attacks, these concerns are quickly becoming far less abstract.<sup>87</sup>

The assassination of Rafik Hariri was the most prominent attack on Lebanese politicians, but it was not an isolated incident.<sup>88</sup> Other attacks on Lebanese officials that have come under the jurisdiction of the STL demonstrate the immediacy of the Appeal Chamber’s decision.<sup>89</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* ¶¶ 52–53. The court enumerates, by way of example, two cases. *Id.* In *Homicide of Sheikh Nizar al-Halabi*, the Judicial Council of the Lebanese Republic held that although the Sheikh was gunned down in a crowded street and for ideological reasons, the assassination was not an act of terrorism because the assailants did not utilize means enumerated in Article 314. Interlocutory Decision, Case No. STL–11/01/1, ¶ 52. Similarly, in *Homicide of Engineer Dany Chamoun*, the same court held that the killing of Chamoun, his wife, and their two children was properly considered murder and not an act of terrorism because it was committed with automatic weapons and not any of the means listed in Article 314. Interlocutory Decision, Case No. STL–11–01/1 ¶ 53.

<sup>83</sup> See Interlocutory Decision, Case No. STL–11–01/1 ¶¶ 52–53, 129–130.

<sup>84</sup> *Id.* ¶ 130.

<sup>85</sup> See Kirsch & Oehmichen, *supra* note 5, at 6; Saul, *supra* note 8, at 679.

<sup>86</sup> See Kirsch & Oehmichen, *supra* note 5, at 6.

<sup>87</sup> See Press Release, Special Tribunal for Leb., Pre-Trial Judge Rules on Connected Cases (Aug. 19, 2011), available at <http://www.stl-tsl.org/en/media/press-releases/19-08-2011-pre-trial-judge-rules-on-connected-cases>; *Timeline: Lebanon Assassinations*, *supra* note 20.

<sup>88</sup> See *Timeline: Lebanon Assassinations*, *supra* note 20.

<sup>89</sup> See Press Release, Special Tribunal for Leb., *supra* note 87; *Beirut Bomb Targets Top Minister*, BBC News, [http://news.bbc.co.uk/2/hi/middle\\_east/4674441.stm](http://news.bbc.co.uk/2/hi/middle_east/4674441.stm) (last updated July 12, 2005); *Blast Kills Lebanese Politician*, BBC News, [http://news.bbc.co.uk/2/hi/middle\\_](http://news.bbc.co.uk/2/hi/middle_)

On October 1, 2004, a car bomb explosion injured former Lebanese Cabinet member Marwan Hamadeh and killed his driver.<sup>90</sup> Another car bomb killed Former Communist Party leader George Hawi on June 21, 2005.<sup>91</sup> Elias Murr, former Lebanese Defence Minister, survived a bombing on July 12, 2005.<sup>92</sup> An assassin shot Minister of Industry Pierre Gemayel at point blank range on November 21, 2006, killing him as he stepped out of his car.<sup>93</sup>

The STL has already extended its jurisdiction to the prosecution of the attacks on Hamadeh, Hawi, and Murr.<sup>94</sup> It may soon also encompass the Gemayel killing.<sup>95</sup> Should the tribunal extend jurisdiction to the Gemayel assassination—distinct among the attacks for its use of a gun as opposed to an explosive—its expansion of the means element could violate a fundamental rule against retroactive punishment.<sup>96</sup> Under Lebanese interpretation of Article 314 of their Criminal Code, a targeted attack by gunfire is not considered creation of public danger and therefore is not an act of terrorism.<sup>97</sup> Under the new STL definition, however, criminal liability for an act of terrorism may attach.<sup>98</sup>

The expansion of liability set out in the interlocutory decision was made possible through a series of unconventional procedures, beginning with the inclusion of Rule 68(G).<sup>99</sup> Article 26(2) of the STL Statute limits the role of the Appeals Chamber to the traditional function of hearing appeals from parties on errors of law and fact, and grants it the power to affirm, reverse, or revise the decisions of the Trial Cham-

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east/4113898.stm (last updated June 21, 2005); *Bomb in Lebanon Wounds Ex-Cabinet Minister*, MSNBC NEWS, [http://www.msnbc.msn.com/id/6147049/ns/world\\_news/t/bomb-lebanon-wounds-ex-cabinet-minister/#.UIyYdml25D4](http://www.msnbc.msn.com/id/6147049/ns/world_news/t/bomb-lebanon-wounds-ex-cabinet-minister/#.UIyYdml25D4) (last updated Oct. 1, 2004); *Lebanese Christian Leader Killed*, BBC NEWS, Nov. 21, 2006, [http://news.bbc.co.uk/2/hi/middle\\_east/6169606.stm](http://news.bbc.co.uk/2/hi/middle_east/6169606.stm) (last updated Nov. 21, 2006); *SSNP Denies Gemayel Murder & Attempt to Assassinate Chidiac*, YA LIBNAN (July 13, 2011), <http://www.yalibnan.com/2011/07/13/ssnp-denies-gemayel-murder-and-attempt-to-assassination-chidiac>.

<sup>90</sup> *Bomb in Lebanon Wounds Ex-Cabinet Minister*, *supra* note 89.

<sup>91</sup> *Blast Kills Lebanese Politician*, *supra* note 89.

<sup>92</sup> *Beirut Bomb Targets Top Minister*, *supra* note 89.

<sup>93</sup> *See Lebanese Christian Leader Killed*, *supra* note 89.

<sup>94</sup> Press Release, Special Tribunal for Lebanon, *supra* note 87.

<sup>95</sup> *See SSNP Denies Gemayel Murder & Attempt to Assassinate Chidiac*, *supra* note 89.

<sup>96</sup> *See Gillett & Schuster*, *supra* note 4, at 1004.

<sup>97</sup> Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Leb. Appeals Chamber, Case No. STL-11-01/1, ¶ 52, (Feb. 16, 2011), <http://www.stl-tsl.org/en/the-cases/stl-11-01/rule-176bis/filings/orders-and-decisions/appeals-chamber/f0010>.

<sup>98</sup> *See id.* ¶ 147; *Gillett & Schuster*, *supra* note 4, at 1004.

<sup>99</sup> *Gillett & Schuster*, *supra* note 4, at 992.

ber.<sup>100</sup> The Appeals Chamber's reasoning that Rule 68(G) improves judicial economy is unpersuasive when weighed against the significant role it grants itself beyond the plain language of the statute.<sup>101</sup> The inclusion of Rule 68(G) led not only to the expansion of customary law by identifying a new crime of international terrorism, but also to an expansion of liability beyond the Lebanese law the tribunal was authorized to apply.<sup>102</sup>

After granting itself advisory powers, the Appeals Chamber continued on its path toward expanding applicable law by inverting the traditional method of textual interpretation.<sup>103</sup> Instead of first considering the plain meaning of statutory language, the Appeals Chamber turned to context as a means of justifying the introduction of international law.<sup>104</sup> This approach, which introduced international law into the decision, raises questions about the boundary between judicial interpretation and legislation.<sup>105</sup>

While veering into an academic discussion of customary law may have been a surprising and superfluous diversion, the application of international interpretation over well-established Lebanese interpretation is an unjustified departure from Article 2.<sup>106</sup> The Appeals Chamber stated that it would apply Lebanese law as interpreted by Lebanese courts unless it found that such an interpretation was "unreasonable, or may result in a manifest injustice, or is not consonant with international principles and rules binding upon Lebanon."<sup>107</sup> Curiously, it offered none of those reasons for choosing to apply international interpretation over Lebanese interpretation.<sup>108</sup> Dedicating just two paragraphs of its one hundred-fifty page decision to explain its logic for straying from the Lebanese interpretation of its code, the Appeals Chamber simply stated that the gravity of the attack, its transnational implications, and

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<sup>100</sup> See S.C. Res. 1757, *supra* note 4, Attachment art. 26; Gillett & Schuster, *supra* note 4, at 992.

<sup>101</sup> See Gillett & Schuster, *supra* note 4, at 993; *supra* text accompanying notes 34–38.

<sup>102</sup> See Gillett & Schuster, *supra* note 4, at 992.

<sup>103</sup> See Ambos, *supra* note 10, at 658; Gillett & Schuster, *supra* note 4, at 998–99. In applying a one-step interpretive approach that examines context before the plain meaning of words, the Appeals Chamber joins a movement of scholars who feel that interpretation limited to individual ambiguities "misses the truth that context can determine meaning." Interlocutory Decision, Case No. STL-11-01/1 ¶ 19.

<sup>104</sup> See Ambos, *supra* note 10, at 658; Gillett & Schuster, *supra* note 4, at 998–99.

<sup>105</sup> See Gillett & Schuster, *supra* note 4, at 999; Saul, *supra* note 8, at 678.

<sup>106</sup> See Kirsch & Oehmichen, *supra* note 5, at 6.

<sup>107</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶ 39.

<sup>108</sup> See Kirsch & Oehmichen, *supra* note 5, at 6.

the fact that the U.N. Security Council established the tribunal warranted the use of international over Lebanese interpretation.<sup>109</sup>

The practical effect of the Appeals Chamber's expansion of applicable law on forthcoming STL trials is disconcerting.<sup>110</sup> By drastically departing from the Lebanese interpretation, the Appeals Chamber has provided a compelling basis for challenging terrorism charges as violating the principle of *nullum crimen sine lege*, establishing that no person should be tried or punished for an act not considered a criminal offense at the time it was committed.<sup>111</sup> *Nullum crimen sine lege* is invoked alongside legislative and interpretive principles that oblige criminal statutes to be drafted with precision and in a manner that resolves ambiguities in favor of the accused.<sup>112</sup>

The Appeals Chamber considered this possibility, but held that "the principle of legality does not preclude 'the progressive development of the law by the court.'"<sup>113</sup> To support its assertion, it cited the ICTY Appeals Chamber's statement that non-codified customary international law can provide reasonable notice that could entail criminal liability.<sup>114</sup> But the differences between the mandates of the ICTY and the STL weaken the Appeal's Chamber's claim.<sup>115</sup> While the ICTY was tasked to primarily apply customary international law, the STL was established to apply Lebanese law.<sup>116</sup> Thus in the absence of applicable law, customary law may be sufficient to provide notice; but where applicable law is clear, resort to custom is tenuous.<sup>117</sup>

The central question enshrined in the *nullum crimen sine lege* principle is whether an accused party could reasonably foresee that certain conduct was criminalized at the time it was committed.<sup>118</sup> Even accepting that certain actions constitute acts of terrorism under customary

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<sup>109</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶¶ 124, 128; Gillett & Schuster, *supra* note 4, at 1002.

<sup>110</sup> See Ambos, *supra* note 10, at 659; Gillett & Schuster, *supra* note 4, at 1003; Kirsch & Oehmichen, *supra* note 5, at 20.

<sup>111</sup> See Ambos, *supra* note 10, at 659; Gillett & Schuster, *supra* note 4, at 1003; Kirsch & Oehmichen, *supra* note 5, at 20; Saul, *supra* note 8, at 678. The *nullum crimen sine lege* principle, which has been extensively used in both international and national legal proceedings, is specifically relevant to appeals in the STL because it is "enshrined in Article 1 of the Lebanese Criminal Code." Interlocutory Decision, Case No. STL-11-01/1 ¶ 76.

<sup>112</sup> Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2008).

<sup>113</sup> Interlocutory Decision, Case No. STL-11-01/1 ¶ 135.

<sup>114</sup> *Id.*

<sup>115</sup> See Gillett & Schuster, *supra* note 4, at 1004.

<sup>116</sup> *Id.*

<sup>117</sup> See *id.*

<sup>118</sup> *Id.* at 1005; see Van Schaack, *supra* note 107, at 121.

international law, Article 2 requires punishment according to Lebanese law; this would treat some crimes falling under the Appeals Chamber's expanded definition, like the assassination of Pierre Gemayel, as homicide.<sup>119</sup>

Conceding that scholars and legal experts of the international community, including the STL Defense Office and Prosecutor, continue to forcefully contend that customary law on terrorism does not exist today, accused parties in the tribunal proceedings can hardly be expected to have recognized that it would encompass more liability than Article 314 in 2005.<sup>120</sup> In this context, the Appeals Chamber's approach gives rise to a strong *nullum crimen sine lege* challenge that could compromise the legitimacy of forthcoming trials.<sup>121</sup>

#### CONCLUSION

The landmark decision of the Special Tribunal for Lebanon is a fundamentally flawed document. The unwarranted establishment of a limited definition of terrorism in time of peace under customary international law is unlikely to leave a legacy of benefits. While it may stimulate discussion and push the international community towards accepting a more comprehensive definition of terrorism in the future, it does so at great cost. The Appeals Chamber relied on an unorthodox and faulty process to reach its historic pronouncement, setting a dangerous precedent for activist international courts. Moreover, by expanding applicable law beyond the bounds of the tribunal's founding statute, the Appeals Chamber assumed legislative powers never granted to it. As such, the interlocutory decision constitutes unjustified judicial overreach. That forthcoming rulings may be jeopardized under the *nullem crimen sine lege* principle is a stark reminder that justice and legitimacy in the international system demand the strict separation of legislative and judicial powers.

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<sup>119</sup> See Interlocutory Decision, Case No. STL-11-01/1 ¶ 52; S.C. Res. 1757, *supra* note 4, Attachment art. 2.

<sup>120</sup> See Interlocutory Decision, Case No. STL-11-01/1 ¶ 83; Saul, *supra* note 8, at 699.

<sup>121</sup> See Interlocutory Decision, Case No. STL-11-01/1 ¶ 76; Ambos, *supra* note 10, at 659; Gillett & Schuster, *supra* note 4, at 1003; Kirsch & Oehmichen, *supra* note 5, at 20; Saul, *supra* note 8, at 678.