

## The Special Tribunal for Lebanon – a political tool or legitimate mechanism for pursuing justice?

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In February 2005, Rafiq Hariri, a former Lebanese Prime Minister was assassinated in a car bomb which also killed 22 people, injuring over 100 others. However, Lebanon's history of assassination, considered in the context of politically motivated assassinations on a global level, prompts the question of why a tribunal was set up to prosecute those responsible for the murder of Hariri, and in particular whether and to what extent political motivations render the Tribunal a political instrument thereby perverting its main function as a court of law?

To assist in the investigation of the assassination, The Security Council adopted Resolution 1595 on 7 April 2005 establishing an International Independent Investigation Commission. In 2007, the Special Tribunal of Lebanon ("STL") was set up to prosecute those responsible and to address the public perception of unaccountability and predominant culture of impunity.<sup>2</sup>

The Lebanese government initially sought help from the UN Security Council, and the ensuing agreement was originally for a tribunal of a hybrid nature. From a constitutional point of view however, it is argued that despite the fact that the request was initiated by Lebanon, its sovereignty had been compromised. Between July and August 2006, at the time of the agreement to establish the STL, there had been an ongoing war and 6 ministers, 5 of whom were representative of the total number Muslim Shia ministers, had resigned from the government. Para J of the preamble to the Lebanese constitution states that *'there is no constitutional legitimacy for any authority which contradicts the pact of communal coexistence'*. This requirement for a representative presence of all

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<sup>2</sup> There are, however, some examples to the contrary, including the successful apprehension and imprisonment of Michel Samaha, former Lebanese minister and intelligence operative, who was arrested and imprisoned in August 2012 for his involvement in transporting explosives into Lebanon and for his attempt to destabilize the country. His arrest and imprisonment demonstrates a functioning and independent Lebanese judicial system and Hezbollah, the same party that invaded half of Beirut in 2008, could not protect Samaha, one of its closest allies in Lebanon.

major religious groups in government had therefore been breached. Subsequently, Lebanon's failure to ratify the treaty meant that it had to be forced through a Security Council resolution issued under Chapter VII of the UN Charter.

Giving that the crime had taken place on Lebanon's territory, the Lebanese judiciary has the natural right to adjudicate on such matters unless it is proven that the judicial system of Lebanon was unable or unwilling to prosecute this crime. Peter Fitzgerald, author of the first Report of the Fact Finding Mission to Lebanon found grounds indicating negligence on the part of Lebanon.

Although 'just' 22 people died, it is argued that this crime had the potential to not only cause a civil conflict, but perhaps even constitute a threat to international peace and security by stirring sectarian conflict that would have had a spill over effect, and gone beyond the Lebanese borders consequently causing grave destabilization in the Middle East. On 30 May 2007, the Security Council adopted Resolution 1757 under Chapter VII reaffirming that Hariri's assassination constituted a threat to international peace and security. An interesting question this paper seeks to answer is; why the Security Council considered international intervention necessary in this case when there are numerous other instances of threats to international peace and security in Lebanon where no action was taken and likewise, no tribunal was set up to investigate the matter (as for example Hezbollah taking over half of Beirut in May 2008).

Given Lebanon's violent history of crimes including numerous assassinations which have taken place, the Tribunal can be criticised as being selective and limited in jurisdiction, thus arguably perpetuating the publically perceived injustice and sectarian tensions.. Unlike previous tribunals established by the international community, the SLT is unique in the sense that despite mass atrocities committed in Lebanon, it has not been set up for the purpose of trying massive violations of international law, Its primary mandate however relates to a single attack, making it by far the narrowest of any international and internationalised tribunal to date. For example, the time frame of the mandate is said to have been highly selective and politicised. A UN official who was involved in the negotiations to establish the STL stated that its jurisdictional limitation were included in its mandate "*at the behest of the United States to ensure that the STL*

*could not take jurisdiction over the conduct of Israeli forces during the 2006 conflict between Israel and Hezbollah/Lebanon".<sup>3</sup>*

The STL is the first court of international character, adopting international procedures, and yet prosecuting Lebanese nationals. In defining terrorism, the STL applied the Lebanese definition and subsequently included binding international obligations and international conventions such as the Arab convention on terrorism and customary international law. Some aspects of the international definition of crime in relation to an act of terrorism coincide with the Lebanese one. For instance there is no requirement for the act to be criminal or transnational. Neither is there a requirement for an element of special intent to coerce as authority. Whilst there are a number of novel powers afforded to the STL there are also restrictions concerning its jurisdiction which make the STL 'special' in the sense that it is different from other similar tribunals:

- The STL is the only international tribunal with subject matter jurisdiction extending only to criminal offences defined by reference to domestic law.
- It is the first international tribunal with jurisdiction over offences of terrorism (albeit under domestic law).
- It has not been given responsibility to prosecute the most serious violations of internal criminal law such as war crimes, genocide and crimes against humanity.
- It can hold trials in absentia, meaning that the accused need not be present at the trial

The SLT has provoked discontent and a sense of injustice amongst the Lebanese population and the Lebanese government has been criticised for failing to reform local judicial institutions and ensure access to justice for all, despite this being the main focus of the conservative cabinets headed by Saad Hariri. However, the STL is considered a model for fair trial and procedural guarantees of international law and serves the purpose of promoting principles of justice which have been incorporated in the

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<sup>3</sup> Cerone, J. (2009) US Attitudes toward International Criminal Courts and Tribunals, in *The Sword and the Scales*, Edited by Romano, C., New York: Cambridge University Press, page179

Tribunal's Statute, such as, Art 15, 16 emphasising due process, fair trial and human rights.

Another novel feature of the court is that it can hold trials *in absentia*, meaning that the accused need not be present at the trial. The Security Council does not require any state apart from Lebanon, to cooperate with the Tribunal by handing over suspects or providing evidence. There are practical problems related to the concept of *trial in absentia*. Although used in Nuremberg and in many civil law systems, as well as under Lebanese law (as is evident in Lebanese Penal Code of 1943), trial in absentia was never used again for the purpose of international criminal proceedings. The provision allowing a *trial in absentia* (Art 22 of the Statute) is contentious and arguably fails to comply with human rights law especially when the accused is in the hands of certain state authorities who refuse to hand him over to the tribunal. The Trial Chamber decided on 20 December 2013 to try Hassan Habib Merhi in his absence as it concluded that all reasonable efforts had been made to secure his presence. Although not in the hands of state Authorities, Merhi was held by Hezbollah refused to hand over to an 'unjust court'.

A number of issues surrounding the functioning of the court and its powers have become apparent since its creation, which may imply the force of political motives outweighing judicial rigor, scrutiny and independence. A breach of Lebanon's sovereignty has potentially been committed through the unlimited access of UN investigators to Lebanese official records. In 2009 the Beirut office in for the Prosecutor in Lebanon reportedly asked the Lebanese ministry of interior to provide an unlimited number of fingerprints of Lebanese citizens, as well as access to university students' records and telecommunication records.

Additionally/furthermore , there were violations of Lebanese law by the UN Independent Investigation Commission for Lebanon. In the first report of the UN International Independent Investigation Commission dated 20 October 2005, the Commissioner published details of the investigation conducted by the Lebanese authorities including the names of more than 25 witnesses. This violated article 53 of the Lebanese criminal code, which should have been respected by the UNIIIC according to articles 2 and 4 of the Memorandum of Understanding between the Commissions' Commissioner and the Lebanese government. Art 53 of the Lebanese Code of Criminal Procedure code states

that the investigation shall remain confidential until such time as the case is referred to the trial court, and that anyone breaching confidentiality should be liable to prosecution. Statements of witnesses who gave testimony to the Commission before the creation of a witness protection programme were published, and one of the witnesses; Gibran Tueni, was assassinated in December 2005.

The telecommunication data relied on as evidence by the STL was described as questionable. On 23 November 2010 the telecommunication committee at the Lebanese parliament held a press conference during which Lebanese telecommunications minister Charbel Nahhas said that the circumstantial evidence by the first STL Prosecutor (Daniel Bellemar) backed up by cell phone data was unreliable. Several telecom experts at the conference presented 7 hypothetical cases in which data connected to cell towers and mobile phones could be altered by Israeli intelligence to the extent that Israel's infiltration made the data lose its reliability. Imad Hoballah head of the Telecommunications Regulatory Authority stated that an investigation was carried out by the Lebanese Army Intelligence which found that phones were tampered with by Israeli intelligence.

Another issue to consider is the prosecutorial mandate of the STL. It has no *locus standi* to prosecute a witness giving false evidence. In relation to the disclosure of confidential records, the UN regulations apply, meaning that if confidentiality rules are violated, it would not be considered a criminal offence but merely an administrative misconduct.

Despite the Lebanese history of assassinations, serious crimes and the abuse of human rights, many argue that there was an absence of accountability, truth seeking and international intervention in Lebanon. It therefore prompts the question of why justice being pursued in the case of Hariri but has been refrained from in many other cases of similar gravity? For example, Imam Musa el Sadr was kidnapped in 1978 by the Gaddafi? regime and no international tribunal set up to prosecute those responsible. In Lebanon, a number of amnesties were granted for acts of a similar gravity. One such example was passed in 2005, five months after the assassination of Hariri by a parliament elected in May 2004 dominated by Hariri's political allies. It amnestied Samir

Geagea, a Lebanese Politician and senior figure of the March 14 Alliance, for five specific sentences against him. In one of those cases, he was sentenced by the judicial council, Lebanon's highest judicial authority, for the assassination of the Prime Minister Rashid Karami former Lebanese Prime Minister and others in 1987. He was firstly sentenced to prison for 10 years and then amnestied. Michel Aoun, former Lebanese Army Commander and now a politician and leader of the Free Patriotic Movement, who assassinated Rene Mouawad, former President of Lebanon was amnestied in 2005. President Bachir Gemayel was assassinated in 1982 and the assassin Habib Shartouni was arrested, prosecuted and sentenced for life. However, he was kidnapped by the Syrian Special Forces who took him to Damascus where he has lived since.

This long list of political assassinations has been used as evidence of the politics associated with selective justice both locally and within the UN Security Council. It is argued that despite the many political or religious leaders that have been victims of assassinations, an international tribunal was only set up to investigate the assassination of Hariri. However, these assassinations are different from the Hariri assassination. This is because unlike in Hariri's case, the perpetrator was known by the Lebanese authorities. Secondly, Hariri's assassination was committed in times of peace whilst the vast majority of the other assassinations and crimes took place during the Lebanese civil war. The perpetrators were granted amnesty as deemed necessary for future peace and stability. Thirdly, some perpetrators had even faced prosecution, although unsuccessful. To summarise, in the examples mentioned above those responsible were identified, prosecuted and/or amnestied. Hariri's assassination should therefore not be used as a basis to suggest that the international community has been politically selective in its decision to set up a tribunal to investigate Hariri's murder as opposed to other Lebanese assassinations.

Security Council member states, who voted for the establishment of the Tribunal, have also political expectations and interests in the indictments filed and verdicts reached. It was argued that the US, through its political pursuit of the establishment of the STL, intended to extend its foreign policy. The Bush administration, along with France, viewed the establishment of a tribunal as part of its wider strategy to pressure Syria to abandon its alleged support for extremist groups across the region. However, the Security Council failed to compel its own members to cooperate with the STL. In 2011,

the STL President (Antonia Cassese) stated that in the absence of a binding Security Council resolution to enforce cooperation and due to the peculiar legal position of the Special Tribunal, no solid legal framework could be established for cooperation with states other than Lebanon. He also explained that various states refused to sign a cooperation agreement with the STL because of 'domestic difficulties'. Instead, they offered to cooperate 'informally and on a case by case basis' thus providing opportunities for selective cooperation based on political interests.

In addition to promoting international justice principles in the Middle East, Lebanese and non-Lebanese players arguably saw its establishment as an opportunity to pursue their interests including revenge, accountability and the reinforcement of Lebanon's sovereignty. In particular, it is suggested that France and the US sought to strengthen a pro-western alliance and political realignment in Beirut whilst weakening Syrian dominance in Lebanon. It was initially widely assumed that Syria's involvement could and would be proved. However, it soon became clear that operatives belonging to the Shiite movement were to be the first to be indicted.

In 2004, Syria's efforts to amend Lebanon's constitution and prolong its president's term had a negative impact on Hariri's relationship with Assad. National interests include the March 14 Alliance, a collation of Lebanese political parties, which once saw the STL as an instrument in the domestic politics and as a tool with which to curb the Shiite movement. On an international level, President George W. Bush's administration accused Syria of assisting foreign militants in Iraq, armed Palestinian groups and Hezbollah. France had a historical interest in Lebanon and a strong connection to several Lebanese communities. The French President, Jacques Chirac, who had close personal ties to Hariri, grew increasingly disillusioned with Bashar al-Assad as a result of Syria's policies toward Lebanon. Saudi Arabia sided with Hariri, its principal Lebanese ally, in his struggle with Damascus. Israeli feared Hizbollah's expanding its military arsenal.

These political concerns resulted in the adoption of UN Security Council Resolution 1559 on 2 September 2004. It requested the withdrawal of all remaining foreign forces which was arguably targeted at Syrian troops and the disarmament of all Lebanese and non-Lebanese militias, which can be construed as a clear reference to Hezbollah,

amongst many others. It further called for the restoration of the country's territorial integrity, full sovereignty and political independence, as well as presidential elections 'according to Lebanese constitutional rules devised without foreign interference or influence'. The resolution was in clear contravention of Syrian attempts to extend President Emile Lahoud's mandate. The following day Syria pressured Hariri into agreeing to extend Lahoud's mandate (who was the President of Lebanon until 2007) in response to which Hariri resigned as prime minister on 21 October. Hariri's assassination took place against this backdrop. On 15 February, the day after Hariri's murder, the U.S. recalled its ambassador from Damascus and Syria was indirectly blamed for the attack.

Resolution 1559 was a way to re-establish Lebanon's sovereignty yet avoiding a full-scale confrontation and rapid regime-change. Establishing an international commission of inquiry into the assassination was seen as sufficient to place Lebanon in a pro-Western influence, weaken the Syrian regime, limit its influence over Lebanon and confront its hostile regional policies towards Iraq and Palestinian groups. In April 2005, Syria formally withdrew its military and security assets.

A fact-finding mission led by Peter Fitzgerald was appointed by UN Secretary General Kofi Annan. Fitzgerald's report dated 24 March 2005 stated that Syria bore 'primary responsibility for the political tension that preceded the assassination of the former Prime Minister and that the Lebanese security apparatus, which operated under Syrian control, had fail to investigate the murder and attempted to cover up potential evidence.'

International justice is always a form of international intervention and will carry with it certain political elements. In this instance, a strong case can be made that the international justice mechanisms are used to intervene in the internal affairs of that country for political reasons and perhaps also for the purpose of maintaining international peace. Political aspirations, both national and international, have played a major role in the establishment of the Tribunal which has been influenced by politicised selective matters to serve the interests of major external powers.

However, although the question of whether the STL could cause political instability is a legitimate concern, it may be time to break the vicious circle of impunity and revive a

culture of justice. Some argue that the creation of the STL has stirred more tensions than secured peace. Nevertheless, it can be said with a certain degree of certainty that the establishment of the STL contributed to the withdrawal of Syrian troops from Lebanon and arguably worked to avoid civil war in Lebanon and Syria which was likely to have had a spill over effect on the rest of the Middle East.

Despite the tribunal's creation being a product of political motivation as opposed to the pursuance of justice, the STL can and should still be based on strict adherence to the highest international standards of criminal justice as envisaged by UN Security Council Resolution 1757. Whilst the establishment of the STL may have been political, it should not influence its functioning as an independent, truth and justice seeking body which promote fair trial and the rule of law. The STL can, if it adheres to good standards of international judicial mechanism contribute to promoting justice and trust amongst the Lebanese people regardless of the STL's findings. Challenges in doing so are the issues already addressed above highlighting how international interference of a political nature can compromise judicial independence and fairness. These include issues regarding the lack of international cooperation and enforcement of judgments, unreliability of evidence, and complexities in the legal framework, the lack of national ownership or influence on the international legal mechanism and the inability to reach a local credibility of the STL as a reliable and legitimate judicial institution. Whether the STL can live up to these challenges remains to be seen.