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Special Tribunal for Lebanon: A Tribunal of an International Character Devoid of International Law

Janice Yun *

Introduction

In May 2007, the United Nations Security Council (Security Council) adopted resolution 1757, which authorized the creation of the Special Tribunal for Lebanon (STL).¹ This resolution was in response to the Lebanese government's request to establish a tribunal of an international character to prosecute perpetrators, organizers and sponsors of the terrorist bombing that assassinated Lebanese Prime Minister Rafiq Hariri on February 14, 2005.² The STL is unique from previous international courts and tribunals because it would be the first international tribunal to apply domestic law exclusively.³ Presently, ad hoc international tribunals for

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1. S.C. Res. 1757, U.N. Doc. S/RES/1757(May 30, 2007).

2. *Id.*

3. Nadim Shehadi & Elizabeth Wilmshurst, *The Special Tribunal for Lebanon: The UN on Trial?*, MIDDLE EAST/INT'L L. BRIEFING PAPER, July 2007 at 7 (citing S.C. Res. 1757, Attachment, Statute of the Special Tribunal for Lebanon, art. 2(a), U.N. Doc. S/RES/1757 (May 30, 2007) [hereinafter STL Statute] (stating applicable criminal law as: "the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offenses, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and Article 6 and 7 of the Lebanese law. . .")).

the former Yugoslavia and Rwanda are limited to prosecuting crimes in violation of international law,⁴ while a new breed of tribunals, referred to as hybrid tribunals, prosecutes crimes under both domestic and international law.⁵

The exclusive application of domestic law in the STL raises the question of whether the decision to apply domestic law exclusively signifies that prosecution under international law would not be feasible. Part I of this article gives background information surrounding the Hariri assassination and explains the need for an international tribunal rather than a domestic trial. Part II offers whether acts under the STL's jurisdiction could constitute substantive violations under international law. This article concludes that, while the establishment of the Special Tribunal for Lebanon was necessary to change the environment of impunity, it falls short of being truly international because it excludes jurisdiction of applicable international criminal law in favor of the exclusive jurisdiction of domestic substantive law.

Part I. Background

The Lebanese penal code specifically addresses the crime of terrorism, which allows Lebanon to prosecute those responsible for the assassination of Hariri under its domestic law using the existing Lebanese judicial system.⁶ Nevertheless, the Lebanese government approached the Security Council with a request "to establish a tribunal of an international character to convene in or outside Lebanon, to try all those who are found responsible for the terrorist crime perpetrated against Prime Minister Hariri."⁷ The Lebanese authorities looked to a tribunal of an international character in order to avoid "the influence or pressures stemming from Lebanon's

4. Statute of the International Tribunal for the Former Yugoslavia art. 1, May 25, 1993, 32 I.L.M. 1192; Statute of the International Criminal Tribunal for Rwanda art. 1, Nov. 8, 1994, 33 I.L.M. 1602.
5. Nidal Nabil Jurdi, *The Subject-matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT'L. CRIM. JUST. 1125, 1126 (2007) (stating that "the Special Court for Sierra Leone" is "given jurisdiction over crimes under Sierra Leonean law, in addition to jurisdiction over international crimes," "the Iraqi High Tribunal also has jurisdiction over a mixture of international crimes and Iraqi domestic crimes," and "the East Timorese Serious Crimes Panels, the Extraordinary Chambers of the Courts of Cambodia and the War Crimes Chamber in Bosnia and Herzegovina have all exercised jurisdiction over both international and national crimes").
6. U.N. LEGIS. SERIES: NATIONAL LAWS & REGULATIONS ON THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM PART II (A-L) at 320, U.N. DOC. ST/LEG/SER. B123, U.N. Sales No. E/F.05.V.7 (2005).
7. Annex to the letter dated 13 December 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General, U.N. Doc. S/2005/783(Dec. 13, 2005).

tumultuous politics.”⁸

The Lebanese political scene has been marked by clashes among religious and political factions and influences of foreign states, most recently by Syria.⁹ Lebanon operates under a system of government known as confessionalism, which “proportionally allocates political power among a country’s communities – whether religious or ethnic – according to their percentage of the population.”¹⁰ After its independence from France in 1943, Lebanon instituted the National Pact, a power-sharing agreement that allowed the President to be a Maronite Christian, the Prime Minister to be a Sunni Muslim and the Speaker of Parliament to be a Shia Muslim.¹¹ It also set the representation in parliament to a ratio of six to five in favor of Christians in accordance with the 1932 census data which placed Christians as the majority at 53% of the population.¹² The Taif Agreement of 1989, which ended the civil war in 1990, reintroduced the confessional system, but allocated the representation in parliament to a ratio of one to one due to the growing Muslim population and decreasing Christian population.¹³

In a pluralistic society represented by 18 religious communities or sects, mostly Christian and Muslim,¹⁴ the system of confessionalism appears to be a fair system of governance. However, it also makes the government particularly susceptible to political conflicts. Because each office has a veto power over another, “[w]hen there are fundamental disagreements, the country grinds to a halt and paralysis sets in, until either a new compromise is reached or, as has happened before, the system breaks down into civil war.”¹⁵ Lebanon’s civil war from 1975 to 1990 was the

8. Jerome Mayer-Cantu, *Lebanon’s Experiment with Hybrid Tribunal*, DAILY STAR – LEBANON, March 18, 2006, available at <http://globalpolicy.igc.org/intljustice/general/2006/0318hybrid.htm>.

9. *Id.*

10. Imad Harb, *USIPeace Briefing, Lebanon’s Confessionalism: Problems and Prospects*, UNITED STATES PEACE INSTITUTE, March 2006, available at http://www.usip.org/pubs/usipeace_briefings/2006/0330_lebanon_confessionalism.html (stating that the confessionalism characteristics include: “(1) proportional allocation of political posts among communities according to their numerical representation in the population; (2) a grand coalition between communities’ leaders on common policies that serve all; (3) communal autonomy whereby each community is free to determine its own affairs such as personal status laws; and (4) mutual veto power, so that any decisions deemed detrimental by any community can be voted down”).

11. *Id.*

12. *Id.*

13. *Id.*

14. Lebanon Country Profile, <http://www.fco.gov.uk/en/about-the-fco/country-profiles/middle-east-north-africa/lebanon> (last visited Dec. 1, 2008).

15. Shehadi & Wilmshurst, *supra* note 3, at 2.

result of some factions “want[ing] to join the [regional] Arab struggle and [others] want[ing] to remain isolated.”¹⁶

Syrian presence in Lebanon started during the civil war. In May 1976, Syrian forces entered Lebanon and maintained a presence with the consent of the Lebanese Government until its final withdrawal 29 years later in 2005.¹⁷ The Taif agreement allowed the Syrian forces to remain in the country in order to “stabilize the situation before withdrawing to Lebanon’s eastern Bekaa Valley and ultimately pulling out.”¹⁸ However, Syrian presence was not limited to military intervention; Syria “also exerted political influence in Lebanese affairs, an influence that has significantly increased since 1990 and was sanctioned in 1991 by a treaty of ‘Brotherhood, Cooperation and Coordination.’”¹⁹ Syria had ensured its control of Lebanon by having the most prominent political posts to the lower ranks of the government occupied by its cohorts.²⁰ However, Lebanese political figures began to question Syria’s presence when Israel finally withdrew from southern Lebanon in 2000.²¹ The Lebanese government believed that Syria should comply with the Taif Agreement and terminate its presence in Lebanon.²²

Events Leading up to Prime Minister Hariri’s Assassination

Mr. Hariri’s assassination took place against the backdrop of his power struggle with Syria.²³ Syria’s control of Lebanese politics was exemplified in President Emil Lahoud’s extension of his post. Mr. Lahoud, a close ally to Syria, had a strained relationship with Prime Minister Hariri during his term.²⁴ Their poor relationship affected Mr. Hariri’s “ability to run the government and to carry out his policies, sometimes to the point of paralysis” and led Syria to mistrust Mr. Hariri because of his difficulties with Mr. Lahoud.²⁵ When Mr. Lahoud’s term came to

16. *Id.*

17. U.N. Sec. Council [U.N.S.C.], *Report of the Fact-Finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Rafik Hariri*, para. 6, U.N. Doc. S/2005/203 (Mar. 24, 2005) (prepared by Peter FitzGerald) [hereinafter *Fact-Finding Report*].

18. Kate Seelye, *Lebanon’s History of Occupation*, FRONTLINE/WORLD DISPATCHES FROM A SMALL PLANET: LEBANON/SYRIA, <http://www.pbs.org/frontlineworld/dispatches/lebanon.syria/seelye1.html>.

19. *Fact-Finding Report*, *supra* note 17, at para. 6.

20. Shehadi & Wilmshurst, *supra* note 3, at 3.

21. *Fact-Finding Report*, *supra* note 17, at para. 7.

22. *See id.*

23. *Id.* at para. 15.

24. *Id.* at para. 7.

25. *Id.*

an end in 2004, Mr. Lahoud sought to extend his term, which required a Constitutional amendment.²⁶ It has been reported that President Assad of Syria told Prime Minister Hariri that “Mr. Lahoud should be viewed as his personal representative in Lebanon and that opposing him is tantamount to opposing Assad himself.”²⁷ Mr. Lahoud succeeded in amending the Constitution in order to obtain a three-year extension to his term because of the Syrian government’s support.

Before the vote on the extension of the presidency, the Security Council adopted resolution 1559, on September 2, 2004, which called upon “all remaining foreign forces to withdraw from Lebanon” and declared its support for a “free and fair electoral process in Lebanon’s upcoming presidential elections conducted according to Lebanese constitutional rules devised without foreign interference or influence.”²⁸ Mr. Hariri, who had close ties to the U.S., France and Saudi Arabia,²⁹ was widely believed to have actively supported this resolution.³⁰

Political tension reached new heights on September 9, 2004, when Mr. Hariri announced his resignation from his post as prime minister shortly after the extension of Mr. Lahoud’s presidency.³¹ Prior to his resignation, those who “called for a review of Syrian-Lebanese relations” had been Christian politicians and groups.³² When Mr. Hariri tendered his resignation, more political figures joined in to support a review of Syrian-Lebanese relations “in line with either Security Council resolution 1559 or under the banner of the Taif-Agreement.”³³ By January 5, 2005, the Sunni, Druze and Maronite representatives had built a new bloc of coalitions, which represented almost all political and religious communities with the noted exception of the pro-Syrian Shi’ite Amal and Hizbollah, to win a clear majority in the upcoming election.³⁴ The new bloc would have had “the ability to force Syria to implement its outstanding commitment under the Taif Agreement and/or Security Council resolution 1559.”³⁵ On February 14, former Prime Minister Hariri, the perceived architect of this new power bloc, was assassinated.³⁶ A large explosion occurred near Mr. Hariri’s convoy killing Mr.

26. *Id.* at para. 8.

27. *Id.* at para. 10.

28. S.C. Res. 1559, U.N. DOC. S/RES/1559 (Sept. 2, 2004).

29. Shehadi & Wilmshurst, *supra* note 3, at 3.

30. *Fact-Finding Report*, *supra* note 17, at para. 9.

31. *Id.* at para. 11.

32. *Id.* at para. 12.

33. *Id.*

34. *Id.* at para. 14.

35. *Id.*

36. *Id.*

Hariri, his security detail and nearby civilians.³⁷

Suspecting Syria's involvement in Mr. Hariri's death, the Lebanese people protested Syria's presence in their country, resulting in Syrian military withdrawal after 29 years of occupation.³⁸ However, even after the Syrian withdrawal, Syria and the pro-Syrian faction still wielded power in Lebanon. Since Prime Minister Rafiq Hariri's assassination, more anti-Syrian members of Parliament have been killed in similar terrorist acts.³⁹ Under the backdrop of the country's history and politics, the Lebanese authorities' concern regarding "the influence and the pressures of its tumultuous politics" on the effectiveness of a domestic trial to bring justice seems valid.⁴⁰

Part II. Applicable International Law

The Statute of the Special Tribunal for Lebanon establishes a narrow jurisdiction. It has jurisdiction only over persons responsible for the attack that killed former Prime Minister Rafiq Hariri, and it may try persons responsible for other attacks only if those attacks are "connected" to the attack on February 14, 2005.⁴¹ Attacks would be deemed "connected" if they share elements such as "criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators."⁴² In order to assist the Lebanese government in the investigation of the attack that killed Prime Minister Hariri, the Security Council had established an international

37. *Id.* at para. 26.

38. *Id.*

39. U.N.S.C., *Tenth Report on the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007)*, para. para. 12, 31, U.N. Doc. S/2008/210. Annex.

40. Mayer-Cantu, *supra* note 8.

41. STL Statute, *supra* note 3, art. 1. Initially, the Security Council envisaged the prosecution of a single attack, the terrorist bombing that killed former Prime Minister Rafiq Hariri. However, the temporal jurisdiction expanded to include other attacks bearing the same or similar characteristics of the Hariri assassination. The reasons for the inclusion of the other attacks are as follows: "(a) as the investigation of the commission has progressed, potential links have emerged between the assassination of Rafiq Hariri and other attacks; (b) the expansion of the mandate of the Commission to provide technical assistance to the Lebanese authorities in respect of the 14 other attacks is an indication of interest on the part of the security Council in judicial accountability beyond the Rafiq Hariri assassination; (c) singling out for prosecution one attack in a context of other similar attacks is bound to create a perception of selective justice." U.N.S.C., *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, para. para. 11-12, U.N. Doc. S/2006/893 (Nov, 15, 2006).

42. STL Statute, *supra* note 3, art. 1.

independent investigation commission to assist the Lebanese authorities in their investigation of the terrorist act that killed Prime Minister Hariri.⁴³ As of March 28, 2008, the commission has since expanded its scope of assistance to twenty attacks, in addition to the Hariri case.⁴⁴ These investigations have involved a series of terrorist attacks that have caused deaths of 61 people and injured at least 494 people.⁴⁵ If these additional attacks under the commission's investigation are deemed connected to the Hariri assassination, the STL's jurisdiction could also expand to include these additional twenty attacks.

As explained earlier, unlike other international mixed tribunals that apply both domestic and international law, the Special Tribunal for Lebanon only applies Lebanese Criminal Code as substantive law.⁴⁶ The applicable provisions of the Lebanese Criminal Code include terrorism, crimes and offenses against life and personal integrity, illicit association and failure to report crimes and offenses.⁴⁷ Since the domestic judicial system would not be handling the prosecution and punishment of domestic crimes, the application of Lebanese substantive law would "ensure that the tribunal would have a national dimension."⁴⁸ Furthermore, in the absence of a cohesive definition of terrorism in international law, the Lebanese domestic law would provide the means to prosecute the perpetrator of the terrorist attacks under its definition of terrorism.⁴⁹ However, the complete exclusion of international criminal law jurisdiction seems to run contradictory to the creation of a tribunal aimed to provide "the highest international standards of criminal justice" in light of applicable international law that includes the violation of Arab Convention for the Suppression of Terrorism, crimes against humanity, and possibly, war crimes.⁵⁰

Arab Convention for the Suppression of Terrorism

The international community has yet to adopt a comprehensive treaty on

43. S.C. Res. 1595, para. 1, U.N. Doc. S/RES/1595(Apr. 7, 2005).

44. U.N.S.C., *Tenth Report on the International Independent Investigation Commission Established Pursuant to Security Council resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007)*, *supra* note 39, para. 2.

45. *Id.* para. 2.

46. STL Statute, *supra* note 3, art. 2.

47. *Id.*

48. U.N.S.C., *Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1644 (2005)*, para. 8, U.N. Doc. S/2006/176 (Mar. 21, 2006).

49. *See* Jurdi, *supra* note 5, at 1138.

50. S.C. Res. 1664, art. 1, U.N. Doc. S/RES/1664(Mar. 29, 2006).

terrorism “which focuses on the combination of the perpetrators’ intention, the means employed, and the outcomes” because of the lack of consensus on the definition of terrorism.⁵¹ Instead, it has tried to address the problem through a patchwork of conventions dealing with subject-specific areas such as hostages or aircraft seizures.⁵² However, the lack of international agreement in defining terrorism has not hindered regional institutions from establishing their own instruments that define terror.⁵³ The Arab League adopted the Arab Convention for the Suppression of Terrorism, which went into force on May 7, 1999.⁵⁴ As of March 9, 2004, it has been ratified by seventeen member states of the Arab League, including Lebanon and Syria.⁵⁵ It defines terrorism as

[a]ny 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.⁵⁶

This broad definition of terrorism encompasses the attack on former Prime Minister Hariri and other connected attacks. Moreover, the convention specifically prohibits attacks on prime ministers or ministers in any of the Contracting States.⁵⁷ Despite the availability of this instrument, the statute of the Special Tribunal excluded the Convention.⁵⁸

51. INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES 2 (2003).

52. *Id.*

53. Ben Saul, DEFINING TERRORISM IN INTERNATIONAL LAW 142 (2006).

54. *Annex to the letter dated 9 March 2004 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the General Assembly, Status of the signature and ratification of the Arab Convention for the Suppression of Terrorism, fifty-eighth session, Agenda item 156, Measures to eliminate international terrorism*, U.N. Doc. A/58/730 (Mar. 10, 2004), available at <http://www.un.org/law/cod/sixth/58/docs.htm>.

55. The members of the Arab League that have ratified the treaty are as follows: Palestine, Bahrain, United Arab Emirates, Egypt, Saudi Arabia, Algeria, Jordan, Tunisia, Sudan, Libyan Arab Jamahiriya, Yemen, Lebanon, Syrian Arab Republic, Morocco, Djibouti and Qatar. *Id.*

56. Arab Convention on Suppression of Terrorism art. 1(2), Apr. 22, 1998, reprinted in INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS 595 (2005).

57. *Id.* art. 2(b) (ii).

58. “A reference to the Arab convention was initially stipulated in an early draft of the Statute, but then also deleted.” See Jurdi, *supra* note 5, at n. 18 (“This was allegedly, a compromise reached to satisfy the Russian negotiators, who rejected any reference to international instruments,” according to the discussion with one of the individuals involved in the

Crimes Against Humanity

Crimes against humanity, as defined in Article 7 of the Rome Statute of the International Criminal Court, include murder, torture and other inhuman acts intentionally causing great suffering or serious injury to body or to mental health when these acts are committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.⁵⁹ The attack against Prime Minister, which resulted in the murders of Prime Minister Rafik Hariri and 22 other civilians, would easily satisfy the predicate crime requirement of crimes against humanity. The predicate crime requirement in other connected attacks within the tribunal's jurisdiction would also be satisfied since the attacks yielded deaths and serious injury to civilian population. The threshold question would be whether the requirement of "widespread or systematic attack" could be satisfied.

The term "widespread" refers to the scale of the acts perpetrated and to the number of victims.⁶⁰ A crime may be considered widespread or committed on a large-scale based on its "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."⁶¹ When looking solely at the attack on Prime Minister Hariri, the act may not meet the widespread requirement because it could be seen as an isolated inhumane act and the number of victims may not be sufficiently numerous to be at the scale of an extraordinary magnitude.⁶² However, the multiple instances of attacks connected to the Hariri assassination point to a large-scale operation that meets the widespread requirement. Moreover, considering Mr. Hariri's popularity as an anti-Syrian figure, the attack on Mr. Hariri had the effect of an extraordinary magnitude because he was thought to have been targeted in order to terrorize both anti-Syrian politicians and the general population into submission.

The "systematic" element requires a pattern in the execution of the act.⁶³ In order to prove this element, the International Tribunal for the Former Yugoslavia (ICTY) requires any of the following factors: "the existence of a plan or political

drafting of the statute of the Special Tribunal for Lebanon.).

59. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 37 I.L.M. 999 [hereinafter ICC Statute].

60. *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgment, para. 206 (Mar. 3, 2000).

61. *Id.*

62. *Id.*

63. INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES (2003) 152 (citing *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR 96-4-T, Judgment, para. 580 (Sept. 2, 1998)).

objective; very large scale or repeated and continuous inhumane acts; the degree of resources employed, military or other; the implication of high-level authorities in the establishment of the methodical plan.”⁶⁴ The circumstances surrounding the Hariri assassination exhibited all of these factors required to satisfy the element of systematic attack. The perpetrators of the crime most likely had the political objective of killing Prime Minister Hariri considering Mr. Hariri’s anti-Syrian stance and the likelihood of his coalition winning the next election. The commission investigating the attack reported that the assassination “could not have been taken without the approval of top-ranked Syrian security officials and could not have been further organized without the collusion of their counterparts in the Lebanese security services.”⁶⁵ The commission implicated both Syrian security chiefs and high-level Syrians as having taken a part in the assassination.⁶⁶

The other instances of terrorist attacks connected to the Hariri assassination also support the factors establishing systematic element. These attacks targeted only figures in or close to anti-Syria political coalition.⁶⁷ The commission in charge of the investigations suggested that these attacks could have been committed by the “same perpetrators, using the same modus operandi and with the same criminal intent.”⁶⁸ The Commission confirmed this link in its tenth report, which stated that “a network of individuals acted in concert to carry out the Hariri assassination and that this criminal network, or part of it, is linked to other cases within the Commission’s mandate.”⁶⁹

Once the context of a widespread or systematic attack against a civilian population is established, individual prosecution for crimes against humanity does not require participation in multiple attacks. In *Prosecutor v. Tadic*, the ICTY stated

64. *Id.* (citing *The Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgment, para. 179 (Feb. 26, 2001)).
65. U.N.S.C., *Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005)*, para. 124, U.N. Doc. S/2005/662 (Oct. 19, 2005) (prepared by Detlev Mehlis).
66. Marlin Dick, *The Mehlis Report and Lebanon’s Trouble Next Door*, MIDDLE EAST REPORT ONLINE, Nov. 18, 2005, <http://www.merip.org/mero/mero111805.html>.
67. Jurdi, *supra* note 5, n. 9.
68. U.N.S.C., *Fourth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005), and 1644 (2005)*, para. 67, U.N. Doc. S/2006/375 (June 10, 2006).
69. U.N.S.C., *Tenth Report on the International Independent Investigation Commission Established Pursuant to Security Council resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007)*, *supra* note 39, para. 25.

Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian *population* and thus '[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution.'⁷⁰

Whether a single act can constitute a crime against humanity in the context of a political repression is considered in an Alien Torts Claim Act (ATCA) action against Alvaro Rafael Saravia. A United States Federal District Court held that the assassination of Archbishop Romero met the elements for establishing a crime against humanity. Saravia took part in an operation to assassinate Archbishop Romero, who had been one of the most important civilians in El Salvador and had criticized the state security forces and state implemented to repression.⁷¹ Because his assassination occurred during "an environment of state-sanctioned violence that was both widespread throughout El Salvador and constituted systematic, inhumane attacks on the civilian population by the ruling military," the court found that it met the requirements of a crime against humanity.⁷² The same conclusion could be made for the individual responsible for the assassination of former Prime Minister Hariri. His murder took place within the context of widespread and systematic attacks against the civilian population by Syrian and Lebanese security forces to root out anti-Syrian factions.

The inclusion of STL's jurisdiction over crimes against humanity had been contemplated in the initial stage of drafting the statute for the Special Tribunal for Lebanon.⁷³ The negotiators recognized that "the 14 attacks committed in Lebanon could meet the *prima facie* definition of the crime, as developed in the jurisprudence of international criminal law" since the attacks "could reveal a 'pattern' or 'methodical plan' of attacks against a civilian population."⁷⁴ However, they seemed to have dwelled on the fact that the series of terrorist attacks committed in Lebanon are not the type of large and massive scale killings and executions perpetrated in other parts of the world subject to the jurisdiction of any

70. Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, para. 649 (May 7, 2007).

71. Doe v. Alvaro Rafael Saravia, 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004).

72. *Id.*

73. U.N.S.C., *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, *supra* note 41, para. 24-25.

74. *Id.*

of the existing international criminal jurisdiction.⁷⁵ In the end, there was a lack of support for the inclusion of crimes against humanity within the subject matter jurisdiction of the tribunal.⁷⁶

War Crimes

The four Geneva Conventions and two Protocols provide a framework for the international humanitarian law, also referred to as the law of war or the law of armed conflict.⁷⁷ The Conventions mainly provide protections to certain classes of persons in international armed conflicts, but Article 3, common to all four conventions, also provides a minimum set of rules governing non-international armed conflict.⁷⁸ The ICC Statute defines war crimes as crimes committed during both international and non-international conflicts, comprising grave breaches of Geneva conventions and other serious violations of the laws and customs applicable in both international and non-international conflicts.⁷⁹ The list of violations includes “willful killing” and “willfully causing great suffering or serious injury to body or health” in international armed conflicts, and “violence to life and person, in particular murder of all kinds” in non-international conflicts.⁸⁰ Moreover, applicable to both international and non-international conflicts is prohibition against “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.”⁸¹ In order to prosecute those involved in the Hariri assassination and other related attacks, the attacks must have been made in the context of an armed conflict.

According to the ICTY, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁸² Although there is no evidence of direct engagement of armed forces between States, the presence of the Syrian armed force in Lebanon at the time of Hariri

75. *Id.*

76. Jurdi, *supra* note 5, n. 18. They arrived at this conclusion after “considering the views expressed by interested members of the Security Council.” In light of the fact that the Russian negotiators allegedly rejected any reference to international instruments, the exclusion of international criminal jurisdiction may have been driven by a political motive.

77. Beth Van Schaack & Ronald C. Slye, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 219-20 (2007).

78. *Id.*

79. ICC Statute, *supra* note 59, art. 8.

80. *Id.*

81. *Id.*

82. Prosecutor v. Tadic, Case No. IT 94-I-T, Judgment, para. 561 (May 7, 1997).

assassination and the implication of Syrian officials in the attack could link the assassination to the Syrian armed force. That could potentially lead to a finding that the attack occurred in the context of an international armed conflict.

To determine the existence of non-international armed conflict, the ICTY focuses on “the intensity of the conflict and the organization of the parties to the conflict” in order to distinguish “an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”⁸³ Likewise, the ICC Statute specifically states that acts committed during “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”⁸⁴ The investigation into the Hariri assassination and other related attacks revealed that “a network of individuals acted in concert to carry out the assassination of Rafiq Hariri and that this criminal network the “Hariri Network” - or parts thereof are linked to some of the other cases.”⁸⁵ An armed conflict exists if this network could be considered an armed group and the acts committed by this group could be shown as protracted armed violence.

83. *Id.* at para. 562. The Commentary to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention I, provides the following factors to determine what is meant by “armed conflict not of an international character”:

(1) That the Party in revolt against the *de jure* government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the convention.

(2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.

(3)(a) That the *de jure* Government has recognized the insurgents as belligerents; or (b) that it has claimed for itself the rights of a belligerent; or (c) that it has accorded the insurgents recognition as belligerents for the purpose only of the present Convention; or (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

(4)(a) That the insurgents have an organization purporting to have the characteristics of a State. (b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate territory. (c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war. (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY (1952).

84. ICC Statute, *supra* note 59, art. 8(d).

85. U.N.S.C., *Tenth Report on the International Independent Investigation Commission Established Pursuant to Security Council resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007)*, *supra* note 39, para. 25.

The existence of either an international or non-international conflict could further provide for prosecution of crimes of terrorism as war crimes.⁸⁶ The Fourth Geneva Convention, which makes up the international humanitarian law regime along with the three other Geneva Conventions of 1949 and two additional Protocols,⁸⁷ states that, with respect to civilians and other protected persons, “all measures of intimidation or of terrorism are prohibited.”⁸⁸ The two 1977 Protocols also prohibit acts or threats of violence done for the primary purpose of spreading terror among the civilian population.⁸⁹

The ICTY became the first court to consider the charge of terror against in violations of the laws or customs of war under the Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949.⁹⁰ The ICTY Prosecutor brought an indictment against General Galić, a commander of a branch of the Bosnia Serb military forces, for unlawfully inflicting terror upon civilians.⁹¹ However, the ICTY only addressed the narrow question of “whether a specific offense of killing and wounding civilians in time of armed conflict with the intention to inflict terror on the civilian population” is an offence over which the court has jurisdiction, and declined to address whether an

86. Van Schaack & Slye, *supra* note 77, 555.

87. *Id.* at 219-220.

88. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33, Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention].

89. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I) art. 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13, Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter Protocol II]. Article 51 of Protocol I and article 13 of Protocol II state, in part:

(1) The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules which are additional to other applicable rules of international law, shall be observed in all circumstances.

(2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

(3) The above offence was committed with the primary purpose of spreading terror among the civilian population.

90. Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, para. 66 (Dec. 5, 2003) (“the charge, as such, of terror against the civilian population is one that until now has not been considered in a Tribunal judgement, although evidence of terrorization of civilians has been factored into convictions on other charges. This is also the first time an international tribunal has pronounced on the matter.”); *Id.* para. 112.

91. *Id.* para. 64-65.

offence of terror in a general sense falls within the international customary law.⁹² Nonetheless, the court concluded that “terror as a crime within international humanitarian law was made effective in this case by treaty law,” and found that Galic’s offence constituted the crime of terror as a violation of the laws or customs of war acts of violence.⁹³

Conclusion

The conflict among the Lebanese political factions explains the international intervention in establishing a tribunal to bring those responsible for the heinous crimes against former Prime Minister Hariri and other civilians to justice. However, the exclusion of international criminal law in favor of exclusive domestic criminal law seems to run contrary to the goal of establishing “an international tribunal based on the highest international standards of criminal justice.”⁹⁴ The international standard of criminal justice includes international criminal law guided by customary and treaty law. The exclusion of jurisdiction of well-established and applicable crimes such as crimes against humanity and treaty law that binds Lebanon does not reflect the highest international standard. Such criticism of the Special Tribunal for Lebanon is not aimed to undermine the use of domestic law; in fact, the application of Lebanese Penal Code in this case not only establishes the national dimension to the Tribunal, and it also may enhance the legitimacy of the tribunal in the Lebanese people who have witnesses too many crimes with impunity. Instead, it is aimed to reflect on the international community’s commitment to international standards, which I believe encompasses consistent application of international law.

92. *Id.* para. 87, n. 150.

93. *Id.* para. 138.

94. S.C. Res. 1664, art. 1, U.N. Doc. S/RES/1664 (Mar. 29, 2006).

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