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Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation

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Introduction

In 2007, the UN Security Council established the Special Tribunal for Lebanon (“STL”), the world’s first international court with jurisdiction over the crime of terrorism, to prosecute those responsible for the 2005 assassination of Lebanese Prime Minister Rafiq Hariri and twenty-two others.^[1] On January 17,

2011, the Tribunal’s Prosecutor, Daniel Bellemare, submitted a sealed indictment for the pre-trial judge to confirm. The pre-trial judge, in turn, requested that the Appeals Chamber resolve fifteen questions relating to the substantive criminal law and modes of criminal responsibility to be applied by the STL and to determine whether the STL should charge crimes cumulatively or in the alternative. In response, on February 16, 2011, the STL Appeals Chamber handed down a landmark ruling.^[2]

The unanimous ruling of the five Appeals Chamber’s judges was signed by Presiding Judge Antonio Cassese, the “Judge Rapporteur” of the STL Appeals Chamber.^[3]

This *Insight* focuses on the two most significant aspects of the STL Appeals Chamber’s opinion—the definition of terrorism and the modes of liability applicable to specific intent crimes.

The Definition of Terrorism

Of the several issues on which the Appeals Chamber issued guidance, by far the most important concerned the definition of terrorism to be applied by the STL. Although the STL’s Statute stipulates that the court shall apply the crime of terrorism as defined by Lebanese law, the Appeals Chamber held that the STL is authorized to construe Lebanese law on terrorism with the assistance of international treaty and customary law.^[4] Rather than apply international law only if an inconsistency or gap in Lebanese law exists, the Appeals Chamber held that it was appropriate to read Lebanese law in the context of “international obligations undertaken by Lebanon with which, in the absence of very clear language, it is presumed any legislation complies.”^[5]

This interpretive approach opened the door for the Appeals Chamber to then opine on whether a defined offense of terrorism exists under customary international law. To that

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end, the Appeals Chamber found that “although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of the marked difference of views on some issues, closer scrutiny reveals that in fact such a definition has gradually emerged.”^[6]

Based on its review of state practice and indicators of *opinio juris*, the Appeals Chamber declared that the customary international law definition of terrorism consists of

the following three key 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 population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element. ^[7]

Reading the Lebanese law on terrorism together with the definition of terrorism under customary international law, the Appeals Chamber concluded that the particular means used in an attack were not dispositive in determining whether an attack is terrorism or simply murder. ^[8] In other words, contrary to Lebanese case law, the Appeals Chamber opined that attacks committed using rifles or handguns, which are not likely to cause a danger to the general population *per se*, are nevertheless within the jurisdiction of the STL.^[9]

Yet, the significance of this aspect of the Appeals Chamber opinion is far broader than its application to the case before the STL. This is the first time that an international tribunal has authoritatively confirmed a general definition of terrorism under international law. This decision will likely have a momentous effect on the decades-long effort of the international community to develop a broadly acceptable definition of terrorism. ^[10] Unable to reach consensus on a general definition, the international community has over the past thirty years adopted a dozen counterterrorism conventions that impose an obligation to prosecute or extradite in cases of hostage-taking, hijacking, aircraft and maritime sabotage, attacks at airports, attacks against diplomats and government officials, attacks against UN peacekeepers, use of bombs or biological, chemical, or nuclear materials, and providing financial support to terrorist organizations.^[11]

By listing the dozen counterterrorism conventions in the preambular clauses of numerous UN General Assembly and Security Council counterterrorism resolutions, which confirm that acts of terrorism are criminal and unjustifiable, the United Nations has arguably crystallized the acts prohibited by those Conventions into customary international law crimes. Yet, significant gaps exist in the coverage of these anti-terrorism conventions. For example, assassinations of businessmen, engineers, journalists, and educators are not included, while similar attacks against diplomats and public officials are covered by the treaties. Attacks or acts of sabotage by means other than explosives against a passenger train or bus, or a water supply or electric power plant, are not dealt with, while similar attacks against an airplane or an ocean liner are. Moreover, most forms of cyber-terrorism are not encompassed by the treaties. Acts of psychological terror not involving physical injury are not covered either, even though placing a fake bomb in a public place or sending fake anthrax through the mail can be every bit as traumatizing to a population as an actual attack. ^[12]

Notably, the STL Appeals Chamber stated that the customary rule can be held to impose a duty on States to prosecute those who commit acts of terrorism as defined under customary international law. ^[13] This would include cases falling within the gaps of the dozen counterterrorism conventions. Moreover, the U.N. Security Council in Resolution 1373

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prohibited the financing of terrorism without defining the term or listing proscribed groups.^[14] The Appeals Chamber's general definition of terrorism will thus facilitate more effective implementation of that important resolution.

Modes of Participation

The Appeals Chamber opined that the STL was "an international tribunal in provenance, composition, and regulation."^[15] The Appeals Chamber further noted that since Article 3 of the STL Statute (setting forth principles of liability) draws verbatim from the Statutes of the *ad hoc* international criminal tribunals, "it reflects the status of customary international law as articulated in the case law of the *ad hoc* tribunals."^[16] Consequently, the Appeals Chamber held that the STL may apply the international modes of responsibility, including joint criminal enterprise ("JCE") liability, which the other international tribunals have employed.^[17] In so holding, the Appeals Chamber took a swipe at the International Criminal Court's alternative approach to co-perpetrator liability (known as "perpetration by means"), stating that unlike JCE, "the doctrine of perpetration by means ... is not recognised in customary international law."^[18]

There are three forms of JCE. JCE I (basic form) attributes individual criminal liability when all co-defendants act pursuant to a common design and possess the same criminal intent, even if each co-perpetrator carries out a different role within the JCE. The *mens rea* required for this form of JCE is the shared intent of all members to commit a certain crime. JCE II (systemic form) is characterized by the existence of an organized criminal system, particularly in the case of concentration or detention camps. The *mens rea* required for this form of JCE is the personal knowledge of the system of ill-treatment and the intent to further this concerted system of ill-treatment. JCE III (extended form) ascribes individual criminal liability in situations "involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common plan, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose." The *mens rea* for this form is either the shared criminal intent of the perpetrators or, at a minimum, the fact that the defendant is "aware of the possibility that a crime might be committed as a consequence of the execution of the criminal act and [she or he] willingly takes the risk."^[19]

Of the three forms of JCE, JCE III has engendered the most controversy, as it is seen by defense counsel and some commentators as a form of guilt by association. Perhaps for this reason, the Appeals Chamber sought to limit the use of JCE III before the STL. While noting that Lebanese law recognizes a principle of liability similar to JCE III,^[20] the Appeals Chamber concluded that the application of JCE III would not be appropriate for the STL to apply to the crime of terrorism because JCE III utilizes an advertent recklessness (*dolus eventualis*) standard, whereas terrorism is a specific intent crime.^[21] In so concluding, the Appeals Chamber recognized that this is a departure from the approach of the ICTY and ICTR, which allow for convictions under JCE III for the specific intent crimes of genocide and persecution as a crime against humanity.^[22] The *ad hoc* tribunals also allow for convictions under the principle of command responsibility for specific intent crimes, even though command responsibility employs a negligent standard (the commander is responsible for the acts of subordinates if he knew or should have known about their crimes and failed to take action to prevent or punish).^[23] For the crime of terrorism, the Appeals Chamber asserts, "the better approach" is to treat the secondary offender as an aider and abetter rather than "pin on him the stigma of full perpetratorship."^[24]

As a final observation, prior to the STL Appeals Chamber's decision, the doctrine of joint criminal enterprise liability had been applied only to war crimes, crimes against humanity, and genocide, though Judge Cassese presaged application of JCE to the offense of terrorism in a book he authored three years before the issuance of the STL Appeals Chamber opinion. Cassese wrote:

International crimes such as war crimes, crimes against humanity, genocide, torture, and terrorism share a common feature: they tend to be expression of collective criminality, in that they are perpetrated by a multitude of persons, military details, paramilitary units or government officials acting in unison or, in most cases, in pursuance of a policy. When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the criminal enterprise or collective crime. . . . The notion of joint criminal enterprise denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan.^[25]

Based on the policies articulated in the quote above, it may well be that the STL Appeals Chamber's confirmation that JCE I and JCE II could apply to the crime of terrorism will be taken as a license for domestic application of the doctrine to terrorism cases worldwide.

About the Author:

Michael P. Scharf, a member of the ASIL Executive Council, is the John Deaver Drinko-Baker & Hostetler Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law. He served formerly as Attorney Adviser for Law Enforcement and Intelligence, and Attorney Adviser for United Nations Affairs at the U.S. Department of State. The Cox Center's War Crimes Research Office provides legal research memoranda on issues pending before the Special Tribunal for Lebanon and other international criminal courts.

Endnotes:

[1] Statute of the Special Tribunal for Lebanon, appended to S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007), *available at* http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/Resolution_Agreement_Statute_EN.pdf. The STL was initially envisioned as a court to be established by an agreement between Lebanon and the United Nations (as the Special Court for Sierra Leone had been). When the Lebanese Parliament failed to ratify the agreement through its domestic legislative process by the June 10, 2007 deadline, the Security Council adopted Resolution 1757 (2007), establishing the STL under its Chapter VII powers. See U.N. SCOR, 62nd Sess., 5685th mtg., U.N. Doc S/PV.5685 (May 30, 2007), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N07/362/08/PDF/N0736208.pdf?OpenElement>.

[2] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I (Feb. 16, 2011), *available at* http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216_STL-11-01_R176bis_F0010_AC_Interlocutory_Decision_Filed_EN.pdf [hereinafter Interlocutory Decision].

[3] Judge Cassese, formerly professor of international law at the University of Florence, served as President of the International Criminal Tribunal for the former Yugoslavia ("ICTY") during the tribunal's early days. The opinions he wrote for the ICTY Appeals Chamber constituted some of the most important legal developments in international humanitarian law since the adoption of the 1949 Geneva Conventions. For example, during Judge Cassese's tenure as President of the ICTY, the tribunal's Appeals Chamber held for the first time that individual criminal responsibility applies not just during international armed conflicts, but to war crimes committed in internal armed conflicts. See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). The Appeals Chamber also developed the novel concept of joint criminal enterprise liability, which has since been applied by the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia. See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter *Tadic*, Judgment]; see generally Michael P. Scharf, *Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 Cornell Int'l L. J. 440, 441 (2010). As the STL Appeals Chamber's Presiding Judge, Cassese once again took advantage of a historic opportunity to boldly push forward the development of international criminal law.

- [4] Interlocutory Decision, ¶¶ 45, 62.
- [5] *Id.* ¶¶ 19-20.
- [6] *Id.* ¶ 83; *see also id.* ¶ 102.
- [7] *Id.* ¶ 85.
- [8] *Id.* ¶ 147.
- [9] *Id.* ¶¶ 59, 138, 145.
- [10] Michael P. Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 36 Case W. Res. J. Int'l L. 359, 360-61 (2004).
- [11] *Id.* at 364-65.
- [12] *Id.* at 365.
- [13] Interlocutory Decision, ¶ 102.
- [14] U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).
- [15] Interlocutory Decision, ¶ 16.
- [16] *Id.* ¶ 206.
- [17] *Id.* ¶¶ 211-49.
- [18] *Id.* ¶¶ 255-56.
- [19] *Tadic*, Judgment, ¶¶ 196, 228.
- [20] Interlocutory Decision, ¶ 231.
- [21] *Id.* ¶¶ 248-49.
- [22] *Id.* ¶ 249.
- [23] Prosecutor v. Oric, Case No. IT-03-68-T, Judgment, ¶ 294 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006).
- [24] Interlocutory Decision, ¶ 249.
- [25] Antonio Cassese, *International Criminal Law* 189-91 (2d ed. 2008).