

Assessing the Political Acceptance of Hybrid Courts in Fractured States

The Case of the Special Tribunal for Lebanon

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1. Introduction

Established in 2007 under UN Security Council (UNSC) Resolution 1757, the Special Tribunal for Lebanon (STL) seeks to prosecute the perpetrators of Lebanon's Prime Minister Rafiq Hariri's murder on February 14, 2005. Even though his legacy remains contested, Hariri had established himself as the father of post-war Lebanon and of its reconstruction.² The STL belongs to the typology of hybrid or internationalised courts (Wetzels and Mitri, 2008: 81). Such courts, which emerged at the end of the 1990s, are credited with devising 'judicial accountability-sharing' between the domestic state and international criminal justice (Holvoet and De Hert, 2012, 229). Lebanon's tribunal promises to establish a justice mechanism and to catalyse a 'demonstration effect' (Wierda, 2007, 1078) in a polity that has been highly prone to political assassinations (Knudsen, 2010). At the same time, it was expected that Lebanon's fractured context and politics of sectarianism which pits factions against each other would make the tribunal's mission extremely complicated (Tolbert, 2014, 2).

Notwithstanding Lebanon's political context, the tribunal's emergence and implementation have fuelled vociferous debates in academic circles. It has introduced the tribunal mechanism for the first time in the Middle East, extending its use to the context of terror (Abboud & Muller, 2015). It has also triggered critical reactions on the 'syndrome of one-time exceptions' and its internationalisation (Mugraby, 2008). Although Lebanon has a history of political assassinations, the STL restricts itself to Hariri's murder and to a string of assassinations and assassination attempts that surround it in the period from October 2014 to December 2015. As the tribunal was based on Chapter VII and not on an agreement with the Lebanese state,³ it has thrown the connection between terrorism and international intervention in domestic affairs into sharp relief (Abboud and Muller, 2015).

The chapter contextualises the Tribunal within Lebanon's politics of power sharing and assesses the extent to which it has secured political acceptance. Determining political acceptance revolves around gauging the extent to which the Tribunal has gained approval in Lebanon's policy spheres in which the powerful often clash over fundamentals (Haddad, 2009).

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² Hariri was Lebanon's Prime Minister from 1992 until 1998, and from 2000 until his resignation in 2004. He is credited with putting Lebanon on the path of post-war economic growth, but his economic policies have been criticised for widening the disparities between poor and rich and neglecting social welfare and public sector programmes.

³ The Lebanese Government could not ratify the agreement for the Tribunal due to political divisions over its creation. The Speaker of Parliament Nabih Berri failed to convene the parliamentary session tasked with signing the treaty.

Lebanon's political system was envisioned as an example of power sharing, favouring the principles of pluralism, communal autonomy, and elite accommodation (Lijphart, 1977). Muslim and Christian parliamentarians are proportionally represented in the legislature. Sectarian quotas regulate civil service appointments, and communities have their own religious courts, schools, and universities. The Maronite Christian President, the Sunni Prime Minister and the Shiite Speaker of Parliament are supposed to form a cartel tasked with facilitating inter-communal coexistence. In practice, however, power-sharing arrangements have, since the birth of the Lebanese state in 1943, been prone to deadlock. The sectarian-based political system heightens divisions and power struggles.

This chapter explores in particular how the Court's legal reality interacts with Lebanon's political system, and which dynamics and stakeholders shape its acceptance or lack thereof. It argues that the STL has, over time, become a nationally divisive institution that has undermined coalescence, considered to be a primary requisite for power sharing in divided societies (Lijphart, 1977). Key political stakeholders, principally Hezbollah, the Shia political party that has evolved into Lebanon's most powerful regional and domestic player, have cast a pall on the tribunal's legitimacy. They have argued that the Court impinges on Lebanon's sovereignty and serves foreign interests.

Against this backdrop, a chasm has formed between the tribunal's normative objective to end impunity and Lebanon's politics of power sharing which can only smoothly function in the absence of heavy external loads and the avoidance of divisions between the political leaders (Fakhoury, 2009).

The chapter is structured as follows. The first part looks into the circumstances underlying the STL's emergence. It sheds light on its mandate, structure, and course of investigations. The second part analyses how Lebanon's political establishment has been, since the STL's birth, divided between those who have endorsed it and those that have decried its illegal and polarising nature. It further analyses why and how the tribunal has evolved into a divisive policy item in the context of Lebanon's political institutions. It explores the factors that have led to reducing the salience of the STL mechanism in Lebanon's policy spheres. More particularly it draws attention to the circumstances under which the onset of the 2011 Arab uprisings and the Syrian war have affected Lebanon's balance of power, displacing the STL from centre- to backstage. The conclusion reflects on the implications of STL's contested acceptance for Lebanon's polarised polity, and conveys broader insights on the potential of hybrid tribunals in divided societies.

2. The Emergence, Development and Structure of the Special Tribunal for Lebanon

In the wake of Hariri's murder, in February 2005 the UN dispatched a fact finding mission in response to the then Omar Karamé's government's request. The mission concluded that Syria was largely responsible for the tensions that led to Hariri's murder. Led by anti-Syrian Prime Minister Fouad Siniora, in December 2005 the Lebanese government addressed a letter to the UN Secretary General calling for the establishment of an international tribunal that could prosecute the criminals responsible for the assassination. There was also an emerging

consensus that Lebanon's judiciary system would be unable to adjudicate the complex case on its own (Tabbarah, 2014, 35).

In March 2006, the UNSC approved Resolution 1664 acknowledging the Lebanese government's request to establish a court. In the wake of this resolution, a series of negotiation rounds took place between the UN authorities and the Lebanese government, but the Lebanese parliament failed to secure the approval of all parliamentary blocs over a ratification treaty. Consequently, in May 2007, the Security Council drew on its enforcement powers in Chapter VII and passed Resolution 1757.⁴ The court and its statute⁵ came into force on June 10, 2007. At the time Resolution 1757 was approved, the United States held the UNSC presidency (ICTJ, 2008, 10). The court began its investigations on March 1, 2009.

With headquarters in Leidschendam in the Netherlands and an investigative office in Beirut, the STL is classified by the Oxford Companion of International Criminal Justice as an example of a hybrid court (Holvoet and De Hert, 2012). These have both merits and drawbacks. They seek to harmonise international and domestic criminal justice, and may connect with local contexts on a deeper level than international tribunals. Due to their mixed nature, they may be better equipped than international criminal bodies to detain and convict individuals and investigate cases on the ground (Berti, 2013, 117–120). At the same time, limited international engagement and non-binding cooperation on the part of third states and international entities pose major challenges to the mission, especially when it comes to gathering evidence and enforcing arrest warrants. In polarised societal settings, political leaders and local populations are likely to perceive such courts as divisive and politicised.

The Court fits the description of hybrid tribunals insofar as it incorporates both international and national structures, staffing, and features of criminal justice. The STL's inception derives from cooperation between the Lebanese government and the international community. Its international character was made explicit in the request which the Lebanese government submitted to the UN Secretary-General. Established by the UNSC and headquartered in Europe, the STL relies on the joint engagement of Lebanese and international judges and staff in its Netherlands and Beirut offices (Humphrey, 2011, 15).

The STL is structured around four organs and a management committee.⁶ The registry is in charge of administration, and the chambers are divided into three sections: one for a pre-trial judge; a trial Chamber which consists of one Lebanese, two international and two alternate judges; and an appeals chamber composed of two Lebanese and three international judges. With regards to the judges' appointment, the Secretary General selects a panel that interviews and recruits Lebanese and international judges in addition to an international prosecutor (ICTJ, 2008). The Office of the Prosecutor includes both the prosecutor and a deputy prosecutor with international and Lebanese staff. In charge of the investigation leading up to the filing of an indictment, the Office of the Prosecutor collects evidence, conducts on-site investigations, interviews suspects, and ensures the safety of all witnesses. Independent of other organs, the Defence Office ensures fair and effective defence, safeguarding the rights of suspects.⁷

⁴ Resolution 1757 (2007): <http://www.stl-tsl.org/en/security-council-resolution-1757>.

⁵ Tribunal Statute: <http://www.stl-tsl.org/en/documents/stl-documents/statute/223-statute-of-the-special-tribunal-for-lebanon>.

⁶ Special Tribunal of Lebanon, <http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl>.

⁷ See Special tribunal of Lebanon, Structure of the STL, <http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl>.

Founded by the UN Secretary General on February 13, 2008, the management committee is responsible for policy direction and for giving advice on all non-judicial aspects of the tribunal's work. It receives and considers progress reports from the STL, provides policy advice for non-judicial questions, approves the annual budget and funding, and makes financial decisions (ICTJ, 2008, 15)

The STL maintains strong links with UN institutions, yet it remains a distinct institution that benefits from limited international cooperation. Resolution 1757 and the STL Statute do not specify that countries other than Lebanon ought to cooperate with the Tribunal. The STL cannot therefore force other states to cooperate in collecting evidence or enforcing arrest warrants, but it can ask the Security Council for help when it comes to convincing reluctant states to respond to STL requests for assistance (ICTJ, 2008). The STL has no duty to report to the General Assembly (ICTJ, 2008, 15), but the Management Committee occasionally reports to member states interested in supporting the tribunal. While 51% of the STL is funded through voluntary contributions made by UN member states, the remaining 49% comes from the Lebanese government. In 2015, the overall budget of the Special Tribunal was at €59.9 million.⁸

The STL conducts all four phases of investigation, pre-trial, trial, and appeal. It applies principles of due process of law and standards of criminal justice adopted in international judiciary bodies. It also holds its trials outside Lebanon, but makes sure that Lebanon's domestic substantive law is brought to international criminal justice.⁹ While it incorporates aspects drawn from Anglo-American or common law system, it draws on procedural elements similar to the Romano-Germanic, or the civil law system on which the Lebanese legal system is based (ICTJ, 2008, 25).

The core of the tribunal's mandate is defined in Article 1, stipulating that the STL has jurisdiction to try all those alleged to be responsible for the attack on February 14, 2005 and the killing of Prime Minister Hariri. Other attacks of similar nature that have taken place in Lebanon between October 1, 2004 and December 12, 2005 or at a later date decided by the UN and Lebanon (with the approval and consent of the UNSC) may be tried as well.¹⁰ Compared with other international courts and their mandates, the STL's jurisdiction is the narrowest of its kind (ICTJ, 2008, 10). Articles 314-316 of the STL Statute stipulate that the court can try domestic crimes and acts of terrorism. According to Articles 547-568, crimes against life and personal integrity that include homicide and bodily harm may also be tried, as well as illicit associations of criminals, and criminal conspiracy (Articles 335-339). In addition, Articles 398-400 specify that failures to report crimes and offenses may also be tried.¹¹ According to Article 6, the government can grant amnesties for these crimes, and it can also disregard any amnesties granted.

The STL is the first international tribunal that does not include core crimes against humanity in its jurisdiction, but focuses on acts of terrorism (Wetzels and Mitri, 2008, 101). Still, reference to regional and international instruments on terrorism such as the Arab Convention on the Suppression of Terrorism is not been included in the Statute (ICTJ, 2008, 10).

⁸ Special Tribunal of Lebanon, 'Sixth Annual Report (2015-2014)', <http://www.stl-tsl.org/en/documents/stl-documents/presidents-reports-and-memoranda/3845-sixth-annual-report-2014-2015>.

⁹ Judge Ivana Hrdličková, presiding judge of the Appeals Chamber, President of the Tribunal, key note speech AUB, October 2015.

¹⁰ Special Tribunal of Lebanon, fact sheet, <http://www.un.org/apps/news/infocus/lebanon/tribunal/factsheet.shtml#top>.

¹¹ 'Statute of the Special Tribunal for Lebanon.' *Special Tribunal For Lebanon*, October 8, 2015. <http://www.stl-tsl.org/en/documents/stl-documents/statute/223-statute-of-the-special-tribunal-for-lebanon>.

The Court's first action in April 2009 was to release the four pro-Syrian generals¹² who had been detailed for four years by the Lebanese Armed Forces. The UN fact finding mission had made accusations linking the four generals to the murder case, but the tribunal found no evidence justifying their involvement. Once the STL had begun its investigations, it ordered their release after establishing that there were no charges against them. On June 28, 2011, the STL issued four indictments related to Hariri's murder. The indicted were Salim Jamil Ayyash (1963), Mustafa Amine Badreddine (1961), Hassan Habib Merhi (1965), Hussein Hassan Oneissi (1974), and Assad Hassan Sabra (1976), all Lebanese nationals born in the Beirut area and related to the Shia political party, Hezbollah. The most prominent individual among the indicted was Mustafa Amine Badreddine, a Hezbollah commander believed to have been the mastermind behind the attack. Trials started in absentia on January 16, 2014. Badreddine, who has been leading Hezbollah's military contingent in Syria since the party's involvement in the post-2011 Syrian war, was killed in an explosion in Syria in May 2016. His killing throws the unravelling of the court's rulings into greater uncertainty.

3. The Contested Acceptance of the Court within Lebanon's Political Landscape

The STL promised to bring the rule of law and justice and to strengthen state sovereignty after Hariri's murder and in the wake of Syria's withdrawal (Humphrey, 2011, 19). In reality, it has not secured the approval of all political stakeholders. To understand why the court has secured only partial political acceptance, it is important to embed its legal structures and developments in Lebanon's history of political dissent, and within Lebanon's politics of power sharing. It must also be contextualised within the broader political circumstances that have led to its establishment. Those circumstances have been paramount to its transformation into a site of legal and political contestation (Sriram, 2010; Burgis-Kasthala 2013). They have also shaped its *sui generis* legal character (Tabbarah, 2014).

After the 1975-1990 war, which saw a complex entanglement of domestic and regional state and non-state actors on Lebanese ground, the Ta'if Accords in 1989 ushered in a post-conflict era. That era has, however, had a mixed record. State institutions have been re-established, albeit at the expense of a supra-sectarian identity and efficient governance. The Lebanese state's weak sovereignty and fragile monopoly over the legitimate use of power have been key arenas of contention since 1990. Though Lebanon's post-war leaders hurried as early as 1992 to organise elections, several factors thwarted the country's democratisation. Institutions have been subservient to sectarian and clientelistic loyalties (Salloukh, 2010). Furthermore, the ratification of the Ta'if Accords has not resulted in the withdrawal of all foreign forces or the demilitarisation of all armed groups.

The Accords granted Syria a privileged status in Lebanon's domestic affairs. In the new political settlement, Syria arose as the key external hegemon that would ensure stabilisation and redeployment of state authority. According to the Agreement, Syrian troops were supposed to be redeployed in 1992. They left only in April 2005 after national and international divergences over their presence had dramatically heightened.

¹² The four Lebanese generals, Jamil Sayyed, Ali Hajj, Mustafa Hamdam and Raymond Azar, were high profile security officials.

The Lebanese state has, since the end of the civil war, shared its monopoly over violence with Hezbollah, Lebanon's Shia political party that possesses a military wing. At the outset, the rationale for Hezbollah's militarisation was linked to Israel's occupation of southern Lebanon. In the wake of Israeli withdrawal in 2000, Hezbollah stated that it would not disarm until the Shebaa farms, a contested piece of land in Lebanon, were liberated. More significantly, it has depicted its arsenal as indispensable deterrence against the Israeli threat in the context of a fragile state.

In 2004, the decision of the Syrian regime to extend the mandate of President Emile Lahoud divided Lebanon into two rival political factions: the anti-Syrian group which called for the end of Syria's hegemonic role, and the pro-Syrian group which praised Syria's role in stabilising Lebanon. The United Nations adopted Resolution 1559, which called for the disarmament of all military groups and the withdrawal of foreign forces. However, the Resolution heightened polarisation in the country. In February 2005, the assassination of Premier Rafiq Hariri, the catalyst for establishing the tribunal, led to a massive wave of protest. Amid international and particularly US pressure, Syrian troops withdrew in April 2005, but that withdrawal however ushered in more than 10 years of political confrontation between pro- and anti-Syrian factions, respectively dubbed as the March 8 and March 14 Alliances.

The March 8 Alliance is led by Hezbollah and its Shia allies, including the Amal party and the Christian-based Free Patriotic Movement. It was named after the mass demonstration that pro-Syrian loyalist groups organised on March 8, 2005. The demonstration defended Syria's role in Lebanon and credited the latter with stabilising Lebanon. In response to the pro-Syrian protest, anti-Syrian groups organised a counter-demonstration on March 14, 2005, condemning Hariri's murder and calling for an immediate end to what they termed the Syrian occupation. Led by the Sunni Future Current that former Prime Minister Hariri established, the March 14 Alliance groups the Current's Sunni allies, the Christian party the Kata'ib, and the Lebanese Forces.

Both alliances have held contrasting stances over high politics issues such as defence strategy and Hezbollah's military wing. The duality has, since 2005, led to institutional gridlock. The 14 March Alliance has opposed Hezbollah's military wing, which it considers a serious challenger to Lebanon's sovereignty. The opposing alliance has defended Hezbollah's role in protecting Lebanon against external threats, namely Israel. Both groups have also coalesced with rival states leading to the so-called regional Sunni-Shia axis. The March 14 Alliance has ties to Saudi Arabia, and the March 8 Alliance to the Syrian regime and Iran.

The STL issue cuts to the core of the divide. While the anti-Syrian grouping represents the tribunal as a justice mechanism set to end impunity in Lebanon, the pro-Syrian coalition has constructed it as a doubtful externally-imposed mechanism that foments strife, undermines Lebanon's sovereignty and guarantees the interests of external powers namely the USA and Israel.

Ever since the government submitted a letter to the Secretary General requesting a tribunal of an international character, the issue has stirred fierce debate between the two contending factions. The reluctance of the tribunal's opponents or of the March 8 Alliance to cooperate has affected the course, pace of investigations, and the STL's capacity to enforce arrest warrants.¹³ It

¹³ For instance, after the tribunal had issued the indictments and demanded that the Lebanese authorities arrest the four Hezbollah-linked

has also undermined the tribunal's ability to enforce justice without stirring disagreements among political leaders and internal strife.

The differences between these coalitions have to a great extent shaped the tribunal's perception within Lebanon's public spheres. People have, for instance, questioned the pertinence of a tribunal that heightens tensions and requires onerous funding (Blanford, 2014; Al Jadid, 2012).

3.1 Political Divergences over the STL's Emergence and Trajectory

In 2005, a constellation of international and domestic events facilitated the STL's emergence. A European-US convergence around the emancipation of Lebanon from Syria's grip had started to emerge by 2004 (Fakhoury, 2009). Following the Hariri murder, the international community hurried to condemn the crime and stated its intent to back the Lebanese government in its determination to prosecute the perpetrators behind the crime.

At a domestic level, the quest for justice in the wake of the Hariri murder reflected a burgeoning grassroots and elite readiness to inaugurate a new phase in Lebanon's troubled post-war history. The 2005 trans-sectarian mass demonstrations triggered by Hariri's murder had a dual claim: the inauguration of a new era based on 'justice' following the murder, and the reestablishment of Lebanon's sovereignty. The people who took to the streets chanted slogans for two months demanding the truth behind Hariri's murder and calling for accountability. Under public pressure, the Karami Government agreed to involve the UN in a fact finding mission. Following Syria's withdrawal from Lebanon, the government led by the March 14 Alliance after the latter's triumph in the 2005 parliamentary elections made punishing the perpetrators of the Hariri assassination a key priority. What added to the determination of the government was a string of political assassinations that targeted eminent anti-Syrian national figures.¹⁴

Despite the favourable constellation that led to the tribunal's inception, the STL has quickly evolved into an issue of disagreement. The March 8 Alliance, which since 2005 has become the key opposition party within the Lebanese government only to dominate it by 2011, has unwaveringly denounced the tribunal's mission for its impinging on Lebanon's sovereignty and for its suspicious international agenda. The Alliance, and more specifically Hezbollah, has argued that, although they do not in principle oppose a trial, they reject Resolution 1757 for its illegal and imposed character (Wierda et al., 2007, 1075). Doubting the motives underlying international involvement, Hezbollah has represented the tribunal as an American Zionist project seeking to undermine the 'resistance' against Israel, especially given that the inception of the tribunal happened in the wake of the 2006 Hezbollah-Israeli war (Sassine, 2011; Slim, 2010).

In the lead up to the 2011 indictments, which have targeted the party's constituency, Hezbollah has categorically denied the party's involvement in the murder. It has also gone so far as to demand the dissolution of the STL for its illegitimate character (Chulov, 2010). The party also launched a fierce political and media campaign¹⁵ seeking to discredit the STL (Slim, 2010). In

individuals implicated in the assassination, Hezbollah's leader, Hassan Nasrallah, ruled out their arrest (Alamuddin and Bonini, 2014, 69).

¹⁴ A string of assassinations targeting prominent national figures such as Gebrane Tuani, Samir Kassir and Pierre el Gemayel have rocked Lebanon in the wake of Hariri's murder and Syria's withdrawal.

¹⁵ See for instance, 'Hezbollah chief renewed attack against Lebanon tribunal' *Ya Libnan*, December 16, 2010

the wake of the indictments, Hezbollah's leader, Hassan Nasrallah, delivered a speech on June 2, 2011 that sought to undermine the Tribunal's credible legal character. In the speech broadcast by Al Manar, Hezbollah's TV station, Nasrallah reduced the STL to an 'American-Israeli conspiracy' and dubbed both the 'rulings' and accusations [as] invalid' (Bergman, 2015). To undermine the evidence presented by the STL, Hezbollah has even showcased a footage presenting evidence of Israel's involvement in the assassination (Sassine 2011). Escalating his threat rhetoric, Nasrallah stated that those who would try to arrest any of its members would be punished.

Hezbollah's allies in the March 8 Alliance have also decried the alleged STL's politicisation and instrumentalisation by foreign powers. In 2009, the leader of the Free Patriotic Current, Michel Aoun, withdrew his support from the tribunal, reproaching it for taking a politicised turn.¹⁶ Amid divisions over STL funding and the 2011 indictments, the Shia Amal Party has called for the March 14 Alliance to free itself from the grip of 'foreign agendas.'¹⁷

In contrast, the March 14 Alliance, mainly composed of Sunni and Christian parties and led by the Sunni Future Current established by Rafic Hariri, has been highly favourable to the tribunal, viewing its inception as a triumph against the 'culture of impunity' (Blanford, 2014). Unlike its rival, it welcomed the Resolution prompting its establishment. In its view, Hezbollah's opposition to the tribunal is based on a political rationale, namely the party's determination to protect its staunch ally, the Syrian regime, initially the prime suspect in Hariri's murder (Wierda et al., 2007, 1075).¹⁸

Reacting to the rival coalition's demand that the Lebanese government disassociate itself from the STL, Saad Hariri, son of murdered premier, has backed the tribunal's legal course and its impartiality, warning against the substitution of the 'logic of justice' by the 'logic of force'.¹⁹ At a rally marking the ninth anniversary of Hariri's assassination in 2014, the March 14 Alliance has gone so far as suggesting submitting to the UN a request that the STL expand its jurisdiction into assassinations after December 2005.²⁰

3.2 The Consequences of Contending Narratives on Lebanon's Power Sharing

Contention over the STL has not remained restricted to leaders' speeches. It has had tangible political implications, contributing to gridlock and the collapse of power-sharing. In November 2006, as the Council of Ministers was about to sign the UN request to start negotiations over the creation of the STL, the five Hezbollah-linked ministers resigned. In 2007, the parliamentary blocs representing the March 8 Alliance refused to sign the ratification treaty, making the Security Council draw on Chapter VII to enforce the establishment of the Court.

<http://yalibnan.com/2010/12/16/hezbollah-chief-renewed-attack-against-lebanon-tribunal/>

¹⁶ See 'Aoun withdraws supports for special tribunal,' *The Daily Star*, May 5, 2009, <http://www.dailystar.com.lb/News/Lebanon-News/2009/May-05/53619-aoun-withdraws-support-for-special-tribunal.ashx>

¹⁷ See 'Berri attacks Hariri Tribunal and March 14', *Ya Libnan*, February 13, 2011 <http://yalibnan.com/2011/02/13/berri-attacks-the-hariri-tribunal-and-march-14/>

¹⁸ Throughout the years, the 14 March Alliance has depicted the Tribunal as a much-needed tool to prevent future assassinations and buttress the rule of law. It also argued that the Tribunal can strengthen the Lebanese state and reduce the influence of external state and non-state actors such as Syria and Hezbollah on the Lebanese polity. It has welcomed the process leading to the 2011 indictments as a historical moment for Lebanon and Lebanese justice.

¹⁹ See 'Hariri: threats won't bring down STL', *The Daily Star*, September 30, 2010, <http://www.dailystar.com.lb/News/Lebanon-News/2010/Sep-30/59373-hariri-threats-wont-bring-down-stl.ashx#axzz110FstnyP>

²⁰ See 'March 14 to Submit to U.N. Petition Asking STL to Probe All Assassinations of March 14 Figures,' *Naharnet*, February 14, 2014, <http://m.naharnet.com/stories/en/118747-march-14-to-submit-to-u-n-petition-asking-stl-to-probe-all-assassinations-of-march-14-figures>

The 2011 indictments led the March 8 Alliance to immediately demand that the Lebanese government cease its support for the STL and cut the tribunal's funding on the basis that the court lacked both legitimacy and credibility. In light of the government's continued endorsement of the STL, pro-Hezbollah ministers drew on their veto powers and withdrew on January 12, 2011. Their walkout led to the breakdown of the Saad Hariri cabinet. Three months later, the Sunni politician Najib Mikati managed to form an interim government. Still, the March 14 Alliance refused to join the newly formed cabinet, denouncing Hezbollah's boycott of the tribunal. Amid disputes over security officials' appointments and the promulgation of an electoral law, the cabinet resigned in March 2013. The March 14 Alliance's refusal to participate due to Hezbollah's boycott of the STL was another factor that had initially cast a shadow over the cabinet's survival. Devised as collegial arenas, Lebanon's cabinets are supposed to be representative of all sectarian and political currents.

The STL crisis has also constituted one of the burning discussion points in Lebanon's National Dialogue, a non-institutional platform uniting Lebanon's key communal leaders and to mitigate political divisions that have proven to be too intractable to be processed within Lebanon's formal institutions. Although a 2006 session succeeded in forging a nascent consensus around the Tribunal, subsequent rounds have failed to defuse the tug-of-war between the two alliances. The failure of the National Dialogue to tackle divergences over the STL has undermined its initial mission of providing an extra-institutional conflict regulation method.

3.3 Scaling Down the STL's Resonance

As the STL issue has exacerbated elite adversarial attitudes, the fear that the tribunal could lead to internal strife has loomed large (Erdahl, 2014). This has prompted political actors to revert to the politics of accommodation at the expense of 'scaling down' the STL prominence. For instance, in the lead up to the indictments, Walid Jumblatt, Lebanon's Druze leader, declared that a tribunal leading to bloodshed was unnecessary (Khashan, 2011, 70).

While Saad Hariri has never disowned the tribunal, he has had to reconcile his desire to prosecute the perpetrators responsible for his father's murder with the politics of realism and consensus.²¹ In 2009, for instance, keen on restoring worsening relations with Syria and safeguarding his own political status, Hariri publicly apologised to Syria's President Bashar al Assad, and retracted the accusation that Syria was implicated in the murder. This 'exoneration' is thought to have tarnished the STL's aura of legitimacy within Lebanon's public and political spheres. Analysts have, in this regard, deplored Lebanon's political context which has reduced the STL to a 'political bargaining' matter (Sassine, 2011).

The STL's divisive impact and instrumentalisation by Lebanese political actors have to be understood in the broader context of Lebanon's political system which allocates status and power in accordance with sectarian visibility and the ability to maintain ties with external power brokers. Historically, leaders have traded good governance for political survival.

²¹ Journalist, interview with the author, April 6, 2016.

3.4 A Changing Post - 2011 Balance of Power: Trading Justice for Stability?

While the STL continues to be a polarising item, shifting dynamics of power and new political realities have lessened its policy salience, at least at the time of writing. The domestic balance of power that has affected the STL's rise and development in Lebanese politics has profoundly altered. In particular, the March 14 Alliance's supremacy, the main enabler behind the rise of the STL, has waned since 2005. Although it has emerged since 2005 as Lebanon's governing coalition, it has since lost some of its cohesion and has been vulnerable to rifts. Adding to this, parliamentary elections, which have previously confirmed the March 14 Alliance's supremacy, have not taken place since 2013. Today, the March 8 Alliance has become an incontestable political player. Its leader, Hezbollah, has emerged as a local and regional military and political actor (Worrall, 2013). Reaching out to the Christian community, Hezbollah has also signed a trans-sectarian coalition-building agreement with the Free Patriotic Current in 2006.

New international and regional dynamics have restructured Lebanon's policy priorities, reducing the prominence of the STL. The STL's emergence was coincident with an era of bold American engagement in the Middle East. This engagement, which at the time emboldened the March 14 Alliance to rally behind the STL, has sharply declined in recent years. Adding to this, broader turmoil has downplayed the immediacy of the STL issue in Lebanon's political arena. Following the 2011 Arab revolts, the small polity has been subjected to destabilising security and political spill over from surrounding upheavals. The inflow of more than 1.2 million Syrian refugees to Lebanon has strained the country's economy, and heightened hostilities between poor host and refugee populations. In 2013, Hezbollah officially declared its military involvement in Syria, proclaiming its intent to back the Assad regime and curb the influence of radical Islamists in Lebanon. Hezbollah's military encroachment in the Syrian conflict has since then strained national consensus.

Institutional deadlock has also hampered any progress on divisive issues. Due to the coalitions' conflicting preferences, parliament has failed since May 2014 to elect a president. As underscored before, Lebanon's worsening security situation against the background of Syria's war, and the inability to agree on an electoral law that could satisfy rival coalitions' interests have prevented parliamentary polls from taking place since 2013. To add fuel to the fire, the Lebanese state has, amid this political deadlock, neglected the provision of services to its citizens. An unparalleled waste crisis led in 2015 to massive protests during which citizens called for the resignation of government officials. Disputes over the allocation of landfill sites where the garbage can be processed, and struggles over presidential elections and security appointments have taken centre stage since 2016. In short, spill over from Syria's conflict and political feuding has diverted attention away from the STL. Although the 2011 indictments led to a temporary increase in media attention, it is no longer in the limelight.²² Syria's war atrocities have also overshadowed the tribunal's developments in Lebanon (Blanford, 2014).

In the context of polarisation and heightened security risks, Lebanon's leaders have favoured, despite institutional paralysis, an informal culture of consensus over loaded items (Fakhoury, 2015). It remains to be seen how the STL's legal developments will interact with Lebanon's polarised context. Still, it is expected that political leaders would seek to shield Lebanon from

²² Hilal Khashan, interview with the author, December 7, 2015, Beirut.

the growing risk of internal strife. This could entail scaling down the impact of the STL in favour of a politics of pragmatism.

4. Concluding Remarks: A Critical Appraisal of the STL and its Implications

This chapter has explored the circumstances under which the STL has arisen as a key item of conflict in Lebanon's politics. It has illustrated how, in the context of adversarial politics, the STL has only secured partial political acceptance. The March 8 Alliance's fierce opposition to the tribunal has affected its legitimacy and demonstrated that it could turn into a tool of strife. Divisions over the STL have also spilled over to the power-sharing executive, leading to the collapse of two cabinets since 2006. In this regard, the chapter has shown that the nature of Lebanon's power sharing, which leads to paralysis in times of discord and which requires the avoidance of zero-sum politics in times of strife, has necessitated deescalating the STL controversy. The chapter has also explored how the Lebanese state's overload due to the Syrian crisis has lessened the importance of the STL in Lebanon's policy discourse and agenda. Disagreement over the STL has not only prevailed within Lebanon's political sphere. A plethora of legal and political studies has unpacked the challenges facing the tribunal (Alamuddin et al., 2014; Burgis-Kasthala, 2013; Gardner, 2011; Eberling, 2008; Milanovic, 2007).

Of central importance is the Tribunal's narrow focus on one single crime. Due to its limited mandate, the STL has not engaged in the 'legacy of the past' (Sriram, 2010, 18), ignoring war crimes and crimes against humanity during the Lebanese civil war and post-war periods. Against this backdrop, some analysts have questioned the rationale behind singling out one specific period in Lebanon's history (Mugraby, 2008). The tribunal's narrow mandate has posed what Alamuddin and Bonini call 'a perception challenge' (2014, 58), making it vulnerable to arguments that it is politicised or that it was established due to specific international interests (Berti, 2013). Thus, the tribunal emerged against the backdrop of a series of interventions condemning Syria and seeking to enforce Hezbollah's disarmament (Abboud and Muller, 2015; Mugraby, 2008). By 2004, US-Syrian relations had deteriorated dramatically, and international determination to free Lebanon from Syria's grip was exceptionally bold (Fakhoury, 2009). Resolution 1757 did not originate in a vacuum but has succeeded to the US's 2003 'Syria Accountability and Lebanese Sovereignty Restoration Act' and the jointly prepared US-French Resolution 1559 which calls for the withdrawal of all military troops from Lebanon and the disarmament of Hezbollah (Mugraby, 2008). Scholars have questioned whether the inception of the STL against this background detracts from the Tribunal's impartiality, and whether the Tribunal could have been an international tool to weaken both Syria and Hezbollah (Abboud and Muller, 2015).

From a legal perspective, the use of Chapter VII to establish the Tribunal and its focus on one single crime have raised reservations on its partiality and illegality (Bouhabib, 2010). In this, for instance, it is argued that Resolution 1757 rests on a contradiction because it affirms its commitment to Lebanon's sovereignty, but enforces the application of the tribunal (Mugraby, 1998, 191). Legal scholars have also cautioned against the use of trials in absentia, and have called for minimizing them in the light of the STL experience (Gardner 2011; Jenks 2009). Moreover, the reluctance of some states to cooperate with the tribunal when it comes to

gathering evidence and the tribunal's inability to arrest indicted individuals arise as serious weaknesses (Alamuddin and Bonini, 2014, 68–69).

From a practical perspective, STL's lengthy proceedings and onerous costs have arisen as additional factors that have weakened public faith in the Tribunal's ability to bring justice (Blanford 2014; Berti, 2013: 117-120).²³ Furthermore, in a rapidly changing Middle East, Lebanon's emergency law tribunal risks appearing obsolete in the broader context of large-scale crimes committed in Syria. Discussions over the future establishment of a Special Tribunal for Syria (Borger, 2015) with a view to prosecuting perpetrators responsible for atrocities suggest that new realities might eclipse the relevance and timeliness of the STL.²⁴

Notwithstanding these critiques, analysts have emphasised its merits and contributions to international criminal law (Doherty 2011). The STL not only 'breaks new ground as an international effort' to end impunity for terror acts (Wetzel and Mitri, 2008, 81) but it also introduces innovative practices such as including witnesses in proceedings (Aptel, 2007). By promising to uncover the perpetrators accountable for a high-level assassination in a country with a long history of political assassinations, it has seriously raised the questions of impunity and deterrence.

The Tribunal holds powerful normative implications for contexts plagued by political violence and corruption. On the one hand, it is seen as a bold attempt to separate the rule of law from obstacles to justice in highly politicised contexts. In Lebanon, it introduced the first serious mechanism for tracking assassinations in a 'context with a grim record of unsolved assassinations' (Knudsen, 2010, 18). On the other, the Tribunal is credited with dispelling the relativistic argument that international law cannot be applied either in non-western contexts or in conflict-prone contexts.²⁵ Despite Lebanon's bleak judicial and legal record, the Tribunal has sought to implement standards of justice and principles of due process of law governing international courts,²⁶ and opened a debate over whether the idea of emergency law, which the STL falls under, can be interpreted as an attempt to transmute 'a political crisis in a legal matter' with a view to consolidating the rule of law and state sovereignty.²⁷

Rather than condemning the geopolitical environment that led to the emergence of the STL, some scholars consider the concordance of international powers over the Hariri case as a window of opportunity that the international community seized.²⁸ Those who view the STL as a much needed tool of justice argue that there should be no impunity for such crimes, notwithstanding the risk of politicisation.

In the context of such a mixed appraisal, as Hilal Khashan argued in an interview with the author, the STL should be regarded as an unprecedented legal exercise to break the cycle of

²³ The author has carried out various informal conversations with Lebanese citizens between September 2015 and April 2016.

²⁴ Journalist, interview with author, Beirut, April 5, 2016.

²⁵ Professor, interview with author, Beirut, April 2, 2016.

²⁶ UN Special Tribunal for Lebanon, Factsheet, United Nations, August 12, 2015. Retrieved from <http://www.un.org/apps/news/infocus/lebanon/tribunal/factsheet.shtml#top>.

²⁷ See argument discussed by Michael Humphrey in 'The Special Tribunal for Lebanon: emergency law, trauma and justice,' *Arab Studies Quarterly*, 33, 1 (2011): 4-22, 5.

²⁸ Professor, interview with the author, Beirut, April 2, 2016.

assassinations in Lebanon. Value should be ascribed to the principles of the investigation even though the tribunal has been 'a victim of Lebanon's political realities'.²⁹

It remains to be seen whether the tribunal can have the intended corrective or 'awareness raising' effects in the Lebanese context in which political solutions have usually overridden the rule of law (Mugraby, 2008). Against this backdrop, analysts have called on the STL to improve its ability to connect with the Lebanese people, debunk assumptions that it is biased, and establish itself as a credible entity through solid evidence (Bouhabib, 2010, 174).

Rather than casting a pall over the use of hybrid courts, the Lebanese case conveys key insights and lessons for improving their mechanisms in polarised settings. While this chapter does not seek to appraise the tribunal's legal developments, it has drawn attention to the tangled relationship between STL's political and legal realities as a major determinant of its acceptance. The STL's contested capacity to navigate the Lebanese system hints at the importance of consolidating international and domestic partnerships so that internationalised courts gain political acceptance.

In divided post-conflict societies which seek to shield themselves from the threat of renewed strife and which are normally vulnerable to geopolitical instability, pragmatic trade-offs must sometimes be made between imposing justice and achieving peace. Before establishing such mechanisms, domestic and international stakeholders should thoroughly explore the political conditions under which international criminal justice could turn into an emancipatory power rather than a strain on national consensus. Of prime importance seems to be the question of whether such tribunals can simultaneously enforce deterrence and act as methods of conflict regulation in post-war transitional processes.

Hybrid courts arise as powerful options for ending impunity, yet they may face much resistance in divided contexts where local leaders perceive internationalised mechanisms as external meddling and drivers of instability. Such courts may also elicit scepticism on the part of third states wary of the consequences of external intervention. The question is how to strengthen the local credibility of such courts and make them complement rather than supplant local ownership of the process of justice.

²⁹ Hilal Khashan, interview with the author, Beirut, December 7, 2015.

5. Bibliography

- Abboud, Samer N. and Muller, Benjamin J. 2013. 'Geopolitics, insecurity and neocolonial exceptionalism: A critical appraisal of the UN Special Tribunal for Lebanon.' *Security Dialogue* 44(5-6): 467-484.
- Alamuddin Amal. 2014. 'The relationship between the UN investigation commission and the Special Tribunal for Lebanon: Problems of principle and practice.' *The Special Tribunal for Lebanon Law and Practice*, edited by Amal Alamuddin, Nidal Nabil Jurdi, and David Tolbert, 5-72. Oxford: Oxford University Press.
- Aptel, Cécile. 2007. 'Some innovations in the Statute of the Special Tribunal for Lebanon.' *Journal of International Criminal Justice* 5:1107-1124.
- Bergman, Ronen. 2015. 'The Hezbollah connection.' *New York Times Magazine*, February 15, 2015.
- Berti, Benedetta. 2014. 'Balancing justice, stability and legitimacy: Lebanon and the UN Special Tribunal – Understanding the domestic impact of international criminal justice'. *Mediterranean Politics* 19(1):117-133.
- Blanford, Nicholas. 2013. 'Beirut blast silences senior anti-Syria voice, echoing past assassinations.' *The Christian Science Monitor*, December 27, 2013.
- Blanford, Nicholas. 2014. 'Lebanon tribunal makes risky bid to try Hezbollah for Hariri killing'. *The Christian Science Monitor*, January 15, 2014.
- Borger, Julian. 2015. 'Call for Special Tribunal to investigate war crimes and mass atrocities in Syria.' *The Guardian*, March 17, 2015.
- Bouhabib, Melia Amal. 2010. 'Power and perception: The Special Tribunal for Lebanon.' *Berkeley Journal of Middle Eastern & Islamic Law* 3(1): 173-205.
- Burgis-Kasthala, Michelle. 2013. 'Defining justice during transition? International and domestic contestations over the Special Tribunal for Lebanon.' *The International Journal of Transitional Justice* 7: 497-517.
- Chulov, Martin. 2010. 'Lebanon braced for bloodshed over report into Rafik Hariri killing.' *The Guardian*, December 16, 2010.
- De Hert, Paul and Holvoet, Mathias. 2012. 'International criminal law as global law: an assessment of the hybrid tribunals.' *Tilburg Law Review* 17(2):228-240.
- Doherty, Heather N. 2011. 'Tipping the scale: is the Special Tribunal for Lebanon international enough to override state official immunity?' *Case Western Reserve Journal of International Law* 43(3):831-876.
- Elberling, Bjorn. 2008. 'The Next Step in History-Writing through Criminal Law: Exactly How Tailor-Made Is the Special Tribunal for Lebanon?' *Leiden Journal of International Law* 21(2):529-538.
- Erdahl, Eric. 2014. 'International tribunal fuels sectarian fire in Lebanon.' *Borgen Magazine*, January 29, 2014.
- Fakhoury, Tamirace. 2009. *Democracy and power-sharing in stormy weather: The case of Lebanon*. Wiesbaden: VS Verlag für Sozialwissenschaften.

- Fakhoury, Tamirace. 2015. 'Lebanon's perilous balancing act'. *Current History* 114 (776): 349-354.
- Gardner, Maggie. 2011. 'Reconsidering trials in absentia at the Special Tribunal for Lebanon: an application of the tribunal's early jurisprudence.' *The George Washington International Law Review* 43(1): 91-136.
- Haddad, Simon. 2009. 'Lebanon: From consociationalism to conciliation.' *Nationalism and Ethnic Politics* 15(3):398-416.
- Humphrey, Michael. 2011. 'The Special Tribunal for Lebanon: emergency law, trauma and justice.' *Arab Studies Quarterly* 33(1): 4-22.
- ICTJ. 2008. *Handbook on the Special Tribunal for Lebanon*. International Centre for Transitional Justice, Prosecutions Program, 1-55.
- Jenks, Chris. 2009. 'Notice otherwise given: Will in absentia trials at the Special Tribunal for Lebanon violate human rights?' *Fordham International Law Journal* 33(1):57-100.
- Khashan, Hilal. 2011. 'Saad Hariri's moment of truth.' *Middle East Quarterly* 18(1):65-71.
- Knudsen, Are. 2010. 'Acquiescence to assassinations in post-civil war Lebanon?' *Mediterranean Politics* 15(1):1-23.
- Lijphart Arend. 1977. *Democracy in plural Societies: a comparative exploration*. New Haven: Yale University Press.
- Milanovic, Marko. 2007. 'An odd couple: domestic crimes and international responsibility in the Special Tribunal for Lebanon.' *Journal of International Criminal Justice* 5(5):1139-1152.
- Mugraby, Muhamad. 2008. 'The Syndrome of one-time exceptions and the drive to establish the proposed Hariri court.' *Mediterranean Politics* 13(2):171-194.
- Salloukh, Bassel. 2010. 'Democracy in Lebanon: The primacy of the sectarian system.' *The Struggle for Democracy in the Middle East*, edited by Nathan Brown and Emad El-Din Shahin, 134-50. London: Routledge Press.
- Sassine Rudy. 2011. 'A turning tide in Lebanon.' *Carnegie Endowment for International Peace*, December 15. Retrieved from <http://carnegieendowment.org/sada/?fa=46236>.
- Slim, Randa. 2010. 'Hezbollah's campaign against the Special Tribunal for Lebanon.' *Foreign Policy*, August 13, 2010. Retrieved from <http://foreignpolicy.com/2010/08/13/hezbollahs-campaign-against-the-special-tribunal-for-lebanon/>.
- Special Tribunal for Lebanon. 2015. 'The Four Phases'. Retrieved from <http://www.stl-tsl.org/en/about-the-stl/the-four-phases>.
- Special Tribunal for Lebanon. 2015. 'Factsheet', UN Special Tribunal for Lebanon, United Nations, August 12, 2015. Retrieved from <http://www.un.org/apps/news/infocus/lebanon/tribunal/factsheet.shtml#top>.
- Special Tribunal for Lebanon. 2015. 'Structure of the STL' Special Tribunal for Lebanon. Retrieved from <http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl>.
- Special Tribunal for Lebanon. 2015. 'Sixth Annual Report'. (2015-2014). UN Special Tribunal for Lebanon. Accessed March 9, 2015. <http://www.stl-tsl.org/en/documents/stl->

- documents/presidents-reports-and-memoranda/3845-sixth-annual-report-2014-2015.
- Sriram, Chandra. 2010. 'Unfinished business: peacebuilding, accountability, and rule of law in Lebanon.' *SOAS School of Law Legal Studies Research Paper Series* 16:1-18.
- Tabbarah, Bahige. 2014. 'Legal nature of the Special Tribunal for Lebanon.' *The Special Tribunal for Lebanon Law and Practice*, edited by Amal Alamuddin, Nidal Nabil Jurdi, and David Tolbert, 32-49. Oxford: Oxford University Press.
- Tolbert, David. 2014. 'Introduction,' *The Special Tribunal for Lebanon Law and Practice*, edited by Amal Alamuddin, Nidal Nabil Jurdi, and David Tolbert, 1-9. Oxford: Oxford University Press.
- Wetzel, Jan Erik and Yvonne Mitri. 2008. 'The Special Tribunal for Lebanon: a court 'off the shelf' for a divided country.' *The Law and Practice of International Courts and Tribunals* 7(1): 81-114.
- Wierda, Marieke, Habib Nassar, and Lynn Maalouf. 2007. 'Early reflections on local perceptions, legitimacy, and legacy of the Special Tribunal for Lebanon.' *Journal of International Criminal Justice* 5:1065-81.
- Worrall, James. 2013. 'Reading booth in Beirut: Is Hezbollah an emancipatory actor?' *Studies in Conflict and Terrorism* 36(3):235-254.

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