

International Tribunals, National Crimes and The Hariri Assassination: A Novel Development in International Criminal Law

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June 6, 2007

I. Introduction

In examining the U.N. Security Council Resolution 1757 of May 30, 2007,¹ we may be witnessing the beginning of a major development in international criminal law.

On February 14, 2005, a huge explosion killed former Prime Minister Rafiq Hariri and others in Beirut, Lebanon.² The next day the United Nations Security Council issued a presidential statement condemning the attack as a "terrorist bombing"³ and describing it later as a threat to international peace and security.⁴

On April 7, 2005, the Security Council decided to establish an international independent investigation commission based in Lebanon "to assist the Lebanese Authorities in their investigation" of all aspects of the act of February 14, 2005, and "help identify its perpetrators, sponsors, organizers and accomplices."⁵

On March 29, 2006, the Security Council requested that the Secretary-General "negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character," as requested by the Prime Minister of Lebanon, "to try all those who are found responsible" for the bombing that killed former Prime Minister Rafiq Hariri.⁶

On November 13, 2006, the Executive Branch of the Lebanese Government, Council of Ministers, approved a draft agreement negotiated with the United Nations, along with its accompanying

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¹ See S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007), available at <http://www.un.org/Docs/sc/unscreolutions07.htm> (follow "S/RES/1757 (2007)" hyperlink), adopted by the Security Council at its 5685th meeting.

² Many national and international news organizations covered the explosion and Prime Minister Hariri's death. For example, see the PBS report at http://www.pbs.org/newshour/updates/lebanon_2-14-05.html.

³ The President of the Security Council, *Statement by the President of the Security Council*, U.N. Doc. S/PRST/2005/4 (Feb. 15, 2005), available at <http://www.un.org/Docs/sc/unscrepresstatements05.htm> (follow "S/PRST/2005/4 of 15 February 2005" hyperlink) (last visited May 31, 2007).

⁴ See S.C. Res. 1636, U.N. Doc. S/RES/1636 (Oct. 31, 2005), available at <http://www.un.org/Docs/sc/unscreolutions05.htm> (follow "S/RES/1636 (2005)" hyperlink).

⁵ See S.C. Res. 1595, U.N. Doc. S/RES/1595 (Apr. 7, 2005), available at <http://www.un.org/Docs/sc/unscreolutions05.htm> (follow "S/RES/1595 (2005)" hyperlink).

⁶ See S.C. Res. 1664, U.N. Doc. S/RES/1664 (Mar. 29, 2006), available at <http://www.un.org/Docs/sc/unscreolutions06.htm> (follow "S/RES/1664 (2006)" hyperlink).



statute, for the establishment of a special tribunal for Lebanon.⁷ The U.N. Security Council expressed its satisfaction with the agreement and its accompanying statute and invited the Secretary-General “to proceed, together with the Government of Lebanon, in conformity with the Constitution of Lebanon, with the final steps for the conclusion of the Agreement.”⁸ The Agreement expanded the temporal jurisdiction of the special tribunal to include under certain conditions, not only those responsible for the attack against Hariri but also those involved in other attacks committed in Lebanon between October 1, 2004, and December 12, 2005.⁹

The international independent investigation commission is still proceeding with its work but the Lebanese Parliament to date has not, as required under the Lebanese Constitution, authorized the Government to sign or ratify the Agreement negotiated with the United Nations.

In a letter dated May 14, 2007, the Prime Minister of Lebanon informed the Secretary-General of the United Nations that “for all practical purposes the domestic route to ratification had reached a dead end, with no prospect for a meeting of parliament to complete formal ratification.”¹⁰ The Prime Minister further requested that the Tribunal as a matter of urgency “be put into effect by the Security Council” adding that “[a] binding decision regarding the Tribunal on the part of the Security Council will be fully consistent with the importance the United Nations has attached to this matter from the outset.”¹¹

In response to the letter of May 14, 2007, the U.N. Security Council acting under Chapter VII of the United Nations Charter adopted, on May 30, 2007, Resolution 1757 in which it decided that the agreement negotiated with Lebanon and approved by the Council of Ministers of Lebanon on November 13, 2006, “shall enter into force.”

This article explains some of the legal issues relevant to the Special Tribunal for Lebanon by discussing the jurisdictional basis for international judicial bodies; examining the jurisdictional reach of mixed tribunals; exploring the legal nature of the February 14, 2005 bombing; and identifying a number of legal questions for which the final answers may shape radically the jurisdictional reach of international criminal law.

II. Jurisdiction of International Judicial Organs

There are at present a number of international judicial institutions established by the common will of the world community, as expressed by the Charter of the United Nations, by international conventions, or by resolutions of the U.N. Security Council.

⁷ For a full account of the negotiation, the text of the draft agreement and the statute of the special tribunal, see The Secretary-General, *Report of the Secretary-General on the establishment of a special tribunal for Lebanon*, U.N. Doc. S/2006/893 (Nov. 15, 2006), available at <http://www.un.org/Docs/sc/sgrep06.htm> (follow “S/2006/893” hyperlink).

⁸ See The President of the Security Council, *Letter date 21 November 2006 from the President of the Security Council addressed to the Secretary-General*, U.N. Doc. S/2006/911 (Nov. 24, 2006), available at http://www.un.org/Docs/sc/unscc_presandsg_letters06.htm (follow “S/2006/911” hyperlink).

⁹ The agreement was also published in the Lebanese Official Gazette No. 59 Supp. of Dec. 14, 2006.

¹⁰ See the full text of the letter of the Prime Minister in the Annex, The Secretary-General, *Letter dated 15 May 2007 from the Secretary-General to the President of the Security Council*, U.N. Doc. S/2007/281 (May 16, 2007), available at http://www.un.org/Docs/sc/unscc_presandsg_letters07.htm (follow “S/2007/281” hyperlink).

¹¹ *Id.* at 2.



The principal international judicial organ is the International Court of Justice, established under Chapter XIV of the Charter of the United Nations.¹² In addition to its judicial function in settling disputes, it provides advisory opinions to the General Assembly, the Security Council, and other organs of the United Nations and specialized agencies as may be authorized by the General Assembly. The Court has subject matter jurisdiction over disputes between or among states but does not have any jurisdiction over violations of international or domestic criminal law committed by individuals.¹³

Another international tribunal of permanent status is the International Criminal Court established by a treaty known as the “Rome Statute of the International Criminal Court” adopted in Italy on July 17, 1998.¹⁴ Under the terms of the Statute, the Court became operative on July 1, 2002, and the Statute is binding only on the states which agree to be bound by it. As of January 2007, there were 104 countries which are parties to the Statute. The subject matter jurisdiction of the Court is limited to the most serious crimes under international criminal law which are specifically identified as: genocide, crimes against humanity, and war crimes. One of the ways the Court exercises its jurisdiction over individuals accused of committing such crimes is a referral of the situation to the Prosecutor of the Court by the United Nations Security Council.¹⁵

In addition to these two permanent international judicial institutions, the U.N. Security Council has established two ad hoc international tribunals.

On February 22, 1993, the UN Security Council decided to establish an international tribunal for the prosecution of persons responsible for committing serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991.¹⁶ These violations were described in the provisions outlining the subject matter jurisdiction of the tribunal as: grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. This tribunal is temporary rather than permanent because its purpose is to prosecute persons who committed certain crimes in the territory of the former Yugoslavia between January 1, 1991 and “a date to be determined by the Security Council upon the restoration of peace.”¹⁷

In November 1994, the UN Security Council established a second ad hoc tribunal entitled the “International Tribunal for Rwanda.”¹⁸ The mission of the tribunal is to prosecute persons responsible for committing, between January 1, 1994 and December 31, 1994, serious violations of international humanitarian law in the territory of Rwanda, as well as Rwandans responsible for committing such

¹² For the full texts of the basic documents setting up the rules, jurisdiction, composition, and functioning of the Court, visit the International Court of Justice website, <http://www.icj-cij.org/documents/index.php?p1=4&PHPSESSID=92e8cafb31f217543c70fe3c021377a0> (last visited May 31, 2007).

¹³ *Id.*

¹⁴ For the full text of the Court Statute setting up its rules, jurisdiction, composition and functioning of the Court, visit the International Criminal Court website, http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf (last visited May 31, 2007).

¹⁵ *Id.*

¹⁶ For the full text of the basic documents of the Tribunal, visit the International Criminal Tribunal for the former Yugoslavia website, <http://www.un.org/icty/legaldoc-e/index.htm> (last visited May 31, 2007).

¹⁷ S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993), available at http://www.un.org/icty/legaldoc-e/basic/statut/S-RES-827_93.htm (last visited May 31, 2007).

¹⁸ For the full text of the statute of the Tribunal, visit the International Criminal Tribunal for Rwanda website, <http://69.94.11.53/ENGLISH/basicdocs/statute.html> (last visited May 31, 2007).



violations in the territories of neighboring states.¹⁹ This Tribunal is also temporary because the crimes for which it was established are limited to those committed during 1994.²⁰

The jurisdiction of these international tribunals has been attached exclusively to violations or disputes governed by international law. There is no prior national or international authority to suggest that an international tribunal established by the United Nations, acting alone, could have a jurisdictional reach over local crimes committed in violation of national law.²¹

III. Jurisdictional Reach of Mixed Tribunals

The United Nations may, as indicated above, establish international tribunals to prosecute international crimes. Jointly with member states, it may also establish mixed tribunals whose jurisdiction covers crimes committed in violation of national law.

On January 16, 2002, the United Nations and Sierra Leone signed an agreement establishing a Special Court for Sierra Leone to prosecute persons responsible for committing serious violations of international humanitarian law and Sierra Leonean law in Sierra Leone since November 30, 1996.²² The agreement was duly ratified by Parliament and issued by the President of Sierra Leone.²³ This Court has both international jurisdiction to prosecute crimes committed in violation of international criminal law, and national jurisdiction to prosecute crimes committed in violation of Sierra Leonean law.²⁴

On June 6, 2003, the United Nations signed an agreement with the Kingdom of Cambodia relative to the “Extraordinary Chambers” designed to prosecute “those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia.”²⁵ This special court is also a mixed court, with both international and national jurisdictions.

IV. The Legal Nature of the Crime of February 14, 2005

¹⁹ *Id.*

²⁰ *Id.*

²¹ Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STANFORD JOURNAL OF INTERNATIONAL LAW 39, 79 (Winter 2007):

The personnel, rules, and institutions that comprise international tribunals conform to and promote international rather than local legal, social, and moral norms. It is far from clear how punishment by an international tribunal, which derives its authority from either treaty or a Security Council resolution (at bottom, a function of state consent to the U.N. Charter, itself a multilateral treaty), can be a legitimate proxy for the penal interests of the literal victims who suffer extraordinary crimes of violence. This disjuncture may well be a major reason that international tribunals often suffer from a perceived lack of legitimacy in relation to affected local communities or states.

²² Sierra Leone Official Gazette No. 22 of April 25, 2002.

²³ *Id.*

²⁴ For the full texts of the documents establishing the Special Court, visit the Special Court for Sierra Leone website, <http://www.sc-sl.org/documents.html> (last visited May 31, 2007).

²⁵ For the full text of the Agreement, visit the Extraordinary Chambers in the Courts of Cambodia website, <http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf> (last visited May 31, 2007).



One preliminary question relevant to the subject-matter jurisdiction of the Special Tribunal for Lebanon is to determine the nature of the attack perpetrated against former Prime Minister Hariri on February 14, 2005. Was the attack an international or national crime?

In this respect one has to decide first whether the attack constitutes an act of terrorism as described by the U.N. Security Council; and second whether acts of terrorism are classified as offenses under international criminal law.

A. Is the Hariri Assassination an Act of Terrorism?

There have been a number of conventions concluded for the purpose of combating terrorism and bringing to justice its perpetrators, such as the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.²⁶ These conventions focus on specific acts of terrorism, but do not provide a general definition, or description of the elements that constitute a crime of terrorism.²⁷

Some countries, including Lebanon, have adopted their own definitions of what they consider acts of terrorism. Under the Lebanese Penal Code terrorist acts are described as “acts intended to create a state of panic committed by using such means as explosives, inflammable materials, toxic or incendiary products, and infectious and microbial agents that cause public danger.”²⁸

The Hariri assassination, which was committed by using explosives, would constitute an act of terrorism under Lebanese law if it is proven that its perpetrators intended, among other things, to intimidate and create a state of fear among the Lebanese polity.

B. Is Terrorism a Criminal Offense Under International Law?

The existing conventions against terrorism generally require the member states to prosecute those persons who are accused of having committed acts of terrorism, or to extradite such persons to a forum where they can be prosecuted.²⁹ But none of these conventions addressed terrorism as constituting criminal offenses under international law.³⁰ Furthermore, despite the large number of statements and resolutions issued or adopted by the Security Council and the General Assembly of the United Nations condemning terrorism and calling for a greater cooperation among nations to combat it, none of these documents have referred to terrorism as a criminal offense under international law or have defined what a crime of terrorism is.³¹

It is true that opinions expressed by a number of legal scholars and jurists, as cited below, have advocated that acts of terrorism or at least some of such acts are to be classified among the criminal offenses prohibited by customary international law. These opinions may still be in the minority.

²⁶ For the full text of this and other conventions against terrorism visit the UN Office on Drugs and Crime website, http://www.unodc.org/unodc/terrorism_conventions.html (last visited May 31, 2007).

²⁷ "Attempts to reach a fixed, universally accepted definition of international terrorism have been frustrated both by changes in terrorist methodology and the lack of any precise definition of the term terrorism." M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS 15 (1937-2001) (2001), *quoting* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 17 (D.D.C. 1998).

²⁸ Article 314 of the Lebanese Penal Code, enacted by Legislative Decree No. 340 of 1943.

²⁹ BASSIOUNI, *supra* note 27.

³⁰ *Id.*

³¹ *Id.*



In an article published in the *European Journal of International Law* in 2001, after the September 11 attacks against the United States, the author, a judge who has headed the International Criminal Tribunal for the Former Yugoslavia, as well as the chairperson for the U.N.-appointed International Commission of Inquiry on Darfur, states the following:

So far, terrorist attacks have usually been defined as serious offences, to be punished under national legislation by national courts. The numerous international treaties on the matter oblige the contracting States to engage in judicial cooperation for the repression of those offences. In my opinion, it may be safely contended that, in addition, at least trans-national, state-sponsored or state-condoned terrorism amounts to an international crime, and is already contemplated and prohibited by international customary law as a distinct category of such crimes.³²

Others have suggested that some of the acts of terrorism may have become part of international criminal law. In a second article published in the same journal in 1991, another scholar, a lecturer in international law from the University of Pisa, states the following:

[A]lthough not all acts that may amount to a crime of terrorism under national or treaty law are also covered by customary norms, at least some of them may have turned into customary law. In this respect, it seems that, because of their intrinsic gravity and their odious consequences for the life and assets of innocent civilians, such acts as aircraft bombing or aircraft hijacking may belong to the class of crimes covered by customary law, particularly when they take on large-scale proportions.³³

A French court espoused such a position. In a criminal case brought against Mouammar Khadafi in France accusing him of complicity in the terrorist enterprise of bombing a UTA aircraft over Africa in 1989, killing 170 innocent people, the investigative judge (*juge d'instruction*) and the Appellate Court of Paris (*Chambre d'accusation*) concluded that the case should proceed notwithstanding the status of the accused as a head of state who enjoys immunity, as recognized by French law.³⁴ The appellate decision to deny Khadafi immunity was based on the belief that the crime for which he was accused, complicity in a terrorist enterprise, is an international crime for which no head of state immunity could attach.³⁵

This decision was appealed to the French High Court (*Cour de Cassation*) by the General Prosecutor (*Avocat general*), who represented the State, opposing the incursion on head of state immunity. The High Court on March 13, 2001, vacated the decision of the appellate court and rejected

³² Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 993 (2001), available at <http://www.ejil.org/journal/Vol12/No5/120993.pdf>. A short biography of Judge Cassese can be found at http://www.columbia.edu/cu/jtl/event_files/banquet07.html (last visited June 1, 2007).

³³ Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes?*, 12 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 595 (2001), available at <http://www.ejil.org/journal/Vol12/No3/120595.pdf>.

³⁴ For the full text of the appellate decision see *Revue Generale de Droit International Public*, Tome 105/2001/2, p. 475-76. The court concluded:

Qu'il en résulte qu'aucune immunité ne saurait couvrir des faits de complicité d'homicides volontaires et de destruction de biens par substance explosive ayant entraîné la mort, en relation avec une entreprise terroriste, consistant, pour un chef d'Etat, à avoir ordonné l'explosion d'un avion de ligne transportant 170 civils; Qu'en effet, ces faits, à les supposer établis, entreraient dans la catégorie des crimes internationaux, et ne pourraient, en tout état de cause, être considérés comme ressortant des fonctions d'un chef d'Etat"

³⁵ *Id.*



it in its entirety, ostensibly rejecting the notion that terrorist acts or some of them are or should be criminal offenses under international law.³⁶

Other courts have reached similar conclusions. In *Tel-Oren v. Libyan Arab Republic*,³⁷ the United States Court of Appeals for the D.C. Circuit also addressed the issue of whether acts of terrorism constitute a violation of international criminal law. The case was originally filed in the District Court by a group of survivors of an attack on a bus in Israel that took place in 1978 and killed a number of innocent civilians. The suit was for compensatory damages against, among others, the Libyan Arab Republic as a sponsor of the attack. The jurisdiction of the American court is based on a provision in a U.S. federal law that gives the district courts original jurisdiction over actions brought “by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”³⁸ The complaint alleged that the 1978 attack on the bus was a terrorist act sponsored by Libya and constituted therefore a violation of international law, giving the US court jurisdiction to prosecute the case.

The District Court dismissed the case³⁹ and the appellate court affirmed.⁴⁰ Although the affirmation by the three judge panel was based on different concurring opinions, it is clear from the reasoning that there was no divergence in the conclusion that acts of terrorism do not rise to the status of crimes against the law of nations, meaning international law. Judge Harry T. Edwards stated:

The divergence as to basic norms of course reflects a basic disagreement as to legitimate political goals and the proper method of attainment. Given such disharmony, I cannot conclude that the law of nations—which, we must recall, is defined as the principles and rules that states feel themselves bound to observe, and do commonly observe—outlaws politically motivated terrorism, no matter how repugnant it might be to our own legal system.⁴¹

Judge Bork also rejected the plaintiffs’ allegations to the effect that the 1978 attack constitutes a violation of the law of nations, by concluding:

In addition, appellants’ principal claim, that appellees violated customary principles of international law against terrorism, concerns an area of international law in which there is little or no consensus and in which the disagreements concern politically sensitive issues that are especially prominent in the foreign relations problems of the Middle East.⁴²

Both the U.N. Security Council and the Lebanese Government agree that the attack perpetrated against former Prime Minister Hariri constitutes a local crime committed in violation of Lebanese law. Article 2 of the statute of the Special Tribunal annexed to the draft agreement negotiated between the United Nations and the Government of Lebanon provides that Lebanese criminal law (not international law) shall apply to those involved in the Hariri assassination.⁴³ Furthermore, in his report to the Security Council dated November 15, 2006, the Secretary-General stated that despite its international

³⁶ Cass. Crim., Mar. 13, 2001, Bull. Crim., No. 64, at 218. The High Court decision is available on the Legifrance website at <http://www.legifrance.gouv.fr> (last visited May 31, 2007).

³⁷ 726 F.2d 774 (D.C. Cir. 1984).

³⁸ 28 U.S.C. § 1350.

³⁹ *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981).

⁴⁰ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

⁴¹ *Id.* at 796.

⁴² *Id.* at 807.

⁴³ U.N. Doc. S/2006/893, *supra* note 7.



characteristics, the subject matter jurisdiction of the special tribunal for Lebanon “remain national in character.”⁴⁴

V. Legal Questions Raised by the Establishment of the Special Tribunal for Lebanon

The decision of the U.N. Security Council to “enter into force” the agreement negotiated with the Government of Lebanon without the ratification of the agreement by the Lebanese Parliament, as required under the Lebanese Constitution, raises several legal questions that may have lasting impact on the development of international criminal law.

There has been no prior instance in which the U.N. Security Council has ordered the entrance into force of an agreement with a state that did not ratify such an agreement through its constitutional process. Nor has there been any instance in which the U.N. Security Council has established an international tribunal to try persons responsible for committing a national crime.

It is true that judicial commissions have been formed by the United Nations to handle local crimes in certain territories such as in Kosovo and East Timor, but in doing so the United Nations has been acting as a transitional administration with the temporary powers similar to that of other national governments in order to promote emerging sovereign rights. This extraordinary power included the authority to establish national judicial institutions.⁴⁵ In contrast, Lebanon, a sovereign nation, is being asked to accept the establishment of a judicial commission created by the United Nations.

Some of the questions which arise as a result of the establishment of the Special Tribunal for Lebanon are:

How an agreement not ratified by Lebanon can “enter into force” by a unilateral decision of the U.N. Security Council? Would this mean that Lebanon has now become an unwilling party to an agreement it did not ratify?

What is the legal nature of the Tribunal so created? Is it a mixed tribunal similar to the one established with Sierra Leone? An international tribunal similar to the one established for the former Yugoslavia or Rwanda? Or does this Tribunal stand alone as the harbinger to a new type of international tribunal?

If the Tribunal is an international tribunal, could its jurisdiction go beyond prosecuting crimes committed in violation of international criminal law? Could an international tribunal prosecute domestic crimes?

Does the Tribunal have jurisdiction to answer such questions if they were to be raised in pre-trial motions? If not does any other international judicial body have such jurisdiction?

⁴⁴ *Id.* at 2.

⁴⁵ For the establishment of a Court of Final Appeal and an Office of the Public Prosecutor by the U.N. Transitional Administration in Kosovo, see UNMIK Regulation No. 1999/5, United Nations website http://www.unmikonline.org/regulations/unmikgazette/02english/E1999regs/RE1999_05.htm.