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Defining Terrorism at the Special Tribunal for Lebanon

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On 16 February 2011, the Appeals Chamber of the Special Tribunal for Lebanon (STL) issued an interlocutory decision regarding the legal definition of terrorism.^[1] This decision was in response to a Pre-Trial Chamber (PTC) list of questions requesting, *inter alia*, an elaboration of the elements of this crime.^[2] In exploring this matter, the Appeals Chamber defined the subjective (*mens rea*) and objective elements (*actus reus*) of terrorism by referring to domestic Lebanese law and international law. It thereby set out the applicable law for the court. The consequence of this decision however is not limited to the law of STL but may be seen as having far-reaching consequences for the conception of terrorism under both international law and International Criminal Law (ICL). Given the significance of the Appeals Chamber judgment, this paper will scrutinise three areas of concern regarding its propriety:

- a) Firstly, how the Appeals Chamber judges perceived their judicial role in light of three considerations: the mixed domestic/international nature of the STL, the wording of the Statute and methods of interpretation (section I);
- b) Secondly how the Appeals Chamber constructed and justified its definition of the objective and subjective elements of terrorism given the absence of a positivist framework that defines international terrorism (section II); and
- c) Thirdly how the significance of this decision may impact on the law of terrorism under international law and ICL (section III).

Section IV will provide conclusions following the three-part analysis.

Background of STL

Before addressing these questions individually, this section will provide a brief outline of the tribunal, its Statute and the PTC request. The STL is the first international court that has been vested with jurisdiction *ratione materiae* for terrorism. It was established pursuant to an Agreement between the UN and the Lebanese Republic (Security Council Resolution 1664 (2005)) to investigate the 2005 assassination of the former Prime Minister Hariri Rafiq and 22 others in a bomb attack. In January 2011, the PTC submitted 15 questions to the Appeals Chamber on points of law regarding substantive crimes, modes of liability and cumulative charging. One of the questions concerned the definition of terrorism to be applied by the



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Tribunal. However neither had the Agreement nor had the Statute of the STL provided for an elaborate definition of terrorism. Consequently this task was left to the judges. The only guidance provided in the Statute of the STL concerning terrorism was article 2 which reads as follows:

‘The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute:

- (a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and
- (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on “Increasing the penalties for sedition, civil war and interfaith struggle”.[3]

Sections I and II below will address the interpretation of this article.

I. The perception of the judicial role

The first aspect of the ruling that requires scrutiny is the perception of the judicial role. Underlying this issue is a concern regarding the nature of adjudication that is befitting for this Tribunal. This concern may be couched in the following manner: should the STL judges perceive their role as judges applying domestic Lebanese law only or as judges applying both domestic and international law? These two conceptions reveal two models of adjudication: the domestic and the international judge. These models have different implications on the scope of law of terrorism and its defining elements (to be discussed in section II). To elucidate, if the domestic model applies, then the definition of terrorism is circumscribed to the law provided under the domestic Lebanese Criminal Code solely. Judges are domestic judges who merely apply the law as it is (*lex lata*). However if the international model applies, then the role of the international judge adds interpretive problems. In light of contentious sources of international law such as treaty law[4] and customary international law (CIL), the interpretive process may import ambiguous, unforeseen and non-domestically implemented concepts regarding the definition of terrorism. Such a broad definition of the judicial role may confer a law-making power on the judges who are subsequently in a position to decide what the law ought to be (*lex ferenda*). This brief discussion indicates that at the heart of the formulation of terrorism lies a crucial discussion of whether the STL Appeals Chamber judges perceived their role as domestic or international law judges. Consequently, a detailed examination of this matter is warranted, beginning with how the judicial role is defined in international law.



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In addressing this matter however, one is confronted with a practical difficulty. Defining the judicial role in international law has remained an under-explored theme within academic discourse. As argued by Wessel, there is 'no general theory of judging in the international context.'^[5] This is particularly problematic for ICL which has witnessed a surge in International Criminal Tribunals (ICTs) such as the establishment of the International Criminal Tribunal of Yugoslavia (ICTY) in 1993;^[6] the International Criminal Tribunal for Rwanda (ICTR) in 1994; ^[7] the Special Court for Sierra Leone (SCSL) in 2000;^[8] the Extraordinary Court of Chambers in Cambodia (ECCC) in 2003 ^[9]and recently the Special Tribunal for Lebanon.

One can nevertheless gain a glimpse of how the international judge operates by turning to discussions of former judges. A relevant example in this context is former ICTY Judge Patricia Wald. Having previously worked as a US Court of Appeals Judge in the District of Columbia, ^[10] she was selected as a US Judge for the ICTY in 1999. She commented on how, in her early days at the ICTY, she knew nothing on international judging despite being a US judge.^[11] Although she does not expound this comment, it is clear that she suggests a difference between the two forms of judging identified in this paper. In her further commentaries and articles, she refers to the use of sources of law, interpretive reasoning and the structure of a Tribunal as providing key guidance in adjudicating cases.^[12]

These three factors will be used as a framework to explain the role of the STL Appeals Chamber judges in this paper. By applying these factors in a STL paradigm, this paper will take into account the nature of the Tribunal, the semantic formulation of article 2, other relevant sources of law and the judicial reasoning provided by the Chamber. The following paragraphs will elaborate these matters.

Nature of STL: Domestic or international court?

The nature of the STL can be outlined by comparing it with one of the aforementioned tribunals, the ICTY. This tribunal is a widely recognised international court that applies international law. No controversy arises from the fact that the judges are international judges applying international law. The same however cannot be said about the STL. In evaluating the description of the STL based on its mandate and Statute, its nature appears uncertain.

On one hand, it is established under chapter 7 of the UN Charter and the Security Council Resolution 1757, which outlines its Statute, refers to its international character. This description suggests that it is an international tribunal. On the other hand, article 2 of its Statute clearly states that it should apply Lebanese law. The characterisations of domestic and international are therefore unhelpful in explaining its nature. Since this discussion does not offer assistance, one may turn to the judgment. However, even from this perspective, the judges have struggled to explain consistently the nature of the court as they comment interchangeably on the domestic



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and international aspects. In several paragraphs the decision notes how the Statute is novel since the Tribunal should apply ‘solely the substantive criminal law of a particular country’[13] and how ‘we (the judges) are called upon primarily to apply national law to the facts coming within our jurisdiction.’[14] Contrastingly, it then makes several references to its international character, [15] what other international tribunals have held[16] and the fact that ‘(t)he Tribunal is not bound by the definitions or classifications set out in the Statute, which reflect the political perspectives of the Statute’s framers.’[17] On the face of it, these remarks indicate two inconsistent positions by suggesting both a domestic and international character. However, following this analysis, the ruling makes an important remark. It declares that the ‘starting point is the criminal law of Lebanon’[18] but that ‘(a)s an international court, we *may* depart from the application and interpretation of national law by national courts under certain conditions (...).’[19] In light of this comment, this paper contends that the Tribunal should be better viewed as a mixed or hybrid tribunal. Such terminologies have been used when describing aforementioned tribunals such as the SCSL and the ECCC.[20] These tribunals were considered mixed as they were set up through international agreements, employ international personnel but also refer to and apply domestic and international law. Similarities can be drawn with the structure of the STL.

Having addressed the identity through this discussion, it is important to return to the foregoing judicial statement. A key point is the reference to the phrase ‘we may depart from the application.’ The italicised permissive term ‘may’ indicates that the judges were not under an obligation to depart from national law[21] but that they exercised their discretion in deciding so. The ruling justified this exercise of discretion by listing the following conditions under which it can depart from national law: unreasonableness; manifest injustice and lack of consonance with international principles that are binding upon Lebanon. Through this explanation, it had set out a reason for adopting a non-domestic role within a hybrid tribunal. This was founded on the necessity of incorporating international law within the applicable law of the STL to embrace a broader definition of terrorism than the one outlined under Lebanese law. This argument constitutes the focal point of this paper.

Appellate Chambers’ judicial reasoning

Having outlined this contention, the judges turned to the appropriate interpretation of article 2 of the Statute. The wording of this article, which has been cited in the introduction, is formulated in unambiguous and clear language. It contends that the applicable law is domestic Lebanese law. Its interpretation is therefore of interest considering the expansive judicial role and the fact that the wording of the text is clear. On this matter, the Defence and the Prosecutor both submitted that the judges should follow the law as has been set out under article 2, thereby embracing a *lex lata* approach. The Prosecutor[22] and the Defence[23] collectively agreed that the Tribunal



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must apply Lebanese law to the crimes established under article 2. The Defence further stressed that the Tribunal should not apply international law.[24]

Despite these arguments, the judges embraced a different view. In line with their broad international based mandate, clarity of language did not matter. The judges argued that the ‘construction (of a text) is the end result after all legitimate considerations have been employed.’[25] Consequently, attention shifts to ‘(t)he question (of) what those legitimate considerations are.’[26] In this regard, the judgment distinguishes itself from many other international judicial decisions. It regularly refers to the work of jurisprudential theorists such as Hart,[27] Dworkin,[28] Anzilotti,[29] Lauterpacht[30] and Bentham.[31] By doing so, it garners support for its expansive judicial role and the need to incorporate international law even in the absence of a gap and clear language. The judges subsequently rejected the Defence Counsel arguments namely that only Lebanese law is applicable; that it is only under circumstances of ambiguity and a lacuna that judges should look beyond the text of a statute[32] and that the principle of *in dubio mitius* (in case of doubt one should prefer the interpretation more favourable to a sovereign state) should apply.[33] By explaining its purpose as ‘identifying with some precision both what the law of Lebanon requires and to what extent, if at all, its application is modified by the Statute,’[34] the Tribunal expressed a preference for the inclusion of international law to buttress domestic Lebanese law. It justified its reasoning on the basis of principles of interpretation such as the teleological form of interpretation and the principle of effectiveness[35] so as to administer justice in a fair and efficient manner. Furthermore it relied on a general principle of construction which it argued was common to many States of the world, namely the principle that one should construe the national legislation of a State in such a manner as to align it as much as possible to international legal standards binding upon the State.[36] In this vein, it jettisoned any suggestion that the Tribunal should be seen as a domestic one applying Lebanese law only. It favoured a definition of terrorism beyond domestic law.

In conclusion, the following picture of the judicial role is formed. The Appeals Chamber judges defined their role broadly by describing themselves as judges who were tasked with applying not only domestic Lebanese criminal law but such law which is in consonance with international law. The judges embraced an expansive role (*lex ferenda*) so as to widen the scope of terrorism beyond domestic law despite the fact that article 2 of the Statute is unambiguous in its reference to domestic law only. As noted in the judgment, the judges regarded themselves as concerned with legitimate considerations of construction and rejected an ordinary interpretation of terms in the absence of ambiguity or a gap. Reference to international law as a source of law would entail resorting to expedient treaty law and CIL to define the elements of terrorism. This is explored in the next section.

II. Defining the subjective and objective elements



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The definition of the subjective and objective elements follows the analysis above as the conception of judicial role largely determines the law to be applied. Had the Appeals Chamber, on the basis of a narrow interpretation of its role, believed that the only applicable law is domestic law (Lebanese Criminal Code), then the elements would be defined according to this criminal code. This role provides for clarity and consistency regarding the elements which are foreseeable and predictable to the offender. However, as already concluded, the Appeals Chamber embraced a broader approach by arguing that international law is applicable. Consequently, the scope of the subjective and objective elements changes due to other sources of law. In this context, we are discussing the application of treaty law and CIL. However, broadening the scope of applicable law in this manner leads to three notable difficulties.

Firstly the international community has failed to agree on a common definition of terrorism. As of recently, an IBA Task Force Report concluded that there is no agreed definition of terrorism in international law.^[37] Therefore in the absence of a positivist framework, the task of defining the subjective and objective elements based on international law is a contentious matter. Secondly, the rule of *nullem crimen sine lege* (NCSL) carries considerable weight in any over-expansive definition of the Appeals Chamber. The rule of NCSL safeguards defendants against arbitrary definitions and allows interpretation in so far as it is reasonable, accessible and foreseeable. Thirdly, how would the judges strike the balance between the existing definition provided under Lebanese law and international law since the Appeals Chamber concluded that the starting point is the criminal law of Lebanon?

With these considerations outlined, the legal background was established for the Appeals Chamber judges to define the elements. The construction of the subjective and objective elements takes place in light of three sources of law: the domestic Lebanese Criminal Code, relevant treaty law (in this case, the Arab Convention for the Suppression of Terrorism (ACST)) and CIL in times of peace only. Although the judgement considered CIL in general, it concluded that only a definition of CIL in times of peace has emerged.^[38] As will be indicated below, the approach of the Appeals Chamber in defining the elements is in line with its broad perception of the judicial role. The principal area of concern is the amount of change introduced to the elements under the Lebanese Criminal Code by the other two sources of law. This matter is important as the Appeals Chamber had underlined that although the Lebanese Criminal Code provides the starting point for discussion, it would not, on its own, represent the final meaning of terrorism to be applied by the STL. To comparatively assess these changes, it is necessary to outline the provisions of the Lebanese Criminal Code.

Under Lebanese Law, article 314 of the Lebanese Criminal Code defines the elements accordingly:

The objective element as:^[39]



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- ‘an act whether constituting an offence under other provisions of the Criminal Code or not; and
- the use of a means “liable to create a public danger.”’

The subjective element as:

- The special intent to cause a state of terror.[40]

Defining the subjective element

The Appeals Chamber defined the subjective element by proposing that the Lebanese Criminal Code should be analysed first, albeit, in light and on the basis of the relevant international rules. [41] Having acknowledged the definition as the special intent of spreading terror of panic among the population,[42] the ruling then turned to the law of the ACST and CIL in times of peace. In reviewing the ACST, the judgment acknowledged that while Lebanon had ratified the treaty, it had not domestically implemented it. It nevertheless did not find itself constrained by a lack of domestic implementation and took the view after analysing several cases that the ACST is still applicable.[43] The Appellate Chamber’s approach can however be criticised as, despite taking note of the ACST definition to ‘sow panic and fear,’[44] it did not address whether the Lebanese Criminal Code should be modified. It therefore left the question of whether the ACST displaces the domestic provision unresolved.

Turning to CIL in times of peace, it adopted a similar attitude by not addressing the hierarchy of law between CIL and the domestic provision. However, before analysing the definition provided under CIL, certain comments need to be made about the use of this source of law in general. Several academics as Roberts,[45] Meron[46] and Mendelson[47] have highlighted how CIL can be used in a controversial, subjective and almost arbitrary manner. The controversy surrounding its use in this context is apparent as the Defence Counsel and the Prosecutor had argued that there is no settled definition of terrorism as a crime under CIL while the Appeals Chamber argued the contrary. To further highlight the controversy, a survey conducted by Saul in 2006 concluded that ‘(a)rguments that terrorism is a customary international crime are premature.’ [48] Yet Cassese, who was one of the STL Appeals Chamber judges, held in a separate academic publication in 2004 that ‘(...) a definition of terrorism does exist, and this phenomenon also amounts to a customary international law crime.’[49] These examples indicate the uncertainty of law generated through the use of CIL. Nevertheless, the Appeals Chamber in light of its broad international law based mandate decided to rely on this source of law. It defined the subjective element of terrorism as a crime in times of peace as:

- the intent (*dolus*) of the underlying crime; and
 - the special intent (*dolus specialis*) to spread fear or coerce authority.[50]
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Yet, in reviewing the three definitions together (Lebanese Criminal Code, ACST and CIL), it however did not modify the subjective element from its original definition under the Lebanese Criminal Code. The eventual definition agreed upon as applicable for the STL was the intent of the perpetrator to cause a state of terror.^[51] The Appeals Chamber did not question whether the ACST definition of sowing panic or the CIL definition of spreading fear modifies the Lebanese Criminal Code provision.

Defining the objective element

Contrastingly, the construction of the objective element is marked by a higher level of judicial creativity than the interpretation of the subjective one. The controversy surrounds the level of influence that international law had on existing Lebanese jurisprudence. By evaluating the judgment, it is evident that the Appeals Chamber judges adopted a broader interpretation of the objective element than provided for under article 314 of the domestic code. The key contentious matter was the definition of means in the phrase ‘means to create public danger’ under article 314 of the Lebanese Criminal Code.

Lebanese jurisprudence had narrowly defined the term, circumscribing its scope to a specific list. These means are indicated in an illustrative enumeration: explosive devices, inflammable materials, poisonous or incendiary products, or infectious or microbial agents. According to Lebanese case law, these means *do not include* such non-enumerated implements as a gun, a machine-gun, a revolver, a letter bomb or a knife.^[52] However under the ACST and CIL in times of peace, there was no such restraint. The Appeals Chamber opted to jettison the domestic definition in favour of the international law approach. It firstly compared the scope of domestic law with the ACST and secondly with CIL in times of peace. In its analysis, it reached the following conclusions. The ACST embraces a broader definition of terrorism than Lebanese law since it does not require that the act was committed by specific means, instrumentalities or devices.^[53] CIL in times of peace is broader than Lebanese law with regard to the means of carrying out the terrorist act, which are not limited under international law but it is narrower as it (i) requires both an underlying criminal act and an intent to commit that act and (ii) involves a transnational element.^[54]

By embracing similar reasoning as outlined in section I, it chose to interpret the Lebanese Criminal Code in line with international law. This effectively meant abandoning domestic law in favour of CIL in times of peace and adopting a broad definition of means to create public danger. It extended the domestic definition of crimes to include other implements under the domestic Criminal Code as handguns, machine guns and other machinery depending upon the circumstances of the case so long as ‘the means used to carry out the terrorist attack also be liable



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to create a common danger, either by exposing bystanders or onlookers to harm or by instigating further violence in the form of retaliation or political instability.'[55]

By focusing on a broad interpretive approach, which is rooted in international legal definitions, the Appeals Chamber reasoning however calls into question the role of NCSL. The STL addressed this matter by stating that broadening the objective element[56] does not run counter to this principle because '(i) this interpretation is consistent with the offence as explicitly defined under Lebanese law; (ii) it was accessible to the accused, especially given the publication of the Arab Convention and other international treaties ratified by Lebanon in the Official Gazette (none of which limits the means or implements by which terrorist acts may be performed); (iii) hence, it was reasonably foreseeable by the accused.'[57] In addition, it chose to adopt several aspects of the international legal definition since in its opinion, the 'unique gravity'[58] and 'transnational dimension'[59] of crimes had to be taken into account. In short, the objective element was defined in a broad manner based on the fact that the judges had an international mandate and not a domestic one.

Definition of terrorism

After scrutinising domestic law, treaty law and CIL, the reasoning of the Appeals chamber culminated in the following definition of terrorism:[60]

- (i) the volitional commission of an act;
- (ii) through means that are liable to create a public danger; and
- (iii) the intent of the perpetrator to cause a state of terror.

The key change that has been introduced by the Appeals Chamber is the scope of 'means' under (ii). In conclusion, the definition of the objective element raises more controversy than the subjective one. The decision to incorporate international legal elements and broaden the definition may be seen as infringing defendant rights. However the Appeals Chamber chose to focus on emphasising the role of international law. It essentially fused domestic with international law to provide a wide definition of the objective element. In conclusion, the only aspect of domestic law that has been retained is the subjective element.

III. Significance of the judgment

The final argument of this paper evaluates the relevance of the judgment in international law. One must assess its possible influence on other tribunals and the international community since its application is circumscribed to the jurisdiction of the STL. Three comments can be posited.



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Firstly the STL Appeals Judgment may be seen as making a vital contribution. As a definition of terrorism is absent from international law and ICL, the decision provides judges with guidance and authority in different ways. Foremost, the formulation of CIL offers an account of widespread state practice and convincing *opinio juris*. Secondly the reliance on CIL strengthens the judgment's legitimacy as this source of law has been described by the former International Court of Justice (ICJ) President, Judge Higgins, as 'binding on all nations.'[61] This justification itself may provide sufficient legal ground for international tribunals and domestic courts to apply this definition. Thirdly, Mylonaki, argues that the ruling sets a precedent for the UN to establish other ICTs and facilitates how future terrorist acts should be dealt with.[62] The decision may thus be seen as an important turning point for international law.

However, a second and different perspective can be offered. Although CIL is an important source of law for many tribunals, its use is marked by inconsistency. As briefly discussed in section II, the use of CIL is controversial due to its indeterminacy and fluidity. In certain cases, it may play a crucial role as in the case of the STL Appeals Judgment. However, in others, it may be rejected. For example, the Netherlands Supreme Court case of *ReBourtese*[63] overturned a Court of Appeal conviction for torture as a crime against humanity on the basis that CIL, as a source of law, is too vague. This critique of CIL has in fact been duly noted by the Appeals Chamber which acknowledged that CIL is not applicable in all tribunals.[64] In addition to this argument, CIL is furthermore controversial in this context as its vagueness has produced two contradictory opinions. While the STL Appeals Chamber holds that a CIL definition of terrorism in times of peace exists, Saul contends that terrorism as an international crime under CIL has not yet matured.[65] Collectively, these views of CIL undermine the strength of the judgment. As a final criticism, whether judges in a different tribunal decide to incorporate the reference to the decision made by the STL Appeals Chamber depends upon their discretion, the type of conflict in place and the relevance of the Appeals Chamber judgment to the factual context in question. As indicated by the Tribunal, '(t)his interpretation is not binding *per se* on courts other than the Special Tribunal for Lebanon, although it may of course be used as an interpretation of the applicable legal provisions in other cases where terrorism is charged.'[66] Therefore it is questionable whether the decision will leave a lasting impact for any type of tribunal, whether a UN-backed court, a hybrid tribunal or even a domestic tribunal.

Thirdly, regardless of its impact in a tribunal, the judgment may provide a credible starting point for future discussions by law-makers. Within international law, it remains to be seen whether the definition could be of any relevance to the work of the UN Counter-Terrorism Committee, domestic parliamentary committees or regional counter-terrorist organisations. Within ICL, the definition may be considered as a point of discussion by the Assembly of State Parties of the ICC. The 1994 ILC Draft Statute of an International Criminal Court which set out provisions for a possible international criminal court initiated the discussion for the current ICC Statute.



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Similarly, this judgment may furnish key points for forthcoming debates at the ICC as terrorism as an international crime for the ICC would require an articulation of the subjective and objective elements. In contrast, a definition of terrorism under international law does not.

IV. Conclusions

Overall, this paper has explored three areas of the STL Appeals Judgment: the perception of the judicial role, the elements of terrorism and its impact in an international context. Notwithstanding the last issue, the analysis has lengthily illustrated the inter-connectedness between defining a crime and the role that a judge plays. As a conclusion, this paper draws on this analysis to portray how the judge, the tribunal and the international community share a complex relationship in defining crimes. If the international community is to define terrorism as an international crime, it is this relationship that is to be carefully scrutinised.

From a practical perspective, the onus of providing an international definition of terrorism falls squarely on the international community. Individual states discuss, negotiate and compromise on definitions to find common agreement on the meaning of terrorism. However, by using the STL Judgment as a case study, it is clear that the dearth of legal instruments reflects the inability of states to do so. Moreover, the recent failure during the Rome Statute negotiations is further evidence of the difficulties of states in finding commonality. In the event of such a failure, judges will be called upon to decide its meaning if a tribunal is established to adjudicate a crime of terrorism. The judges, who are therefore left without a definition by states, are vested with much discretion to frame a meaning. The conclusion is that if states fail to provide a precise definition to protect the rights of the defendant and define terrorism within certain limits, then this task will inevitably fall in the unpredictable hands of judges as witnessed in the STL Appeals Judgment.

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Notes

[1]Case STL 11-01/I, STL, Appeals Chamber, Interlocutory Decision on Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011. See <http://www.stl-tsl.org/sid/55>. (hereinafter STL Appeals Judgment on Applicable Law).

[2]Case STL 11-01/I, STL, Pre-Trial Chamber, Order on Preliminary Questions addressed to the judges of the Appeals Chamber Pursuant to Rule 68, paragraph (G) of the Rules of Procedure and Evidence, 21 January 2011, p.12-15.

[3]Statute of the STL pursuant to SC Res 1757.

[4]Treaty law may be considered contentious if different treaties exist on the same matter. This may lead to a conflict of applicable law.

[5]Wessel. J, (2006), Judicial Policy Making at the International Criminal Court: An Institutional Guide to Analysing International Adjudication 44 *Columbia Journal of International Law* 377, 377.

[6]The ICTY was set up under Security Council Resolution 808.



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[7]The ICTR was set up under Security Council Resolution 955.

[8] The SCSL was established by an Agreement between the United Nations and the Government of Sierra Leone under Security Council Resolution 1315.

[9]The ECCC was established under an Agreement between the United Nations and the Royal Government of Cambodia under the General Assembly Resolution 57/228.

[10]Wald. P (2001), The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court, 5 *Washington Journal of Law and Policy* 87, 87.

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[12]Wald. P (2004), ICTY judicial proceedings: an appraisal from within, 2 *Journal of International Criminal Justice* 466, 471; Wald. P (2005-2006) *Op. Cit.* 323-324.

[13]STL Appeals Judgment on Applicable Law, para. 15.

[14]*Ibid*, para.33.

[15]*Ibid*, paras 15, 16, 39 and 40.

[16]*Ibid*, para. 39.

[17]*Ibid*, para. 14.

[18]*Ibid*, para. 25.

[19]*Ibid*, para. 39 (emphasis added).

[20]De Bertodano. S (2006), Problems arising from the mixed composition and structure of the Cambodian Extraordinary Chambers 4 *Journal of International Criminal Justice* 285, 289.

[21]*Ibid*, para. 39.

[22]*Ibid*, para. 17.

[23]*Ibid*, para. 18.

[24]*Ibid*, para. 18.

[25]*Ibid*, para. 37.

[26]*Ibid*, para. 37.

[27]*Ibid*, para. 23, fn. 37.

[28]*Ibid*, para. 19, fn. 31.

[29]*Ibid*, para. 91.

[30]*Ibid*, para. 11.

[31]*Ibid*, para. 135, fn 244.



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[32]*Ibid*, para. 37.

[33]*Ibid*, para. 29.

[34]*Ibid*, para. 12.

[35]*Ibid*, para. 30.

[36]*Ibid*, para. 41.

[37]IBA Task Force (eds) (2011), *Terrorism and International Law, Accountability, Remedies and Reform (A report of the IBA Task Force on Terrorism)*, Oxford University Press 1.

[38]STL Appeals Judgment on Applicable Law, para. 85

[39]*Ibid*, pg. 2.

[40]*Ibid*, pg. 2.

[41]*Ibid*, para. 45.

[42]*Ibid*, para. 57.

[43]*Ibid*, para. 82.

[44]*Ibid*, paras. 65 and 69.

[45]Roberts. A (2001), Traditional And Modern Approaches To Customary International Law: A Reconciliation, 95 American Journal of International Law 757.

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[50]STL Appeals Judgment on Applicable Law, pg. 3.

[51]*Ibid*, pg. 4.

[52]*Ibid*, pg. 2 (emphasis added).

[53]*Ibid*, pg. 3.

[54]*Ibid*, pg. 3.

[55]*Ibid*, pg. 3.

[56]*Ibid*, para. 130.

[57]*Ibid*, pgs 3-4.



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[59]*Ibid*, pg. 3.

[60]*Ibid*, pg. 4 and pg. 88, para. 147.

[61]Higgins. R (1994), *Problems and Process, International law and how we use it*, Oxford University Press 210.

[62]Mylonaki. E (2011), Defining Terrorism, 175 *Criminal Law and Justice Weekly* 338.

[63]Hoge Raad der Nederlanden, Strafkamer, uitspraak van 18 September 2001 inzake D.D. Bouterse (Supreme Court of the Netherlands, Chamber of Criminal law, decision of 18 September 2001 in the case of D.D. Bouterse), para. 4.4 and 4.7. This decision is available in Netherlands Yearbook of International Law 2001.

[64]STL Appeals Judgment on Applicable Law, para. 101, 114-117.

[65]Saul. B, *Op. Cit* 270

[66]*Ibid*, para. 144.