Leiden Journal of International Law, 21 (2008), pp. 513–528
 Printed in the United Kingdom doi:10.1017/S0922156508005074

The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' Equivalent to an 'International Criminal Court'?

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Abstract

The Special Tribunal for Lebanon is the latest international criminal tribunal to be established by the United Nations. Similar in many respects to the earlier institutions – for the former Yugoslavia, Rwanda, and Sierra Leone – it stands alone in the fact that its subject-matter jurisdiction does not contain any international crimes. It is thus international in some respects, but it is arguably not an international criminal tribunal in the sense that was intended by the International Court of Justice in the *Yerodia* case. The drafting history of the Statute of the Special Tribunal is examined with a view to determining whether the new court should treat sovereign immunity in the same manner as the other three UN criminal tribunals.

Key words

immunities; international crimes; international criminal tribunals; UN Security Council

'Certain international criminal courts'. This is the terminology used by the International Court of Justice (ICJ) in the famous paragraph 61 of the *Yerodia* decision, when the Democratic Republic of the Congo's challenge to a Belgian arrest warrant for its former foreign minister was upheld as being contrary to customary international law. The Court stated that while an incumbent or former foreign minister (or equivalent, including a head of state) could not be prosecuted by the national courts of a third state, he or she was subject to prosecution by 'certain international criminal courts, where they have jurisdiction'. The Court said that

> an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or

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> international law, shall not bar the Court from exercising its jurisdiction over such a person.[1]

The Court distinguished this case from that of prosecution before what it described, in the same paragraph, as 'foreign jurisdiction' or, alternatively, a 'court of one State'. The ICJ did not elaborate on the criteria for determining how to identify 'international courts'. Determining that a judicial institution belongs to the genus of 'certain international criminal courts' identified by the ICJ has significant legal consequences, notably with respect to the immunity of incumbent and former heads of state and ministers.

'A tribunal of an international character' is the expression used by the Security Council in the resolution establishing the Special Tribunal for Lebanon.[2] The question this essay seeks to address is whether 'a tribunal of an international character', such as the Special Tribunal for Lebanon, can also be classified as an 'international criminal court' as this expression is intended by the International Court of Justice.

A starting point might be to consider the nomenclature. In contrast with the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda, the word 'international' does not appear in its name. The word 'international' is also absent in the name of the Special Court for Sierra Leone, which is the UN-sponsored criminal tribunal that bears the closest resemblance to the Special Tribunal for Lebanon. Both are described as 'special' rather than as 'international'. The Appeals Chamber of the Special Court for Sierra Leone has not attached much significance to any of these distinctions, and has ruled that the Special Court is more or less equivalent in status to the two earlier ad hoc tribunals established by the Security Council.[3]

1. The drafting history of the Statute of the Special Tribunal for Lebanon

The expression 'tribunal of an international character' first appeared in the letter that launched the process creating the Special Tribunal for Lebanon, sent by the prime minister of Lebanon to the Secretary-General on 13 December 2005.[4] The Security Council reacted promptly, '[*a*]*cknowledg*[*ing*] the Lebanese Government's request that those eventually charged with involvement in this terrorist attack be tried by a tribunal of an international character, request[ing] the Secretary-General to help the Lebanese Government identify the nature and scope of the international assistance needed in this regard'.[5]

The Secretary-General then responded to the request, noting that

> it became clear from our consultations with the Lebanese authorities that the creation of an exclusively international tribunal would remove Lebanese responsibility for

1. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 3, para. 61.
2. UN Doc. S/RES/1757 (2007).
3. *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, A. Ch., 31 May 2004.
4. UN Doc. S/2005/783 (2005).
5. UN Doc. S/RES/1644 (2005), para. 6.

> seeing justice done regarding a crime that primarily and significantly affected Lebanon. Therefore it appears that the establishment of a mixed tribunal would best balance the need for Lebanese and international involvement in the work of the tribunal.[6]

In addition to distinguishing between an 'exclusively international tribunal' and a 'mixed tribunal', the report of the Secretary-General also referred to 'international or internationally assisted tribunals',[7] and proposed to establish the Lebanese court on the basis of an agreement between the United Nations and Lebanon, leaving it to the Lebanese authorities to determine whether national legislative action was needed. 'Such an approach would also not exclude the need for the [Security] Council to take complementary measures to ensure the effectiveness of and cooperation with the tribunal', concluded the Secretary-General.[8] He noted further that the choice of applicable law 'must take into account the types of crimes committed and respect the legal culture of Lebanon, as well as the international criminal justice standards that have developed over the past years in the work of other tribunals'.[9] The report discussed the importance of 'significant international participation' in the composition of the tribunal, relating this to issues of independence, objectivity, and impartiality.[10] It was also acknowledged that international financial support would be necessary.[11]

The Security Council '[*w*]*elcom*[*ed*] the report of the Secretary-General, and request[ed] him to negotiate an agreement with the government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice, taking into account the recommendations of his report and the views that have been expressed by Council members'.[12] In November 2006 the Secretary-General responded to this mandate with a detailed report, including a draft agreement between the United Nations and Lebanon establishing the new tribunal, and the draft statute of the tribunal. He spoke directly regarding the meaning to be given to the concept of a 'tribunal of an international character':

> Although the features of such an international character were not specified, the constitutive instruments of the special tribunal in both form and substance evidence its international character. The legal basis for the establishment of the special tribunal is an international agreement between the United Nations and a Member State; its composition is mixed with a substantial international component; its standards of justice, including principles of due process of law, are those applicable in all international or United Nations-based criminal jurisdictions; its rules of procedure and evidence are to be inspired, in part, by reference materials reflecting the highest standards of international criminal procedure; and its success may rely considerably on the cooperation of third States. While in all of these respects the special tribunal has international characteristics, its subject matter jurisdiction or the applicable law remain national in character, however.[13]

6. UN Doc. S/2006/176 (2006), para. 5.
7. Ibid., para. 6.
8. Ibid.
9. Ibid., para. 8.
10. Ibid., para. 10.
11. Ibid., para. 11.
12. UN Doc. S/RES/1664 (2006), para. 1.
13. UN Doc. S/2006/893 (2006), para. 7.

https://doi.org/10.1017/S0922156508005074 Published online by Cambridge University Press

The Secretary-General was distinguishing between tribunals that were 'of an international character' or had 'international characteristics', and those that 'remain national in character'. He also observed certain distinctions between what was being proposed for Lebanon and the existing UN-inspired international tribunals, notably with regard to procedure. Previous tribunals had 'included more common law elements'.[14] Perhaps all that this indicates is that the criminal procedure followed by any particular tribunal does not assist in determining whether or not it is 'of an international character'. Nor does the temporal or personal jurisdiction seem relevant in examining the question. It is probably otherwise, however, with respect to the subject-matter jurisdiction and the applicable law, as the Secretary-General noted when he said 'its subject matter jurisdiction or the applicable law remain national in character'.[15]

The French text of the Statute of the Special Tribunal for Lebanon provides a further complication. The Security Council refers to the Tribunal as being a 'tribunal international',[16] and this succinct term suggests a higher level of internationalization than the English expression 'tribunal of an international character'. But in at least one other document, including one for which the original was drafted in French by the most senior international lawyer in the UN Secretariat, the expression 'tribunal à caractère international' is employed.[17] Because of the discrepancies in the French terminology, it would be unwise to attach too much importance to the distinction between 'tribunal of an international character' and 'tribunal international'.

2. Subject-matter jurisdiction

In *Yerodia*, the ICJ did not indicate how it proposed to distinguish between international criminal courts, before which immunity did not avail, and national courts, where it could be invoked as an obstacle to the exercise of jurisdiction. It seems unlikely that the Court considered the subject-matter jurisdiction to be the determining factor, however. Indeed, it had been one of Belgium's main arguments that there could be no immunity precisely because of the international nature of the crimes in question. The ICJ did not follow this reasoning, although it did form the basis of the dissent of the ad hoc judge, Christine van den Wyngaert, and was also commented upon by other judges. Judge van den Wyngaert reproached the majority for disregarding 'the whole recent movement in modern international criminal law towards recognition of the principle of individual accountability for international core crimes'.[18] Judge Oda, on the other hand, said that the issue was 'too new to admit of any definite answer'.[19] With respect to the Special Tribunal for Lebanon,

14. Ibid., para. 9.
15. Ibid., para. 7.
16. Ibid., para. 6.
17. 'Déclaration du Secrétaire général adjoint aux affaires juridiques, Conseiller juridique, lors des consultations officieuses tenues par le Conseil de sécurité le 20 novembre 2006', UN Doc. S/2006/893/Add.1 (2006), para. 2.
18. *Arrest Warrant* case, *supra* note 1, at 137, para. 27 (Judge Van den Wyngaert, Dissenting Opinion). See also ibid., at 95, para. 7 (Judge Al-Khasawneh, Dissenting Opinion); ibid., at 63, paras. 73–75 (Judges Higgins, Kooijmans and Buergenthal, Joint Separate Opinion).
19. Ibid., at 46, para. 14 (Judge Oda, Dissenting Opinion).

the question is not, however, whether the institution is 'international' because it is prosecuting international crimes. One of the features of the Special Tribunal for Lebanon that sets it apart from the other UN ad hoc tribunals is the fact that its subject-matter jurisdiction comprises no international crimes whatsoever. What needs to be determined, therefore, is whether a court can be international if its subject-matter jurisdiction consists of purely national crimes.

Crimes may be 'international' as a result of their recognition either by treaty law or by customary law. When they are identified as 'international', the legal consequences of this determination may include an obligation to prosecute or extradite, formulated with varying degrees of strength[20] or weakness,[21] as well as an acknowledgement that third states may exercise universal jurisdiction over such a crime.[22] Some crimes are almost certainly international, essentially because they are transnational in nature or are committed in areas that are not within the territorial jurisdiction of any state. Piracy, which may be committed on the high seas against nationals of a state that has no realistic hope of punishing the crime, is an example. Other crimes are said to be international in nature because they 'shock the conscience of humanity'. Such crimes – genocide, crimes against humanity, war crimes, and the crime of aggression – have been central to the jurisdiction of the international criminal tribunals since their inception. They are the 'core crimes' of the ICC. International tribunals may also prosecute crimes that are not even remotely international. For example, as a general rule, the international tribunals have jurisdiction over such crimes as false testimony or perjury.[23] The justification is not that these are international crimes, but rather that they are in some way ancillary to the exercise of jurisdiction over the truly international crimes.

An unresolved issue in international criminal law echoes a familiar debate in national criminal justice, namely whether the crimes are *mala in se* or *mala prohibita*. For a crime to be genuinely international, is it enough for it to be declared as such by treaty, or by a resolution of the Security Council? Or is there something special or inherent in the nature of international crimes, a feature that elevates them, to use the words of the preamble of the Rome Statute, to being 'the most serious crimes of concern to the international community as a whole'?[24] The international character of the prohibition of genocide, crimes against humanity, and war crimes is often justified because they are *mala in se*. Indeed, this underpins their claim to being norms that are *erga omnes* and *jus cogens*. Yet in the case of other international crimes, such as piracy and drug trafficking, the *mala prohibita* rationale seems to prevail. This intriguing question need not be addressed in considering whether the Special Tribunal for

20. 1987 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (1987), Art. 7.
21. 1951 Convention for the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951), Art. 7.
22. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 11 *bis*; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 11 *bis*; *Jorgic v. Germany*, Judgment of 12 July 2007, ECHR application no. 74613/01, paras. 48–54, 66–70.
23. See, e.g., Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 77(E); Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 77(A); Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 77(A).
24. 2002 Rome Statute of the International Criminal Court, 2187 UNTS 90 (2002), preamble, paras. 4, 9, Arts. 1, 5(1).

Lebanon is an 'international criminal court', because the drafting history of the Statute makes clear the intent to give it jurisdiction only over crimes under national law.

One of the international tribunals, the Special Court for Sierra Leone, has jurisdiction over a mixture of international crimes and crimes provided for in the laws of Sierra Leone that are quite clearly not of an international nature, such as 'abusing a girl under 13 years of age', 'abduction of a girl for immoral purposes', and 'setting fire to public buildings'.[25] Nobody would suggest that a state can exercise universal jurisdiction with respect to 'setting fire to public buildings', or that all states have a duty to prosecute or extradite with respect to such a crime, or that it is *erga omnes* or *jus cogens*. In his report proposing the creation of the Special Court for Sierra Leone, the Secretary-General clearly distinguished between 'crimes under international law' (in other words, war crimes and crimes against humanity) and the crimes under Sierra Leonean law that he proposed to include in the subject-matter jurisdiction of the Court. He reasoned that

> While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law.[26]

As no defendants have ever been charged under Article 6 of the Statute of the Special Court for Sierra Leone, there has been no determination as to whether an institution established by a treaty to which the United Nations is a party, but which prosecutes crimes that are not recognized as being international, may fall under the rubric of 'certain international criminal courts' as the term was used by the ICJ. Charles Taylor, the former president of Liberia, is being prosecuted before the Special Court for Sierra Leone on charges of crimes against humanity and war crimes. He is not accused of 'abusing a girl under 13 years of age', 'abduction of a girl for immoral purposes', or 'setting fire to public buildings'.

Apparently there was a debate within the Security Council about the internationalization of the subject-matter jurisdiction of the Special Tribunal for Lebanon. We know this because the Secretary-General's report says that 'the views expressed by interested members of the Security Council' on the subject were considered in reaching a decision not to include international crimes.[27] But we do not know exactly what these views were, because the session at which they were expressed was not public. The Secretary-General acknowledged that the issue of subject-matter jurisdiction was germane to determining the 'international character' of the tribunal. He explained that consideration was given to qualifying the terrorist crimes in Lebanon as crimes against humanity,

> and to define them, for the purpose of this statute, as murder or other inhumane acts of similar gravity causing great suffering or serious injury to body or to mental health,

25. Statute of the Special Court for Sierra Leone, Art. 6.
26. Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000), para. 19.
27. UN Doc. S/2006/893 (2006), para. 25.

> when committed as part of a widespread or systematic attack directed against the civilian population.[28]

He continued,

> Mindful of the differences in scope and number of victims between the series of terrorist attacks committed in Lebanon and the killings and executions perpetrated on a large and massive scale in other parts of the world subject to the jurisdiction of any of the existing international criminal jurisdictions, it was nevertheless considered that the 14 attacks committed in Lebanon could meet the prima facie definition of the crime, as developed in the jurisprudence of international criminal tribunals. The attacks that occurred in Lebanon since 1 October 2004 could reveal a 'pattern' or 'methodical plan' of attacks against a civilian population, albeit not in its entirety. They could be 'collective' in nature, or 'a multiple commission of acts' and, as such, exclude a single, isolated or random conduct of an individual acting alone. For the crime of murder, as part of a systematic attack against a civilian population, to qualify as a 'crime against humanity', its massive scale is not an indispensable element.[29]

Nevertheless, 'there was insufficient support for the inclusion of crimes against humanity within the subject-matter jurisdiction of the tribunal. For this reason, therefore, the qualification of the crimes was limited to common crimes under the Lebanese Criminal Code'.[30]

In a supplement to the report, the legal advisor to the UN Secretariat elaborated the matter somewhat further:

> Applicable criminal law. The prosecution and punishment of the crimes under the jurisdiction of the tribunal shall be governed by Lebanese criminal law, specifically the provisions mentioned in article 2 of the draft statute. Early in the negotiations the possibility was raised of incorporating legal grounds that would enable the judges, in certain circumstances and with sufficient proof, to qualify crimes as crimes against humanity. The draft document before you does not include this possibility. The text of the statute, the language of the report, the preparatory work and the background of the negotiations clearly demonstrate that the tribunal will not be competent to qualify the attacks as crimes against humanity.[31]

We can only speculate on why there was 'insufficient support' for prosecution based on the undisputedly international category of crimes against humanity, and why, taking into account the views of 'interested members of the Security Council', the decision was taken to prosecute undisputedly national crimes on the basis of the domestic criminal code. One explanation might be that in extending the subject-matter jurisdiction of the Court to genuinely international crimes, framed broadly as crimes against humanity, it might inadvertently find itself with the authority to prosecute other atrocities committed on the territory of Lebanon in recent years. Indeed, one of the ironies of the new tribunal for Lebanon is that it will address the admittedly serious terrorist crimes committed on the country's territory since early

28. Ibid., para. 23.
29. Ibid., para. 24 (footnotes omitted).
30. Ibid., para. 25.
31. Statement by Mr Nicolas Michel, UN Under-Secretary-General for Legal Affairs, the Legal Counsel, at the informal consultations held by the Security Council on 20 November 2006, UN Doc. S/2006/893/Add.1 (2006), para. 2.

2005 but not the arguably more serious war crimes and crimes against humanity committed on that same territory in mid-2006.

Another explanation for the decision not to include crimes against humanity within the Tribunal's subject-matter jurisdiction may the be positioning of the institution generally as one that is national with international features, rather than as a truly international tribunal. By confining subject-matter jurisdiction to the national criminal code, the Security Council signals that the Tribunal is more 'hybrid' or 'mixed' than international, and that the international involvement is essentially that of technical assistance.

Finally, although the Secretary-General supported the view that terrorist crimes like those committed in Lebanon could be qualified as crimes against humanity, there are good arguments to the contrary. Basing prosecutions on an expansive interpretation of crimes against humanity might unnecessarily complicate prosecutions. It is beyond the scope of this article to address in a thorough manner the debate about the scope of crimes against humanity.[32] Echoing pronouncements of the International Law Commission, the Appeals Chamber of the ICTY has set a low threshold for crimes against humanity, describing them as more than merely 'isolated or random acts'.[33] The Rome Statute of the ICC, on the other hand, is more exigent, with its requirement that there be 'a course of conduct involving the multiple commission of [punishable] acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'.[34] Cherif Bassiouni has argued persuasively that crimes against humanity, as formulated in Article 7 of the Rome Statute as well as under customary law, do not apply to the acts of non-state terrorist groups such as al Qaeda.[35]

Although terrorist crimes as such have not previously figured in the statutes of international criminal tribunals, there were proposals to include them in the Rome Statute of the ICC.[36] The Final Act of the Rome Conference contains a reference to terrorist crimes, and it is likely that the issue will be revived at the Review Conference, expected to be held in late 2009 or early 2010. There are also 12 international treaties dealing with specific forms of terrorism. Although the treaties impose obligations concerning prosecution and mutual legal assistance, they fall short of declaring terrorism to be an 'international crime', and they do not hint at the exercise of universal jurisdiction over such crimes. In other words, they treat terrorist crimes as a matter of international concern, but along the same lines as piracy, money laundering, trafficking in persons, and cutting submarine cables. They are not in the

32. On this point see W. A. Schabas, 'Is Terrorism a Crime against Humanity?', in H. Langholtz, B. Kondoch, and A. Wells (eds.), *International Peacekeeping, The Yearbook of International Peace Operations*, Vol. 8 (2003), at 255–62.
33. *Prosecutor v. Kunarac et al.*, Judgement, Case No. IT-96-23/1-A, A. Ch., 12 June 2002, para. 98.
34. 2002 Rome Statute of the International Criminal Court, 2187 UNTS 90 (2002), Art. 7(2)(a).
35. M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, Vol. I (2005), at 151–2. See also M. Cherif Bassiouni, *Crimes against Humanity* (1999), at 243–81.
36. Proposal Submitted by Algeria, India, Sri Lanka and Turkey on Article 5, UN Doc. A/CONF.183/C.1/L.27/Corr.1 (1998). See N. Boister, 'The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics', (1998) 3 *Journal of Armed Conflict Law* 27; P. Robinson, 'The Missing Crimes', in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002), at 497–525.

same category as the 'core crimes' of international criminal law, namely genocide, crimes against humanity, war crimes, and aggression.

The Security Council resolutions that preceded creation of the Tribunal described the assassination of Rafik Hariri on 14 February 2005 as a 'terrorist crime'[37] or a 'heinous crime'.[38] However, they did not describe 'terrorist crimes' as 'international crimes'. Nevertheless, according to Choucri Sader, who participated in the negotiations as a representative of Lebanon,

> These four resolutions attest to the UN Security Council's intention to include terrorist crimes, along with war crimes, genocide and crimes against humanity, in the category of crimes subject to international criminal law and therefore under the jurisdiction of an international tribunal. In this regard, the preliminary drafts of the Special Tribunal's Statute allowed the international judges to consider terrorist crime as a crime under international criminal law, thus overcoming certain doctrinal controversies. Moreover, the preliminary drafts made a clear reference to the Arab Convention for the Suppression of Terrorism, which defines terrorism in a much broader sense than the definition given by Article 314 of the Lebanese Penal Code.[39]

Judge Sader may be overstating the point, and perhaps his involvement in the discussions leads him to read more into the resolutions than would any reasonable observer who lacks insider knowledge. On a literal reading, one can just as easily conclude that the Security Council took great care to avoid characterizing the terrorist bombing and assassination of Rafik Hariri as an international crime. In any event, as Judge Sader explains, 'the final version of the Statute differs substantially from the initial drafts', notably by its exclusion of any suggestion that terrorist crimes are international crimes. 'We regretfully note that the real aim of the UN Security Council was to strictly confine the Special Tribunal – which is, to date, the only international tribunal empowered to hear cases of terrorism – to the application of domestic laws, thus rendering problematic the possibility of considering terrorist offences as crimes falling under international criminal law', says Judge Sader.[40]

When all of this is taken into account, the qualification of crimes in the Statute of the Special Tribunal for Lebanon tends to argue against the institution being considered as an 'international criminal court'.

3. The role of the Security Council in the creation of the Tribunal

The role of the Security Council in creating the Special Tribunal for Lebanon provides a strong argument for claiming it is an 'international criminal court'. It was in this context that the Appeals Chamber of the Special Court for Sierra Leone attempted to answer the question 'Is the Special Court an International Criminal Tribunal?'[41]

37. UN Doc. S/RES/1636 (2005), preamble, para. 12; UN Doc. S/RES/1664 (2006), preamble, para. 4.
38. UN Doc. S/RES/1595 (2005), preamble, para. 6; UN Doc. S/RES/1636 (2005), para. 7.
39. C. Sader, 'A Lebanese Perspective on the Special Tribunal for Lebanon', (2007) 5 *Journal of International Criminal Justice* 1083, at 1087.
40. Ibid.
41. *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, A. Ch., 31 May 2004, heading between paras. 36 and 37.

The initial intent of the Security Council was to establish a tribunal similar in many respects to the Special Court for Sierra Leone. It was to be created by agreement between the government of Lebanon and the United Nations, and not, as was the case with the ad hoc tribunals for the former Yugoslavia and Rwanda, by a Security Council resolution empowered with the authority of Chapter VII of the UN Charter. However, it proved impossible to establish a broad enough political consensus within Lebanon for the agreement, with the result that the Security Council imposed the Special Tribunal in a resolution that invoked Chapter VII. But the Security Council went out of its way to note the support of the Lebanese parliamentary majority for the Tribunal, 'the demand of the Lebanese people that all those responsible for the terrorist bombing that killed former Lebanese Prime Minister Rafiq Hariri and others be identified and brought to justice', and the fact that 'all parties concerned reaffirmed their agreement in principle to the establishment of the Tribunal'. In other words, although Security Council intervention was necessary to resolve a constitutional impasse within Lebanon, the Tribunal was truly indigenous and widely supported.[42]

Moreover, even though the Special Court for Sierra Leone was created by agreement rather than by Security Council resolution, its judges have tended to blur the distinction. In ruling that the former president of a third state, Charles Taylor, did not benefit from immunity for acts committed while he was in office, the Appeals Chamber of the Special Court said,

> Although the Special Court was established by treaty, unlike the [ICTY] and the [ICTR] which were each established by resolution of the Security Council in the exercise of powers by virtue of Chapter VII of the UN *Charter*, it was certain that the power of the Security Council to enter into an agreement for the establishment of the court was derived from the *Charter of the United Nations* both in regard to the general purposes of the United Nations as expressed in Article 1 of the *Charter* and the specific powers of the Security Council in articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315, the establishment of the Special Court by Agreement with Sierra Leone.[43]

The Appeals Chamber noted the 'high level of involvement of the Security Council in the establishment of the court including, but not limited to, approving the *Statute* of the Special Court and initiating and facilitating arrangements for the funding of the Court'.[44] The Chamber has also confirmed that the Security Council is authorized by the Charter of the United Nations to delegate authority for creating a tribunal or court to the Secretary-General,[45] that the Secretary-General may conclude such an agreement on its behalf,[46] and that the Security Council itself exercised its authority over an organ created at its behest through its representative on the Management Committee of the Court, created pursuant to Article 8 of the Agreement establishing

42. UN Doc. S/RES/1757 (2007), preamble.
43. *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, A. Ch., 31 May 2004, para. 37.
44. Ibid., para. 36. See also *Prosecutor v. Brima*, Ruling on the Application for the Issue of a Writ of *Habeas Corpus* Filed by the Applicant, Case No. SCSL-03-06-PT, T. Ch., 22 July 2003.
45. *Prosecutor v. Fofana*, Decision on Preliminary Motion on Lack of Jurisdiction *Ratione Materiae*: Illegal Delegation of Powers by the United Nations, SCSL-2004–14-AR72(E), A. Ch., 25 May 2004, para. 16.
46. Ibid., para. 17.

the Court.[47] Thus the Appeals Chamber decision strongly bolsters the claim of the Special Tribunal for Lebanon to being an 'international criminal court'.

But it would probably be incorrect to conclude that any criminal court or tribunal created by the Security Council, even acting pursuant to Chapter VII of the UN Charter, would therefore be sanctified as an 'international criminal court' with all that this implies, especially with regard to immunities. Security Council authority also lies at the basis of institutions such as the Serious Crimes Unit and the Special Panels for Serious Crimes in Dili in Timor Leste,[48] and the Kosovo war crimes prosecutions,[49] which are generally viewed as classic examples of hybrid tribunals. In such so-called executive missions, the Security Council is in effect acting as the national government. Courts and tribunals established under its authority in such circumstances are no more international in nature than are institutions like the national police force.

Writing about the Special Tribunal for Lebanon, Bert Swart has distinguished between international and internationalized tribunals.[50] Sometimes, internationalized tribunals have been called 'hybrid tribunals'[51] or 'mixed tribunals'.[52] According to Professor Laura A. Dickinson,

> Such courts are 'hybrid' because both the institutional apparatus and the applicable law consist of a blend of the international and the domestic. Foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries. The judges apply domestic law that has been reformed to accord with international standards.[53]

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47. Ibid., para. 24. Note that the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, 16 January 2002, nowhere refers to Security Council representation. It states, 'The management committee shall consist of important contributors to the Special Court. The Government of Sierra Leone and the Secretary-General will also participate in the management committee.' The Special Court for Sierra Leone does not report to the Security Council, and the Security Council has taken no action with respect to the Court since its creation except to make positive statements.
48. UN Doc. S/RES/1272 (1999); UN Doc. S/RES/1543 (2004); UN Doc. S/RES/1573 (2004). The institutions were established under the authority of the Security Council: UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. See also Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999, UN Doc. S/2005/458 (2005), Ann. II.
49. UN Doc. S/RES/1244 (1999).
50. B. Swart, 'Cooperation Challenges for the Special Tribunal for Lebanon', (2007) 5 *Journal of International Criminal Justice* 1153. See also C. P. R. Romano, A. Nollkaemper, and J. K. Kleffner (eds.), *Internationalised Criminal Courts and Tribunals, Sierra Leone, East Timor, Kosovo and Cambodia* (2004). In addition to co-operation, Professor Swart notes that another distinction between international and internationalized courts is the primacy of the former over national jurisdictions. Perhaps I have misunderstood him, but international courts do not necessarily have primacy over national courts, as the Rome Statute of the International Criminal Court makes abundantly clear. See 2002 Rome Statute of the International Criminal Court, 2187 UNTS 90 (2002), Art. 17.
51. See, e.g., The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, UN Doc. S/2004/616 (2004), paras. 40, 41, 42, 45, 46.
52. Ibid., para. 43.
53. L. A. Dickinson, 'The Promise of Hybrid Courts', (2003) 97 AJIL 295. See also on the hybrid courts D. A. Mundis, 'New Mechanisms for the Enforcement of International Humanitarian Law', (2001) 95 AJIL 934; K. Ambos and M. Othmann (eds.), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (2003); C. P. R. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', (1999) 31 *New York University Journal of International Law and Policy* 709; D. Turns, 'Internationalised or *Ad Hoc* Justice for International Criminal Law in a Time of Transition: The Cases of East Timor, Kosovo, Sierra Leone and Cambodia', (2001) 6 *Austrian Review of International and European Law* 123.

According to Professor Swart, the Special Tribunal for Lebanon is an internationalized rather than an international court, and this despite the fact that it was established by the Security Council. It seems implausible that the ICJ meant for internationalized or hybrid tribunals to be subsumed within the category of 'certain international criminal courts'. This is not to say that the Security Council could not bestow upon an internationalized or a hybrid tribunal some of the attributes that are inherent to international criminal courts, such as obligations to co-operate or the absence of sovereign immunity.[54] The Security Council can do this even with respect to national justice systems as it did, for example, in the *Lockerbie* case.[55] But it would have to do so expressly. Such attributes of an international criminal court could not be inherent or implied.

In 1946, when its authority was challenged by some of the accused, the International Military Tribunal said that, in establishing the institution, the four powers had 'done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law'.[56] It added, 'The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world'.[57] The judgment noted that in addition to the four powers which actually created the Tribunal, by treaty, a large number of governments of the United Nations signalled their adhesion in accordance with Article 5 of the London Agreement. Consequently, to the extent that the Tribunal required the endorsement of the 'civilized world' (today, we would speak of the 'international community'), it was not entirely accurate to suggest that the four powers had done collectively what each of them could have done singly. Rather, the Tribunal's status as an 'international criminal court' needed an additional element. The support of the 'civilized world' is the only indicator offered by the judgment capable of responding to this requirement.

4. Official capacity and head-of-state immunity

One of the intriguing features of the Statute of the Special Tribunal for Lebanon is the absence of a provision concerning the defence of official capacity. The terms are familiar, and they have appeared in essentially every international model since Nuremberg: 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as

54. Note that s. 15(2) of the UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, declared that 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising its jurisdiction over such a person'. Whether such a provision is a valid exercise of the authority delegated by the Security Council has never been tested.
55. UN Doc. S/RES/731 (1992); UN Doc. S/RES/748 (1992); UN Doc. S/RES/883 (1993).
56. *France et al. v. Goering et al.*, (1946) 22 IMT 203, at 230.
57. Ibid.

https://doi.org/10.1017/S0922156508005074 Published online by Cambridge University Press

freeing them from responsibility or mitigating punishment'.[58] Why no comparable provision is included in the Statute of the Special Tribunal for Lebanon is not explained by the preparatory documents. Cécile Aptel, who headed the legal advisory services of the UN International Independent Investigation Commission in Lebanon, has observed,

> An unusual limitation of the Statute of the STL, when compared to all other international and hybrid criminal jurisdictions established so far, is that it does not contain provisions stipulating that the official position of accused persons – for instance as Head of State or government or as a responsible government official – shall not relieve them of criminal responsibility nor mitigate punishment.[59]

After noting that such provisions have been systematically inserted into the applicable law of other international criminal tribunals, she goes on to consider the issue of immunities:

> While Article 6 of the Statute specifies that amnesty shall not constitute a bar to prosecution before the STL, the Statute does not contain provisions clarifying that immunities, including personal and functional immunities, shall also not constitute a bar to prosecution before this court. This omission of a fundamental principle of international criminal justice could be construed as deliberate, for derogations to the general rules on the immunity of state officials are usually limited to international crimes *stricto sensu* (i.e. genocide, crimes against humanity and war crimes) and could therefore not apply before the STL. The applicability of this principle before international criminal jurisdictions was iterated by the International Court of Justice in the *Yerodia* case. However, the International Court of Justice underlined that the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals are only applicable to the latter. This finding may not provide a sufficient basis for the identification of a possible emerging principle of customary international law which would apply to those prosecuted before the STL, in light of the omission of this principle and also because of the specific jurisdiction of the STL, which does not extend to core international crimes. Thus, this omission may keep state officials out of the reach of the STL and hence further restrict the scope of its activities.[60]

The classic provision on official capacity was possibly omitted because the drafters of the Statute considered it to be applicable only to international crimes. Since international crimes were excluded from the Statute, they might have deemed it inappropriate and legally unsound to deprive an accused person of a defence that was recognized under national legal systems at the time the crime was committed. But if this is the explanation, it is difficult to understand why other features of international criminal prosecution, such as superior responsibility and the denial of the defence of superior orders, are included in the Statute of the Special Tribunal for Lebanon.[61] There are, here, potential violations of the principle *nullum crimen sine lege*.

58. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, (1951) 82 UNTS 280, Art. VII.
59. C. Aptel, 'Some Innovations in the Statute of the Special Tribunal for Lebanon', (2007) 5 *Journal of International Criminal Justice* 1107, at 1110–11.
60. Ibid. (references omitted).
61. Statute of the Special Tribunal for Lebanon, Arts. 2(2), 2(3).

Withdrawal of the defence of official capacity is often confused with the issue of immunity, but the two concepts, although related in some respects, are quite distinct. This can be seen clearly in Article 27 of the Rome Statute of the ICC, which comprises two paragraphs, one addressing the defence of official capacity and the other concerning immunity.

> Article 27. Irrelevance of official capacity
>
> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The lawmaking authority of a given state is free to remove a defence of official capacity in proceedings before its own courts to the extent that one already exists. This is merely a decision about criminal law policy taken within the parameters of sovereign jurisdiction. To the extent that certain international crimes are concerned, a state is actually obliged to remove such a defence.[62] But a state may not remove the immunity of the head of state of another state, because this violates customary international law, as the ICJ affirmed in the *Yerodia* case. This holds true even for international crimes. The distinction between the defence of official capacity and a claim of immunity as a bar to exercise of jurisdiction was muddled by the Special Court for Sierra Leone in its ruling on Charles Taylor's claim of immunity. The Appeals Chamber seemed to equate Article 6(2) of the Statute of the Special Court for Sierra Leone, which removes the defence of official capacity, with Article 27(2) of the Rome Statute, where in fact the two provisions are legally quite different.[63] Similarly, in the preliminary motion in the *Milošević* case, a trial chamber of the ICTY also seemed to confound the defence of official capacity and the issue of immunity of an incumbent or former head of state.[64] The same problem can be seen in the dissent of Judge Van den Wyngaert in the *Yerodia* case.[65]

Although the statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda do not speak to the issue of immunity directly (in contrast with Art. 27(2) of the Rome Statute), the oft-cited paragraph 61 in the *Yerodia* decision of the ICJ provides some authority for the position that there is no immunity for heads of state and similar officials before 'certain international criminal courts', even where this is not explicitly stated in the Statute. Paragraph 61 of *Yerodia* is somewhat puzzling, nevertheless, because it also refers to paragraph 27(2) of the Rome Statute

62. 1951 Convention for the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951), Art. 4.
63. *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, A. Ch., 31 May 2004, para. 53.
64. *Prosecutor v. Milošević*, Decision on Preliminary Motions, Case No. IT-02-54-PT, T. Ch., 8 November 2001, paras. 26–33.
65. *Arrest Warrant* case, *supra* note 1, at 137, para. 27 (Judge Van den Wyngaert, Dissenting Opinion).

as evidence for the proposition that there is no immunity before international courts. This suggests that the ICJ appreciated the distinction between paragraphs (1) and (2) of the Rome Statute. But the Court did not explain why there was, similarly, no immunity before the ad hoc tribunals despite the absence of any equivalent to paragraph 27(2). At the heart of the reasoning of the ICJ lies the principle that heads of state and similar officials do not enjoy immunity before 'certain international criminal courts'. Accordingly, there should be no need to state this in the applicable legal instruments of such a tribunal. Perhaps, then, paragraph 27(2) of the Rome Statute does nothing more than state what is already inherent in the nature of an international criminal court.

All this leads to the conclusion that there is no need to include a provision dealing with immunity in the Statute of the Special Tribunal for Lebanon, if – and only if – it is indeed an 'international criminal court'. The result is somewhat weird. Assuming the Special Tribunal for Lebanon is indeed an international criminal court, then if a head of state were to be prosecuted before it, he or she would not be able to invoke immunity but might, nevertheless, have a defence of official capacity. It seems unlikely that this is what the Security Council, the Secretary-General and the government of Lebanon intended. Rather, the omission of the defence of official capacity stands out as a conscious decision, given the inclusion of such provisions in all of the previous models. But that, in turn, seems to suggest that existing immunities under customary international law were to be respected as well. This is a further argument for the view that the Special Tribunal for Lebanon is not an international criminal court in the sense that this term is employed by the ICJ.

5. Conclusion

This discussion of the nature of the Special Tribunal for Lebanon shows that identification of what constitutes an 'international criminal court' is not a simple matter. The ICJ used the expression in the context of a discussion about immunities, but without providing clear guidelines to assist in classifying institutions. It identified three examples: the two ad hoc tribunals for the former Yugoslavia and for Rwanda and the ICJ. This invites an *ejusdem generis* approach, except that even the three institutions have significant differences, notably with respect to the method of their creation. The two ad hoc tribunals are the offspring of the international community as a whole, speaking through one of its designated organs, the UN Security Council. The ICC, on the other hand, is established by a multilateral treaty. In principle, it is only applicable to the parties.

Did the ICJ really mean to imply that a group of states, acting in concert, could modify rules of customary international law concerning immunities with regard to third states? We know that Belgium alone could not override the immunity of the former Congolese foreign minister. This was decided authoritatively in *Yerodia*. But what if Belgium joined forces with, say, the Netherlands, to establish a tribunal with jurisdiction over war crimes and crimes against humanity? Would that be enough of an 'international criminal court' to fall within the exception set out by the ICJ? Technically, it would be international, if establishment by treaty is the criterion.

But it is unrealistic to think that Belgium and the Netherlands can do collectively what they cannot do individually, namely eliminate the immunity of the former foreign minister of a third state. But does this change when Belgium has not one treaty partner but 104, as is the case with the ICC? The matter remains to be decided, although the better view is probably that Article 27(2) of the Rome Statute applies between the parties and cannot be set up against the head of state of a third state.

The question of the international nature of the Special Tribunal for Lebanon and the related issue of immunity may prove to be of some importance in the judicial activities of the institution. It is no secret that much suspicion for the assassination of Rafik Hariri in February 2005 falls upon Syria. The International Independent Investigation Commission had to confront this directly, and the Security Council was required to intervene in order to compel Syrian co-operation.[66] It is not, however, at all obvious that the same regime applies with respect to the Tribunal. The Security Council could, of course, intervene, should the Tribunal identify a Syrian official benefiting from immunity as a suspect in the prosecutions. But absent further Security Council action, whether the Special Tribunal for Lebanon is sufficiently international to override the immunities that currently exist under customary international law seems doubtful.

66. UN Doc. S/RES/1636 (2005); UN Doc. S/RES/1644 (2005).