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Charity Registration Number: 208223

Meeting Summary

The Special Tribunal for Lebanon

Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 17 March 2011

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Introduction

The event was organised to discuss the recent developments related to the Special Tribunal for Lebanon, in the context of the latest judicial decisions as well as the overall political climate in Lebanon.

The participants included representatives of government, embassies, NGOs, academics and practising lawyers.

Political background

The functioning of the Special Tribunal for Lebanon (STL) will affect the way international criminal justice is perceived in the Middle East. Up to now, international criminal justice has had a rather negative image in the region, with investigations such as those in Sudan (by the International Criminal Court) or Lebanon (by the STL) often deemed to be politicised. However, with the recent developments in Tunisia, Egypt and Libya, societies are increasingly calling for accountability of previous regimes, which may result in growing acceptance of the criminal justice concept throughout the Middle East and Africa.

With regard to Lebanon specifically, it is now facing a political crisis, unable to form a government, and it looks like a long time before that will be achieved. This, however, can be seen partly as a positive development, as it simply reflects the intricacies of the standard political process. After the 2009 elections, where the STL issue was one of those discussed, the very close results led to the formation of a government supported by a weak parliamentary majority. After two parliamentary blocks had changed their positions on the STL, the subsequent political crisis resulted in the fall of the government.

It will be interesting to see how, in the process of the formation of a new government, Hezbollah's demands with regard to the STL will be dealt with. Firstly, Hezbollah demands that Lebanon provide no further financial support for the Tribunal. The government of Lebanon has to finance 49% of the Tribunal's expenses, and if enough funds are not coming in, there will be a cash-flow problem, although that will not be fatal to the Tribunal's existence.

Secondly, Hezbollah demands that all cooperation with the Tribunal is halted. Cooperation of the Lebanese government is essential since it is important to conduct investigations on the ground. Should any cooperation be withdrawn, the situation will become more complicated, but there is room for optimism that a thorough case can be presented.

Thirdly, Hezbollah calls for the withdrawal of all Lebanese judges from the Tribunal. Its current composition, including four Lebanese and seven international judges, means that if some were to step down, it would have direct implications for the conduct of proceedings. However, it is important to note that the government of Lebanon does not have any power to recall the judges, as they were appointed by the UN Secretary-General, who has no reason to withdraw them. Moreover, the current judges are dedicated to the work of the Tribunal and are working hard to fulfil its mandate.

Political assassinations have been frequent in Lebanon, estimated at approximately 85 since 1950's, but were not followed by subsequent enquiries into accountability. That is why the Tribunal operates in a politically challenging environment and naturally produces some controversy. The current developments also bring in the broader debate on peace and stability versus justice. In the longer term, the work of the Tribunal can positively influence stability in the region, where the pattern of political assassinations has a severe impact on the government and the running of the country. The Tribunal's jurisdiction is limited to the Hariri case and connected cases within the time period from 1 October 2004 to 12 December 2005, but it generally seeks to eradicate the pervasive environment of impunity in the region. It would be a wrong message to send if the Tribunal failed to find persons responsible for the terrorist incidents, after the international community, and the Government of Lebanon itself, had pumped millions of dollars into its functioning.

Functioning of the Tribunal

When comparing the STL to other international tribunals, it should be noted that it contains more civil law elements than e.g. the ICTY, such as the increased role of the Pre-Trial Judge in the early stages of a case. Another new feature is the establishment of the Victims' Participation Unit, which facilitates the participation of victims in the Tribunal's proceedings, and reflects upon the lessons learned from the International Criminal Court. It remains to be seen how the STL will manage to find the right balance between the need to include victims into the legal process and the need to conduct proceedings in a timely manner.

The STL also has a separate Defence Office, a counterpart to the Office of the Prosecutor. The office is, however, not responsible for conducting the defence of the accused, but rather for providing general support to the defence counsels in particular cases. Practice Direction on the Role of the Defence Office, guidance for its functioning, was issued on 30 March 2011.

The Rules of Procedure and Evidence were amended in November 2010. Some clarifications were included as to how the participation of victims will work on the practical level, such as the use of the Tribunal's rulings to enforce claims for compensation in the domestic courts. Further amendments concern trials *in absentia*, as the STL is the first contemporary international tribunal whose Statute envisages such a possibility.

A Code of Professional Conduct for Counsel was adopted in February 2011 and is binding on all counsel appearing before the STL; whether from the Office of the Prosecutor, defence counsel or the legal representatives of victims.

Recent legal developments

The question is sometimes raised whether the establishment of the STL two years ago did not come too early, since the prosecution may need more time to prepare the cases, given that the investigation of terrorist crimes can be a very complicated and lengthy process. The first indictment was issued just recently, on 17 January 2011. The prediction was that it would take at least another six to ten weeks to have the indictment confirmed. The confirmation of the indictment is carried out by a Pre-Trial Judge, who reviews whether it provides a sound legal basis for initiating the trial. It is carried out solely on the basis of judicial requirements and is not influenced by political considerations. However, an amended indictment was submitted on 11 March 2011, which means that the judge will require some additional time for confirmation. At present, the names in the indictment are still confidential.

One side legal issue has arisen recently for the Tribunal. The first act of the STL after its establishment was to order the release of four individuals who were being held in relation to the Hariri investigation under the Lebanese law allowing for indefinite detention in such cases. The Tribunal concluded that there was not a sufficient basis for their continued detention and Mr Jamil El Sayed, one of those released, subsequently requested the Tribunal to grant him access to the material upon which the detention was based. The STL ruled that it had jurisdiction over the matter and that the individual had standing to bring such a claim on the basis of that brief part of his detention which was at the hands of the Tribunal. The litigation in this case is still ongoing. The Office of the Prosecutor was required to file a list of confidential documents by 11 March, detailing reasons why certain materials cannot be disclosed, and the Pre-Trial Judge will now issue a decision on that basis.

On 21 January, the Pre-Trial Judge submitted certain questions of law to the Appeals Chamber, following a procedure envisaged by the Rules of Procedure and Evidence in cases where the Pre-Trial Judge has legal questions on the law applicable to the indictment. The Appeals Chamber issued its decision on 16 February, dealing with five areas of law – the definition of terrorism, conspiracy, homicide, and the issues of perpetration and cumulative charging. Importantly, any accused in the future can request a re-consideration of this decision.

The most controversial issue concerns the definition of the international crime of terrorism under customary law. Although the STL applies Lebanese domestic law, the Appeals Chamber reached the conclusion that it nevertheless has to be interpreted in light of the international law obligations of Lebanon.

To conclude, the legal issues that the Tribunal has dealt with so far include the international customary law definition of terrorism, right to access one's file, presumption of innocence and various others, such as joint criminal enterprise and other modes of criminal liability. Furthermore, the recent Appeals Chamber decision includes an interesting discussion of legal interpretation in general, especially interpretation of domestic laws in light of international law. For example, the judges referred to the International Court of Justice's *Advisory Opinion on Kosovo* when discussing the interpretation of the Security Council resolution through which the provisions of the Tribunal's Statute have entered into force.

Discussion

Definition of terrorism

Some critique of the decision has appeared already in the legal blogs, mostly with regard to the customary law definition of terrorism. There have been attempts internationally to draft a comprehensive definition of terrorism; they have however been stagnating for a few years. The overriding view in the international community is that there is not yet a general agreement on the definition or existence of an international crime of terrorism in peacetime. In this context, and, also contrary to the submissions of the Prosecution and Defence, the Appeals Chamber nevertheless concluded that such a definition has emerged. The customary law definition, according to the Appeals Chamber, includes three elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act, (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or

indirectly coerce a national or international authority to take some action, or to refrain from taking it and (iii) the act involves a transnational element.¹ The question is whether it was necessary for the Appeals Chamber to have decided on this matter, when it would have achieved the same aim by acknowledging that the Lebanese domestic law definition is not exhaustive as to the means of commission. According to Article 314 of the Lebanese Criminal Code, terrorist acts are all acts intended to cause a state of terror and committed by means liable to create a public danger, such as explosive devices, inflammable materials, toxic or corrosive products and infectious and microbial agents. For example, the underlying act in Lebanese law does not have to be criminal. Furthermore, according to Lebanese case law, the means do not include such non-enumerated implements as a gun, a letter bomb or a knife. What the Tribunal did, without changing the definition in the Lebanese Criminal Code, was to interpret the Lebanese law definition in light of what the STL said to be international law, although only in respect of the means of commission.

The elements of the crime as proposed by the Appeals Chamber ignore some of the most difficult questions in the search for an international definition, such as the authors of terrorism (whether they include states, national liberation movements, etc.) and whether there should be a threshold of gravity of the underlying criminal act. The STL's decision on a definition may have implications if it were to be picked up by the international community generally, such as the resulting duty to prosecute all alleged perpetrators of terrorist acts as defined in the Appeals Chamber decision.

Modes of liability

The Appeals Chamber reaffirmed the concept of joint criminal enterprise (JCE), although under limited circumstances when compared with its use by the ICTY. The so-called JCE III cannot be applied to special intent crimes, including terrorism. Also, in case of conflict between Lebanese and international law governing modes of liability, the most favourable to the accused will apply.

It was noted that the most favourable criterion is reasonably applied to the modes of liability, but at the same time, the Tribunal applies a more extensive definition of terrorism than that included in Lebanese domestic law. On the other hand, there is a difference

¹ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*. Case No STL-11-01/I, Appeals Chamber, 16 February 2011, para 85

between interpreting Lebanese law in light of its international law obligations, and adding a completely new mode of liability that is unknown to Lebanese law.

Procedural issues

The Pre-Trial Judge can decide to make the indictment public upon its confirmation, but the government or the prosecutor may request it to be kept under seal. Disclosure of supporting material may also have implications for victims and the Victims' Participation Unit is prepared to implement protective measures if required, including in cooperation with another states.

The exact arrest procedure will depend on where a particular person is located. Since the STL's Statute is binding on Lebanon, its government is obliged to cooperate in case the suspect is found on Lebanese territory. In that case, the Pre-Trial Judge issues an arrest warrant or a summons to appear, and it will be up to the Government of Lebanon to implement it. If the suspect is found in other countries, assistance will be requested but they have no legal obligation to cooperate.

If arrest is not possible for various reasons, trial may be conducted *in absentia*. Another novel feature is that it is possible for the accused to participate in the proceedings via video-conference provided that his counsel attends the hearings in person.

The cooperation from the Government of Lebanon has been fairly positive so far and the requests for assistance were performed properly. In some cases, investigation may be hindered by the circumstances on the ground. For example, there has been some reluctance from individuals on the ground to cooperate after the October 2010 incident, when STL staff members were attacked during a pre-arranged interview in Beirut.

Political issues

At present, there are 25-30 countries that have contributed financial resources to the STL, including countries in the region.

Finally, it is true that in the short term, the existence of the STL clearly has an impact on Lebanese politics and it does not make political life in Lebanon any easier. On the other

hand, it is essential to continue the efforts, with the long-term objective of bringing both justice and stability to the region in mind.

Summary by Monika Hlavkova