

Special Tribunal for Lebanon: The First Orders by the Pre-Trial Judge

By [Antonios Tzanakopoulos](#)

I. Introduction



Shortly after a 2005 Beirut bombing claimed the life of former Lebanese Prime Minister Rafiq Hariri and 22 others, Lebanese and international officials began to contemplate an international tribunal to bring the perpetrators to justice.^[1] After lengthy negotiation, the United Nations Security Council established on June 10, 2007, the Special Tribunal for Lebanon (STL),^[2] which officially commenced its operations on March 1, 2009.^[3]

The STL has had a somewhat complicated start that requires some assessment. In its first Order, Pre-Trial Judge Daniel Fransen directed the Lebanese authorities investigating the attack against Hariri to defer to its jurisdiction.^[4] On April 29, 2009 the same judge directed the Lebanese authorities to release four pro-Syrian Lebanese generals who had been in Lebanese custody since August 30, 2005 in connection with the Hariri attack.^[5] This Insight will trace the troubled history of the STL, analyzing the recent judicial Orders and some of the important legal and political issues surrounding the Tribunal.

II. A Truly “Special” Tribunal for Lebanon

If the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda, the “first generation” UN-based criminal courts, served as the “models for the creation of second generation country-specific” internationalized (or “mixed” or “hybrid”) criminal tribunals,^[6] then the Special Tribunal for Lebanon must be the 3G version.

The term “internationalized criminal courts and tribunals” is used to describe a range of judicial organs as diverse as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the War Crimes Chamber in the Court of Bosnia and Herzegovina, the East Timor Special Panels, and the Kosovo Regulations 34 and 64 Panels. These tribunals were created to address mass atrocities in the context of a particular conflict. They vary significantly in their structure, legal basis, procedural law, and temporal and personal jurisdiction, in order to accommodate the diverse circumstances in various territories and in the different conflicts within which serious international crimes were perpetrated.^[7]

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Diverse as they may be, internationalized criminal courts share some key traits.^[8] Most important among these is subject matter jurisdiction, which gives the tribunals jurisdiction over international crimes, such as crimes against humanity, genocide, war crimes, and/or other crimes.^[9] In addition to jurisdiction over crimes under international law, these tribunals may have supplemental jurisdiction over crimes under domestic law.^[10]

Unlike other tribunals emerging after a conflict, the Special Tribunal for Lebanon was not created to deal with atrocities during the 15-year civil war in Lebanon (1975—1990)^[11] or to try those responsible for international crimes stemming from the many conflicts in which the country has been engulfed since the 1990s.^[12] Rather, the STL's main mandate is to address only *one* incident: the 2005 assassination of former PM Hariri (and 22 others). While the Tribunal actually has jurisdiction over attacks between October 1, 2004 and December 12, 2005, these must be “connected” and of “similar nature and gravity” to the Hariri attack in order to come under the STL's jurisdiction.^[13] As a result, the STL may end up holding a single trial. This serves to raise concerns over the rendering of selective justice, a frequent claim against *ad hoc* criminal courts, which in the case of the Lebanon Tribunal seems easier to justify.^[14]

In further contrast to other internationalized tribunals, the STL has no jurisdiction over *any* international crime. In accordance with Article 2(a) of its Statute, it only has jurisdiction over acts of “terrorism, crimes and offences against life and personal integrity, criminal participation and conspiracy” under the Lebanese Criminal Code.^[15] The truly “international” features of the Tribunal are in the form of the international judges and prosecutor applying Lebanese law;^[16] partial international funding; and its seat in the Netherlands. The seat of the Tribunal being outside the State concerned is also in stark contrast to all other internationalized courts—one of the ‘major merits’ of the latter being that they sit in the State concerned and have thus close proximity to evidence, witnesses, and the local population.^[17]

The Tribunal's establishment is the outcome of a novel process ripe for criticism,^[18] and it highlights the deeply divisive and complex internal political situation in Lebanon. Originally, the Tribunal was to be created by agreement between the United Nations and Lebanon, similar to the Special Court for Sierra Leone. Once an agreement between the parties was negotiated, a Statute of the Tribunal was agreed upon and attached to it. The agreement was subsequently signed by Lebanon and by the UN. However, the process of approval and ratification required prior to the agreement's entry into force^[19] was blocked by the refusal of the Speaker of the Lebanese Parliament to convene a session, where the agreement was expected to be ratified. To overcome the stalemate, the Security Council was asked by the anti-Syrian government to establish the Tribunal using its Chapter VII powers, despite opposition by pro-Syrian fractions, including the Lebanese President, the Speaker of the Parliament, and a number of parliamentarians. The Council obliged,^[20] but not without five vocal abstentions.^[21]

Critics of the Tribunal also note that concerns over the selectivity of justice to be meted out by the STL are compounded by certain provisions of the

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Tribunal's Statute, particularly a provision that allows for trials *in absentia*,^[22] another striking innovation unique to the STL.^[23] This provision could be attributed to the particular civil law tradition of Lebanon that the STL seeks to accommodate, but it may also be seen as an ambition to try suspects under Syrian jurisdiction not turned over to the Tribunal. It is no secret that both Syria and pro-Syrian factions in Lebanon vehemently oppose the STL,^[24] while some United Nations International Independent Investigation Commission (UNIIIC) reports openly accused Syria of participating in the Hariri assassination.^[25] Syria was made by the Security Council to cooperate with the UNIIIC, the Tribunal's precursor,^[26] but it is currently under no obligation to cooperate with the STL. When considered together with the bitter internal division over the Tribunal's establishment, its peculiar subject matter jurisdiction, and the history of modern Lebanon, the possibility of trials *in absentia* completes a picture of what can be described—perhaps in somewhat simplistic, yet telling terms—as the perceived anti-Syrian pro-Western bias of the Special Tribunal.

Against this legal and factual background, it becomes all the more important how the STL will carry out its mandate. The Special Tribunal will have to respond to concerns about its legitimacy and convince not solely the local Lebanese constituencies, divided as they are, but also Syria, the other States in the region, and ultimately the international community as a whole of its capacity to render justice in an impartial, fair, and objective manner.

III. The Pre-Trial Judge Orders

An opportunity for the STL to respond to fairness and legitimacy concerns is its judicial work. That the Tribunal understood this is evident in its first Orders. In his first Order, which is merely meant to direct the Lebanese authorities upon the Prosecutor's request to transfer jurisdiction over the Tribunal's only case—the Hariri attack—to the now constituted Tribunal, Judge Fransen went into a relatively elaborate analysis of Article 4(2) of the STL Statute, interpreting it in accordance with Article 31(1) of the 1969 Vienna Convention on the Law of Treaties.^[27] Judge Fransen particularly relied on the context of the Statute,^[28] drawing a distinction between the transfer of the case file and the transfer of those detained in connection with the investigation by Lebanese authorities, deciding that the two must logically take place in two successive stages.^[29]

The case file was subsequently transferred to the Tribunal by the Lebanese authorities, and the only outstanding issue was the transfer of individuals in Lebanese custody to the custody of the STL. Soon after the STL became operational, the Prosecutor asked the judge for three weeks to submit applications for further detention or release of the four generals, given the sheer size of the case file and the complexity of the case.^[30] In the April 15, 2009 Order, the judge reduced the time available to the Prosecutor to 12 days, relying on international human rights instruments and cases on pre-trial detention.^[31]

In response, the Prosecutor submitted his application by the deadline and requested that the individuals in custody be immediately released,^[32] noting that it was impossible to charge the detained persons with any crime under the STL Statute in view of the evidence available.^[33] The judge, observing

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that he could not substitute his evaluation of the evidence and the prospects of an indictment for that of the Prosecutor,^[34] granted the Prosecutor's request, ordered the immediate release of the generals and demanded that their safety be ensured.^[35]

IV. Human Rights Guarantees as the Response to Bias Concerns

It is worth reflecting on how Judge Fransen dealt with the situation before him. The STL inherited a situation in which the four generals had already been held for several years without charge. They had been arrested by Lebanese authorities in 2005, following the recommendations of the UNIIIC.^[36] While the generals had spent only about a month and a half under the authority of the STL (but still in the custody of Lebanon),^[37] the judge's Orders convey a certain urgency to resolve the continued detention or release of the generals. In the April 15, 2009 Order, Judge Fransen stressed the need to ensure the protection of fundamental human rights and explicitly stated that those detained are presumed innocent. Judge Fransen also stated that freedom is the principle, detention the exception.^[38] This explicit statement may be a direct response to criticisms leveled against the ICTY's and ICTR's Rules of Procedure and Evidence (RPE), which initially provided for pre-trial detention as the rule, rather than the exception.^[39]

Under the STL's Rules of Procedure (Rule 17[B]), the Prosecutor must submit an application on the continued detention or release of those transferred to the authority of the Tribunal "as soon as practicable." In his April 15, 2009 Order, Judge Fransen held that this provision should be interpreted in harmony with international human rights standards, including the International Covenant on Civil and Political Rights, the European and American Conventions on Human Rights, and the jurisprudence of the European and Inter-American Courts, as well as the UN Human Rights Committee. Judge Fransen held that the words "as soon as practicable" meant "promptly",^[40] and that the right to be promptly brought before a judge is "an international principle of *jus cogens*", binding both on States and on "international bodies", whether of a judicial, political, or administrative nature.^[41] As a result, the judge reduced the period of three weeks requested by the Prosecutor to twelve days.^[42]

In making this bold statement and adopting a very strict stand towards the Prosecutor, Judge Fransen sought to confirm that the Special Tribunal will adhere to an expansive understanding of the requirements of customary international law with respect to the right to a fair trial.^[43] This approach could be seen as the Tribunal's response to accusations of bias and inability to conduct a fair trial in the prevailing political climate. The Tribunal's reliance on international human rights standards is further exemplified in the April 29, 2009 Order, where Judge Fransen reviewed the Prosecutor's request to immediately release the four generals. The judge again stressed the notion that provisional detention is exceptional and only warranted when strictly necessary.^[44] Holding that under the Tribunal's standard of review, which requires that the Prosecutor's request be "manifest[ly] unreasonable,"^[45] to be vacated, the judge granted the Prosecutor's request for immediate release of the generals.

The STL decision and subsequent release of the four generals was

welcomed in parts of Lebanon.^[46] The first Orders by the Tribunal's pre-trial judge could be seen as reassuring the pro-Syrian camp and Syria that the STL has not been established simply to perform a historiographic function favoring a particular view of Lebanese history.^[47] Instead, the Tribunal seeks to confirm that it is a truly impartial and independent court with the sole purpose of bringing those responsible for the assassination of Rafiq Hariri to justice.

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Endnotes

[1] *Letter of the Prime Minister of Lebanon to the Secretary-General*, U.N. Doc. S/2005/783 (Dec. 13, 2005) (requesting the establishment of a tribunal of an international character to try those responsible for the terrorist crime of Hariri's assassination); see S.C. Res. 1644, ¶ 6, U.N. Doc. S/RES/1644 (Dec. 15, 2005); and S.C. Res. 1664, ¶ 1, U.N. Doc. S/RES/1664 (Mar. 29, 2006).

[2] S.C. Res. 1757, ¶¶ 1(a) and 2-3, U.N. Doc. S/RES/1757 (May 30, 2007).

[3] See Order Directing the Lebanese Judicial Authority Seized with the Case of the Attack Against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No. CH/PTJ/2009/01, ¶ 8 (Mar. 27, 2009), available on the Tribunal's website: <http://www.stl-tsl.org> (along with all other orders made by the STL) (last visited Aug. 5, 2009) [hereinafter the Deferral Order]; Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack Against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, ¶ 1 (Apr. 29, 2009) [hereinafter the Detained Persons Order].

[4] Deferral Order, *supra* note 3.

[5] Detained Persons Order, *supra* note 3, *in fine* (Part VI.-Disposition).

[6] See Daphna Shrager, *The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions*, in INTERNATIONALIZED CRIMINAL COURTS—SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 15, 15 (Cesare P. R. Romano et al. eds., 2004); Daphna Shrager, *Mixed or Internationalized Courts*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 424, 424 (Antonio Cassese ed., 2009).

[7] See generally Romano et al., *supra* note 6, *passim*; Cesare P. R. Romano, *Mixed Criminal Tribunals (Sierra Leone, East Timor, Kosovo, Cambodia)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2009), available at <http://www.mpepil.com> (last visited Aug. 5, 2009).

[8] Mixed subject matter jurisdiction, mixed composition, and 'linkage' to the UN: see Shrager, *in* Romano et al., *supra* note 6, at 36.

[9] See, e.g., Statute of the Special Court for Sierra Leone, arts. 2-4, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (signed January 16, 2002) [hereinafter SCSL Statute]; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, arts. 4-8 [hereinafter Cambodian Law]; United Nations Transitional Administration in East Timor Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, Doc. UNTAET/REG/2000/15, §§ 1.3, 4-7 [hereinafter UNTAET Reg. No. 2000/15].

[10] See, e.g., SCSL Statute, art. 5; Cambodian Law, *supra* note 9, art. 3; UNTAET Reg. No. 2000/15, §§ 1.3, 8-9.

[11] These were summarily amnestied, except for certain political assassinations, under the General Amnesty Law of Aug. 26, 1991.

[12] Other atrocities include the Israeli occupation that ended in 2000, the Syrian domination over the country (sometimes referred to as *Pax Syriana*), or the Israeli attack on Hezbollah in Lebanon during the summer of 2006; see, e.g., Marieke Wierda, Habib Nassar, & Lynn Maalouf, *Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1065, 1069 (2007).

[13] See Article 1 of the Statute of the Special Tribunal for Lebanon, attached to a document entitled *Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon*, itself annexed to S.C. Res. 1757, *supra* note 2.

[14] See Secretary-General, *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, U.N. Doc. S/2006/893, ¶ 18 (Nov. 15, 2006).

[15] References to the crime of terrorism under regional treaties and to crimes against humanity were considered but rejected during the negotiating process. See *id.*, ¶¶ 23-25.

[16] Complemented, as it were, by forms of individual criminal responsibility distinctively 'international in character', for which see Marko Milanović, *An Odd Couple—Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1139 (2007).

[17] See Antonio Cassese, *The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality*, in Romano et al., *supra* note 6, 3, 6; and Allain Pellet, *Internationalized Courts: Better than Nothing...*, in *id.*, 437, 438.

[18] Some have questioned whether the United Nations Security Council had the power to decree the entry into force of an international agreement, or whether the STL should be considered a Chapter VII measure. For which *cf.*, e.g., Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1093 (2007) (arguing

that the STL should be considered an enforcement measure under Chapter VII); Shraga, *in Cassese, supra* note 6, 424, and Nadim Shehadi & Elizabeth Wilmshurst, *The Special Tribunal for Lebanon: The UN on Trial?*, CHATHAM HOUSE, MEP/IL BP 07/01, July 2007, at 6-7 (arguing that the STL is still treaty-based, the treaty having been 'brought into force' by the Security Council).

[19] See art. 19 (1) of the *Agreement*, annexed to S.C. Res. 1757, *supra* note 2.

[20] S.C. Res. 1757, *supra* note 2, ¶ 1(a).

[21] U.N. Doc. S/PV.5685, at 5-6 (May 30, 2007). See also *id.* at 2-5 for the relevant statements by Qatar, Indonesia, South Africa, Russia, and China.

[22] STL Statute, *supra* note 13, art. 22.

[23] See Christoph Safferling, *Trial in Absentia*, *in Cassese, supra* note 6, 542-543; and Paola Gaeta, *To Be (Present) or Not To Be (Present)—Trials In Absentia before the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1165 (2007).

[24] See, e.g., Ian Black, *Syria Brands Hariri Tribunal as Harmful Ploy by Washington*, THE GUARDIAN (London), June 1, 2007, at 24, available at <http://www.guardian.co.uk/world/2007/jun/01/syria.lebanon2> (last visited Aug. 5, 2009); *UN Approves Hariri Murder Court*, BBC NEWS, May 31, 2007, available at http://news.bbc.co.uk/1/hi/world/middle_east/6703587.stm (last visited Aug. 5, 2009).

[25] See, e.g., the *Second Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005) and 1636 (2005)*, transmitted to the Council by the *Letter dated 12 December 2005 from the Secretary-General addressed to the President of the Security Council*, U.N. Doc. S/2005/775, ¶¶ 6-8, 63 (Dec. 12, 2005); and the *Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005)*, transmitted to the Council by the *Letter dated 20 October 2005 from the Secretary-General addressed to the President of the Security Council*, U.N. Doc. S/2005/662, ¶¶ 124, 191, 216, 222 (Oct. 20, 2005).

[26] S.C. Res. 1636, ¶ 11, U.N. Doc. S/RES/1636 (Oct. 31, 2005).

[27] As he is directed by Rule 3 of the Rules of Procedure and Evidence (RPE), but without mentioning it.

[28] Deferral Order, *supra* note 3, ¶¶ 13-15.

[29] *Id.* ¶ 19.

[30] See Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17 (B) of the Rules of Procedure and Evidence, Case No. CH/PTJ/2009/03, ¶ 6 (Apr. 15, 2009) [hereinafter the Time Limit Order].

[31] *Id.* ¶¶ 10-18.

[32] See Detained Persons Order, *supra* note 3, ¶ 10.

[33] See *id.* ¶ 12.

[34] *Id.* ¶¶ 26-38.

[35] *Id.* ¶ 39 and part VI.-Disposition.

[36] Report of the UNHCR transmitted to the Security Council on Oct. 20, 2005, *supra* note 25, ¶ 174.

[37] Time Limit Order, *supra* note 30, ¶ 5.

[38] *Id.* ¶ 7.

[39] See Salvatore Zappalà, *Provisional Release, in Cassese*, *supra* note 6, 519-520.

[40] Time Limit Order, *supra* note 30, ¶¶ 10-14.

[41] *Id.* ¶ 14.

[42] *Id.* ¶ 18.

[43] See Salvatore Zappalà, *Fair Trial, in Cassese*, *supra* note 6, 324-325 and literature cited therein.

[44] Detained Persons Order, *supra* note 3, ¶ 22.

[45] *Id.* ¶ 27.

[46] There was dancing, celebratory gunfire, and slaughtering of sheep. Cf. *Lebanon Releases Hariri Suspects*, BBC NEWS, Apr. 29, 2009, available at http://news.bbc.co.uk/1/hi/world/middle_east/8024463.stm; *Lebanon Frees Four Generals Held in Hariri Case*, AL ARABIYA, Apr. 29, 2009, available at <http://www.alarabiya.net/articles/2009/04/29/71647.html>; *Hariri Tribunal Orders Release of Detained Four Generals*, MENASSAT, Apr. 29, 2009, available at <http://www.menassat.com/?q=alerts/6459-hariri-tribunal-orders-release-detained-four-generals>; *Lebanon Releases Pro-Syrian Generals*, NATIONAL POST, Apr. 30, 2009, available at <http://www.nationalpost.com/related/topics/story.html?id=1547440>; *Lebanon Tribunal Orders Release of Four Generals*, RADIO NETHERLANDS WORLDWIDE, Apr. 27, 2009, available at <http://www.rnw.nl/int-justice/article/lebanon-tribunal-orders-release-four-generals> (all last visited June 5, 2009).

[47] See extensively for this argument Björn Elberling, *The Next Step in History-Writing through Criminal Law: Exactly How Tailor-Made is the Special Tribunal for Lebanon?*, 21 LEIDEN J. INT'L L. 529 (2008).