

TERRORISM AS A CRIME UNDER INTERNATIONAL CUSTOMARY LAW INTRODUCED BY SPECIAL TRIBUNAL FOR LEBANON

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Abstract: *The attitude of Special Tribunal for Lebanon to the issue of terrorism was introduced in its interlocutory decision on the applicable law. Author in this article is analysing its definition of distinct crime, its reasoning which was crucial to introduce such definition and its importance in relation to Lebanese law. The aim of this article is not only to identify the attitude of Special Tribunal for Lebanon but also to criticize distinct decision with intention to find, if STL argumentation is valid and sound, as this decision was highly criticised by a number of scholars. Last aim is to adopt an attitude toward to this decision in ways of its relation to international criminal law and international criminal judiciary on one hand and on the other hand its importance to proceedings at the Special Tribunal for Lebanon.*

Keywords: *international criminal law, crime of terrorism, Special Tribunal for Lebanon, international customary law, international criminal judiciary*

INTRODUCTION

The first international criminal institution with jurisdiction over the crime of terrorism was established in 2007, on the basis of resolution of UN Security Council, as a result of agreement between UN and Lebanon government. There are some security issues that were probably crucial for decision of Lebanon not to prosecute those, who were responsible for assassination of prime minister and other persons in Lebanon (2005), on his own. For the same reasons, the city of The Hague was chosen as a place for Tribunal - far from other potential members (or sympathisers) of their terrorist group. This is (presumably) hindsight from experiences in Iraq, where Saddam Hussein was prosecuted by national court and where were been statistically proven relations between proceeding at the court and the number of victims of violence in the country.¹

Before the proceedings efficiently started, the pre-trial judge had asked the Appeals Chamber to answer 15 question, which could be grouped into 5 categories (terrorism, conspiracy, homicide, perpetration, cumulative charging). The Appeals Chamber of the Special Tribunal for Lebanon (thereinafter only “STL”) unanimously ruled an interlocutory decision on the applicable law,² with esteemed Antonio Cassese³ as a judge rapporteur, who deceased in that very year. The reason for asking those questions (according to rule 68 G of the Statute of the Special Tribunal for Lebanon, thereinafter only “Statute”) by pre-

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¹ On the matter of relation, see inter alia SCHARE, M. Order in the Courtroom: The unique Challenge of maintaining Control of a War Crimes Trial. *Case Western Reserve Journal of International Law*. 2007, p. 168.

² Case No. STL-11-01/1, 16. February 2011.

³ His influence on outcome of interlocutory decision may be significant, as he was known that he had been advocating similar opinion before, see e. g. CASSESE, A. The Multifaceted Criminal Notion of Terrorism in International Law. *Journal of International Criminal Justice*. 2006, Vol. 5, No. 4, pp. 933–958.

trial judge was to ensure, that there will be no problems in further proceedings and that the indictments were confirmed on “*sound and well-founded grounds*”.⁴ Distinctive for this sui generis procedure at the STL is that it is not part of criminal proceedings against certain persons and its basis is to resolve certain issues in abstracto, before they could eventually arise in proceedings against concrete accused.

The aim of this article is to identify the attitude of STL to the issue of terrorism, mainly if STL chose distinctive way of definition of a distinct crime. If STL created a sui generis definition of terrorism, to answer what are its characteristics and on which ground it was found. Second major aim of this article is to screen its definition of terrorism and to found, if STL argumentation is valid and sound, inter alia if crime of terrorism was existing in international criminal law, or if it is STL’s judicial novum, which must follow a proper argumentation, especially in a field of criminal law. Last aim is to adopt an attitude toward to this decision in ways of its relation to international customary law and therefore its importance to other international criminal courts and tribunals, and how this definition of terrorism was (has been) used in proceedings at the STL.

INTERLOCUTORY DECISION OF SPECIAL TRIBUNAL FOR LEBANON

In general

STL is specific and distinctive internationalised court, as it is applying specific parts of national criminal law of Lebanon similarly to domestic courts (of Lebanon). Despite of that, as STL said, it is still international court, so it must “*abide by the highest international standards of criminal justice, and its statute incorporates certain aspects of international criminal law*”.⁵ And hence, if law of Lebanon has inconsistency with international law or if it has a gaps and these problems could not be solved with regard to the general rules and principles of Lebanese law, than they must be solved with regard to the international treaties or customary law⁶ or with priority of international law. If there was inconsistency between requirements of international law and that of Lebanese law⁷ it has to interpret national law with respect to the international law or apply only international law and incoherent national law leave unapplied. This must be considered with accordance to fact, that either Lebanese criminal law, as well as international criminal law must follow one of the basic principles – the principle of legality, which component, that forbids retroactivity of criminal substantive law (*nullum crimen sine lege praevia*), is especially actual for international criminal judiciary.

Lebanese criminal code consists of respective provisions,⁸ so there is no need for international rules to be directly applied. However, the STL said,⁹ that international criminal

⁴ Case No. STL-11-01/1, 16. February 2011. par.1.

⁵ *Ibid.*, par. 16.

⁶ *Ibid.*, par. 17.

⁷ *Ibid.*, par. 40.

⁸ In concreto, relevant is art. 314 of 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 or microbial agents.*”

⁹ *Ibid.*, par. 45–46.

law (as conventional as customary) may provide guidance for interpretation of those provisions. In accordance to the principle of legality, it could be concluded, that also international customary law must exist ante facto, if it shall be applied. The STL used this guidance on the matter of “*the objective element of the means used to perpetrate the terrorist act*”¹⁰ where Lebanese criminal law and its interpretation by Lebanese courts is of narrower scope and it is not criminalising conduct involving machine guns or handguns as terrorism, but as a homicide, i. e. in view of that interpretation such conduct is not falling under STL’s *ratione materiae* (this is just a hypothetical problem as such conduct is not the case of assassination of prime minister, where perpetrators used explosive material). STL said, that its (extensive) interpretation was not violation of principle of legality, as it was consistent with Lebanese law (it is not *contra legem*, merely matter of interpretation of statutory law) and in the other hand, it had been already existing in international law, “*thus it is a reasonably foreseeable application of existing law*”.¹¹ The STL decision is on the other side also restrictive, as in its definition in Lebanese criminal code the special “terrorist” intent is missing. In other words, STL’s decision is extensive in matter of conduct of crime (*actus reus*) and restrictive in matter of intent (*mens rea*) in comparison to the Lebanese criminal substantive law. Any other elements of Lebanese law are not analysed as they are not crucial to this article.¹²

Concerning aforesaid, there are no gaps in matter of definition of terrorism in Lebanese national law and STL did not need to directly use definitions from international law (as mentioned afore, international law has only interpretative relevance), even though it presented a definition of international terrorism from analysis of international treaty law and international customary law. STL was analysing only one treaty, that was relevant for the jurisdiction over crime of terrorism and ratified by and binding for Lebanon (The Arab Convention for the Suppression of Terrorism) and which will be not further analysed in this article,¹³ but we rather move to the main topic – international customary law.¹⁴

Affirmative position in the view of STL

Exhaustive analysis of STL’s interlocutory decision is beyond scope of this article, nevertheless its argumentation could be introduced in a brief summary.

As mentioned also in the decision itself,¹⁵ there had been no widely accepted definition of terrorism and in this the Defence office and the Prosecutor had concurring opinion.

¹⁰ Ibid., par. 46.

¹¹ Ibid.

¹² For purposes of this article, the Lebanese domestic law is not analysed, only STL definitions and arguments about international law. For more about Lebanese domestic law see Case No. STL-11-01/1, 16. February 2011. par. 47–60 or VENTURA, M. J. *Terrorism According to the STL’s Interlocutory Decision on the Applicable Law. Journal of International Criminal Justice*. 2011, Vol. 9, No. 5, pp. 1024–1025.

¹³ For more about international treaty law see Case No. STL-11-01/1, 16. February 2011. par. 63–82.

¹⁴ It could be disputed, if its usage in STL analysis was appropriate in the view of drafting history of STL Statute, where STL is prohibited to prosecute with reference to this convention, or more broadly speaking, drafters of STL Statute have shown their will to eliminate any references to the Arab Convention on Terrorism. See JURDI, N. N. *The Special Tribunal for Lebanon: Law and Practice*. Oxford University Press, 2014, p. 85.

¹⁵ Case No. STL-11-01/1, 16. February 2011. par. 83.

Despite of that, STL had different opinion and thought, that definition of terrorism had already emerged in international customary law “*at least in time of peace*”¹⁶ while the obligation of individuals under international law that prohibits it in times of armed conflicts had been already forming and so far, the acts of terrorism in these times are not punishable per se, but only as a war crimes.¹⁷

There are two fundamental conditions for consuetudo in international law – 1) general practice (usus) and 2) conviction that such practice reflects law (opinio juris), which both must be met for creation of creation of an international custom.¹⁸

The court sustained its opinion on the basis of “*number of treaties, UN resolutions, and the legislative and judicial practice of States*”¹⁹ that leads to creation of opinio juris and related general practice was coherent with this basis. STL formulated definition of international terrorism as a crime under international customary law as followed:

“1. *The perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act.*

2. *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.*

3. *The act must involve transnational element.*”²⁰

STL argued, in favour of opinio juris condition, that there obviously is general agreement of universal society (societas maxima), that states are obliged to fight against terrorism (in all its forms), as it results from various international documents²¹, which STL cited in his decision. STL also highlighted chosen national judiciary from five states, in concreto from Canada, Italy, Mexico, Argentina and USA.²²

The first argument of STL in favour to classify international terrorism as a crime under international customary law is universal and regional instruments of international law,²³ although they are not from field of international criminal law, they are significant as a fount of knowledge about rules of international customary law. Multiple regional treaties or resolutions of international organisations et cetera are taken in account by STL,²⁴ where it could found ground for definition of terrorism, as mentioned afore, mainly aspect of special intent. STL did not stopped at the regional instruments and pointed out also unanimous resolution 1544 of UN Security Council from 2004. STL also mentioned some other international conventions²⁵ in which it emphasizes transnational element

¹⁶ Ibid., par. 85.

¹⁷ See Ibid., par. 106–108.

¹⁸ Inter alia: CASSESE, A. *International Law*. New York: Oxford University Press, 2005, p. 156 and following; SHAW, M. N. *International Law*. UK: Cambridge University Press, 2003, p. 68 and following; KLUČKA, J. *Mezinárodní právo veřejné*. Bratislava: Iura Edition, 2011, p. 113 ff.

¹⁹ Case No. STL-11-01/1, 16. February 2011, par. 85.

²⁰ Ibid.

²¹ Ibid., 85 or 92.

²² Ibid., par. 86.

²³ Ibid., par. 88.

²⁴ E. g. Council Framework Decision 2002/475/JHA, On Combating terrorism, arts. 1-4.

²⁵ In concreto Montreal Convention (art. 4), Tokyo Convention (art. 1(2)), SUA Maritime convention (art. 4), Terrorist Bombing Convention (art. 3) and Hostage Convention (art. 13), see Case No. STL-11-01/1, 16. February 2011, cit. 146.

(which should be interpreted in extensive way)²⁶ of international terrorism, which differentiate ordinary crime of terrorism punishable according to the national laws and crime of terrorism punishable on the ground of the international criminal law. In short, even though the act of terrorism is capable of causing serious losses, it is not crime under international law if all three conditions, as were found by STL, are not fulfilled. In conclusion to this argument, STL has opinion, that from those treaties and/or decisions of international organisations conclusions could be drawn not only about *opinio juris* of members of universal society, but also definitional characteristics of examined crime.

The court also emphasizes, as its second argument, that national legislatures are having concurrence in the matter of definitional characteristics of terrorism in their domestic criminal codes, which are similar to that introduced by STL, with (understandably) exception of transnational element. To reinforce its view, STL picked up and compared criminal laws of many states of different legal systems, because “*consistent national legislation can be another important source of law indicative of the emergence of a customary rule ... reference must not be made to one (major, a. n.) national legal system only ... although the distillation of a shared norm does not require a comprehensive survey of all legal systems of the world*”.²⁷ What is important is also that there is not only (more or less) identical definition in national legal systems, but there must be also a common understanding of universal society, that a crime violates universal values and this criterion is, according to the STL, also met.²⁸ STL even considered Sharia law and mentioned that even under this “law”²⁹ acts of terrorism are prohibited – according to The Kingdom’s Council of Senior Religious Scholars³⁰ (of Saudi Arabia).

The third argument that court takes in account is national judiciary. As it also results from International Court of Justice ruling in case of military and paramilitary activities in and against Nicaragua,³¹ which was taken in consideration by STL, the general practice of states (including their judiciary practice) should be in general consistent with rule, in order to become an international customary rule – a contrario, there is no need for corresponding practise to “*be in absolutely rigorous conformity with the rule*”.³² From this comparative

²⁶ E. g. perpetrators of such act are from different countries, or the act has a significant impact to another country etc. See Case No. STL-11-01/1, 16. February, 2011, par. 90.

²⁷ Being inspired by ICTY decision in case *Furundžija*, 10. December 1998, par. 177. Cit. in Case No. STL-11-01/1, 16. February 2011, par. 91.

²⁸ To turn into an international crime, a domestic offence needs to be regarded by the world community as an attack on universal values (such as peace or human rights) or on values held to be of paramount importance in that community; in addition, it is necessary that States and intergovernmental organisations, through their acts and pronouncements, sanction this attitude by clearly expressing the view that the world community considers the offence at issue as amounting to an international crime. In Case No. STL-11-01/1, 16. February 2011, par. 91.

²⁹ Which is (with no ambitions of exhaustive explanation) not a law in stricto sensu, but a religious normative system, with ambition to become a law and which norms can be adopted by a state and its normative materiae can be transformed into a legal (secular) binding form. This is actual for some state, e. g. Saudi Arabia or United Arab Emirates.

³⁰ Interpol Report to the Counter-Terrorism Committee (Saudi Arabia), 26 December 2001, S/200111294, at 5. Cit. 188 in Case No. STL-11-01/1, 16. February 2011.

³¹ Judgment, ICJ. Reports (1986) 14, at 98.

³² *Ibid.*, at 98, para. 186.

analysis of national judiciary³³ STL form its opinion, that judicial practice³⁴ of courts manifested through identical or similar judgments³⁴ as a reflection of common definition (in fundamental elements) and also of *opinio juris* (Italian Supreme Court of Cassation even explicitly referred to international customary law). STL adopted the Sørensen doctrine³⁵ of positive presumption of *opinio juris*, which means that, if there is a general practise, there is *ipso facto* also a presumption of *opinio juris*, as long as the opposite is proven.

According to these arguments STL concluded that there is an international customary rule forbidding the crime of terrorism and binding the states to (inter alia) prosecute on its territory those, who are involved in such a crime and/or to prosecute and repress the crime of terrorism perpetrated on its territory. STL also noted, that customary rule of cooperation of state in such activity is not formed yet, but it is in process of nascending.³⁶ However, as STL also said, the existence of this customary rule, as formulated by STL, not means that crime of terrorism must be crime under international law. As was stated in case of Duško Tadić³⁷ there must be certain criteria met, mainly, the individual must breach directly international rule to which individual was obliged.³⁸ The court to deal with this problem used an example of resolutions of UN General Assembly and UN Security Council, in concrete that they distinguish between other crimes (such as drug trafficking etc.) and terrorism which was characterised as a threat to peace and security and exactly this “*difference in treatment of these various classes of criminal offences, and the perceived seriousness of terrorism, bears out that terrorism is an international crime classified as such by international law, including customary international law, and also involves the criminal liability of individuals*”.³⁹

In summary, the view of STL is that customary rule of international criminal law, as defined afore – prohibiting and criminalising the act of terrorism had already been emerged, at least in time of peace and similar rule in times of armed conflicts is in *statu nascendi*.⁴⁰

CRITICAL DISCUSSION

Most plausible reason for giving priority to extensive interpretation of respective article of Lebanese criminal code concerning terrorism was that STL issued its decision in abstracto. Appeals Chamber did not saw any indictment against concrete persons and situation, so it did not know, if an extensive interpretation would be necessary (which would

³³ See several citations in Case No. STL-11-01/1, 16. february 2011, par. 100.

³⁴ Case No. STL-11-01/1, 16. February 2011, par. 100.

³⁵ SØRENSEN, M. *Principes de droit international public in Recuell des Cours de l'Academle de La Haye*. 19760-III, p. 51. Cited in Case No. STL-11-01/1, 16. February 2011, par. 101.

³⁶ Case No. STL-11-01/1, 16. February 2011, par. 102.

³⁷ *Prosecutor v. Dusko Tadic aka “Dule” (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para 94 and 128–137.

³⁸ In other words, not breaching only a domestic rule, that was passed with regards to the international law.

³⁹ Case No. STL-11-01/1, 16. February 2011, par. 104.

⁴⁰ The rule is not already emerged mainly due to the of states that are opposing to create such a rule in times of armed conflict, because of advocating in favour to so called freedom fighters. See Case No. STL-11-01/1, 16. February 2011, par. 110.

be examined later). Appeals Chamber itself noted, that deciding in light of specific facts would be an advantage.⁴¹

However, STL's Appeals Chamber decided to decide, and this is highly criticised by some scholars in various ways. Firstly, there is a question, if a criminal court even could be asked to answer a question in absence of specific case at all – i. e. to answer a hypothetical question that might never become relevant to the cases before it? The answer is that “*there is no legal system that would allow for higher court to issue its interpretation of the substantive law applicable in criminal proceeding pending before a lower court absent of specific facts*”.⁴² Hence a judicial balance was shifted as Appeals Chamber expanded its rule (in a way, that questionably might require an amendment of Statute) and acquired an advisory function. Reason for adopting this attitude was to ensure a speedy trial (to refrain possibility of different opinion of the Pre-Trial Judge or the Trial Chamber)⁴³ and this argument might sound reasonable but it is not appropriate if decision would be taken at the expense of due process, especially in such fundamental aspects of applicable law, where “*court should be careful not to convert itself into an advisory body*”.⁴⁴ One of major problems is also that in this “advisory procedure” one party is missing– the accused. This party was replaced by Defence Office which should defend interests of hypothetical accused in this proceeding. On the other hand, it is true that accused has a possibility to ask for reconsideration (art. 176 bis and art. 190 of the STL Rules of Procedure and Evidence) but it might be difficult to court (in general) to depart from its own jurisprudence.⁴⁵ Therefore rights of accused (art. 16 of the Statute) might be at stake.

Even though, STL might not appropriately managed to answer, why it should interpret Lebanese law differently from Lebanese court in the view of that drafters of Statute (UN Security Council and Lebanese government) directed it to apply Lebanese domestic law. In interpreting of Lebanese domestic law (Lebanese criminal code) domestic courts are more fit to give a persuasive interpretation due of their experiences with it and due of their familiarity of context of terrorism in Lebanon. Thus, primarily STL should in his reasoning consider Lebanese law, then its case law and only then international customs as it is obliged to decide upon national not up on international law.⁴⁶ Crucial to this point of discussion is position of international customary law in Lebanese law, where STL had an opinion, that it should have at least same status as domestic legislation adopted by parliament, thus international custom could eventually override national legislation. According to relevance of the Lebanese case law: Lebanon is a civil law country without doctrine of binding precedent, thus different (extensive) interpretation of respective provisions of law is matter of free judicial reasoning (such discretion certainly should not be arbitrary) and is permissible if provision such interpretation allows (e. g. is not clear enough or con-

⁴¹ Case No. STL-11-01/1, 16. February 2011, par. 10.

⁴² GILLETT, M., SCHUSTER, M. Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism. *Journal of International Criminal Justice*. 2011, Vol. 9, No. 5, p. 996.

⁴³ Case No. STL-11-01/1, 16. February 2011, par. 9.

⁴⁴ Case No. IT-94-1-AR72, 2. October 1995, *Tadić*. Separate opinion of judge Sidhwa, par. 109.

⁴⁵ For more see GILLETT, M., SCHUSTER, M. Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism. *Journal of International Criminal Justice*. 2011, Vol. 9, No. 5, pp. 991–997.

⁴⁶ *Ibid.*, pp. 1002–1005.

tains words as “such as” which is also case of art. 314 of Lebanese criminal code). Hence, according to Ventura, STL does not changed Lebanese law but “*it is more accurate to say that the STL disagreed with Lebanese interpretation of Article 314*”.⁴⁷

According to the Statute, STL is obliged to decide upon a national law of Lebanon (art. 2 of the Statute). It is true, that even Lebanese legal system acknowledges the principle of monism (in general),⁴⁸ so STL statement about priority of international law could be valid also according to the Lebanese constitutional system, but its integral part is also the principle of legality, so analysis of Lebanese legal system should not be biased in favour of one principle without appropriate concerning of the second, where a next set of questions is arising.

Despite of mentioned problems, the decision of STL has eminent significance for the theory of international criminal law, as there is no general definition of terrorism at all, so it would likely have effect for long-time efforts of international community to develop such a definition.⁴⁹ For the same reason, that international community was not able to find common definition⁵⁰ and to form exact characteristics of effects to the states (and other subjects) accruing from such definition, this decision could be disputed. Considering mentioned and in view of the *nullum crimen sine lege* principle, customs finding in the field of criminal law should be considered cautiously and restrictively.

STL noted, that the crime of terrorism, as well as punishment for it, without any doubt existed in Lebanese law and STL is not making a definition of completely new crime under its jurisdiction, however it is introducing a new crime under international law, that might a) has effects also out of Lebanese borders (as STL introduced definition of terrorism as an crime under International Law, not a mere interpretative tool) and b) has effects as an interpretative criterion, that cause extensive interpretation of Lebanese criminal law and that might be considered as a law-making of a new (more broadly qualified) crime – as Lebanese case law is not considering all methods (such as knives or guns) of terrorism under STL doctrine as an acts of terrorism, where as Prosecutor as Defence Office advocated in favour of Lebanese case law coherent interpretation.⁵¹

⁴⁷ VENTURA, M. J. Terrorism According to the STL's Interlocutory Decision on the Applicable Law. *Journal of International Criminal Justice*. 2011, Vol. 9, No. 5, pp. 1027–37.

⁴⁸ JURDI, N. N. *The Special Tribunal for Lebanon: Law and Practice*. Oxford University Press, 2014, pp. 84–85.

⁴⁹ SCHARE, M. Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation. *American Society of International Law Insights*. 2011, Vol. 15, No. 6. Available at: <https://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and#_ednrefl0>.

⁵⁰ The international treaty law on this issue is fundamentally particular, and e. g. assassinations of businessmen, engineers, journalists, and educators are not included, while similar attacks against diplomats and public officials are covered by the treaties. Attacks or acts of sabotage by means other than explosives against a passenger train or bus, or a water supply or electric power plant, are not dealt with, while similar attacks against an airplane or an ocean liner are. See SCHARE, M. Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation. *American Society of International Law Insights*. 2011, Vol. 15, No. 6. Available at: <<https://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and>> or SCHARE, M. Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects. *Case Western Reserve Journal of International Law*. 2004, Vol. 36, No. 2. Available at: <<http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1399&context=jil>>. See p. 365.

⁵¹ For more see GILLET, M., SCHUSTER, M. Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism. *Journal of International Criminal Justice*. 2011, Vol. 9, No. 5, p. 1000.

This STL decision is criticised for its abrupt conclusions. Its analysis of national law was correct in conclusion that national legislation could indeed be found of knowledge about existence of international customary rules in general. STL differentiates between transnational and domestic terrorism, from which the second is not a crime under international law. According to Saul, STL in its analysis of national legislation made no adequate effort to differentiate between these two and “*that would be like suggesting that because every state prohibits murder in its own territory, therefore transnational murder must be a customary international crime*”.⁵² Where Ventura oppose, that he is ignoring what Appeals Chamber actually said – that domestic offence also needs to be regarded as an attack on universal values.⁵³ Secondly, the STL did conflate the national definition for criminal and civil (or non-criminal) purposes.⁵⁴ Thirdly, the STL did analysis of a number national legislations, but their number is still not significant compared to the total number of members of universal society, from which about 87 states (2006)⁵⁵ lacked a special definition for crime of terrorism. This analysis is also omitting some crucial aspects of national criminal legislations, on which basis differences between understanding of the crime of terrorism could be noticed. And lastly, STL was citing also national legislations, that were officially criticised for raising human-rights concerns and it should be considered if these legislations are also suitable for serious analysis of an institution of international justice.⁵⁶

For similar reasons, the adequacy of few in decision cited judgements could be a matter of speculation, as they are not representative sample of national judiciaries and according to Saul who paid attention to every one of cited judgements, STL even misread these judgements, exaggerated, or misrepresented their significance and did not take the necessary care to closely examine any judgment.

Saul is also emphasising fact, that UN Security Council resolutions are not supporting STL arguments in case of definition of terrorism nor in case of argument that crime of terrorism should be a crime under international law, because resolution 1373 (2001) contains only a duty of states to criminalise terrorism, without mentioning what exactly terrorism

⁵² SAUL, B. Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism. *Leiden Journal of International Law*. 2011. Available at: <<https://ssrn.com/abstract=1865564>>. See pp. 5–6.

⁵³ VENTURA, M. J. Terrorism According to the STL's Interlocutory Decision on the Applicable Law. *Journal of International Criminal Justice*. 2011, Vol. 9, No. 5, p. 1028.

⁵⁴ The United States' definition serves jurisdictional, remedial, and ancillary offence purposes, but does not establish a criminal offence of terrorism. Likewise, in the United Kingdom, there is no crime of terrorism per se, but only various inchoate offences that 'hang off' the terrorism definition; just as in the days of combating the Irish Republican Army, terrorist acts may still be prosecuted as ordinary offences (such as murder and so forth). The Russian Federation's law primarily empowers governmental authorities to combat terrorism, while the Pakistani law attends to court jurisdictional matters. SAUL, B. Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism. *Leiden Journal of International Law*. 2011. Available at: <<https://ssrn.com/abstract=1865564>>. See pp. 5–6.

⁵⁵ SAUL, B. Defining Terrorism in International Law (2006), p. 264. Cited in SAUL, B. Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism. *Leiden Journal of International Law*. 2011. Available at: <<https://ssrn.com/abstract=1865564>>. See p. 7.

⁵⁶ For more see SAUL, B. Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism. *Leiden Journal of International Law*. 2011. Available at: <<https://ssrn.com/abstract=1865564>>.

is. The next cited resolution (1566 from year 2004) is source of soft law, where just a few states really changed their legislation with regard to this guideline and secondly (paradoxically) this resolution is not even supporting that definition which was introduced by STL, since this resolution “*does not criminalize any additional conduct that is not already criminal under existing transnational anti-terrorism treaties*”.⁵⁷

UN General Assembly declaration 49/60 from 1994 also lacks definition of terrorism for legal purposes and itself only politically emphasizes necessity to find, develop and codify such one. Significant is starting moment of negotiations about Draft Comprehensive Terrorism Convention. But they had been at deadlock not only at the time of decision, but they have been at deadlock all the time including today and no change is on the horizon because of differences about definition of terrorism.⁵⁸ If there was a common understanding about terrorism, as a part of *opinio juris*, it would not probably be such a problem to find an adequate definition in the course of 20 years of UN General Assembly ad-hoc commission existence. In addition, the operational definition of this ad-hoc commission differs from UN General Assembly declaration as well as from definitions of UN Security Council or from those in international treaties or in national legal systems.

One of major disputed differences is, that if the political (ideological) motive of such act should be involved in definition (*dolus specialis*) where STL pointed to the International Court of Justice decision in Nicaragua case⁵⁹ and stated that relevant practise should be consistent with rule at least in general, where Saul opposed, that “*this is not a peripheral difference, but goes to the core of whether conduct can be properly described as terrorism or not*”.⁶⁰

STL said that there is no such a crime during armed conflicts because of so called freedom fighters (liberation movements) which are advocated by some states. If there would be a crime of terrorism under international customary law, there is no reason to exclude times of armed conflicts. National legislations as well as international treaty law (Terrorism Financing Convention) does not differentiate between terrorism committed during armed conflict and during peace. Reservations are not on basis of time (situation), but on basis of subject. Hence if there would be such international custom, it would be applicable also during armed conflicts, but just in relation to liberation movements such custom is not emerged yet.⁶¹

⁵⁷ Definition in resolution of UN Security Council 1566 (2004): (i) when committed to provoke a state of terror, or intimidate a population, or compel a government or an international organization, and (ii) where the conduct also constitutes an offence under existing ‘sectoral’ anti-terrorism treaties. According to and for more see SAUL, B.: Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism. *Leiden Journal of International Law*. 2011. Available at: <<https://ssrn.com/abstract=1865564>>.

⁵⁸ See United Nations General Assembly, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth session (28 January–1 February 2002).

⁵⁹ ICJ decision in Nicaragua case from 1986 could be confronted with ICJ decision in North Sea Continental Shelf case from 1969, where ICJ said, that “*state practice ... should have been ... virtually uniform*”. ICJ Reports (1969) 3, par. 43.

⁶⁰ SAUL, B. Defining Terrorism in International Law. 2006, p. 264. Cited in SAUL, B. Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism. *Leiden Journal of International Law*. 2011. Available at: <<https://ssrn.com/abstract=1865564>>.

⁶¹ GILLET, M., SCHUSTER, M. Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism. *Journal of International Criminal Justice*. 2011, Vol. 9, No. 5, pp. 1011–1014.

The definition is also vague, as it contains also formulation “and so on” in its objective element, which could be problematic in connection to part of its intent definition “or to coerce national or international authority to take some action, or to refrain from taking it”. And it should be problematic also as that this definition does not need that the attack is aimed against civilians (or at least non-military) population. This formulation of definition could be dangerous as it might be misused by some totalitarian regimes or might lead to a overcriminalisation,⁶² as such definition prohibits also fight for freedom against government, or maybe could be misinterpreted by government to criminalise also not officially approved mass protests or strikes?

The Tribunal is correct that there is a customary rule prohibiting perpetration of terrorism and that results to the obligation of states to prevent and repress such act (aut dedere aut judicare). But this per se does not mean, that it must be also a crime at international level and this is acknowledged also by the STL.⁶³ The Appeals Chamber of STL argued, that there is presumption of individual criminal responsibility. This could be assigned to possible misinterpretation of ICTY judgement in case Tadić⁶⁴ and to some logical errors (petitio principii).⁶⁵ There are three conditions that must met, in order to speak about crime under international law a) Respective prohibition must be part of international law b) Breach of this prohibition must be serious and affecting universal values c) This breach must entail individual criminal responsibility, independently on the domestic laws⁶⁶ and from these the third one is problematic and need closer argumentation, but the STL was not very exhaustive on this issue and “*the fact that terrorism is not part of the core offences of the ICC Statute and that it has so far not been possible to adopt a comprehensive terrorism convention is rather evidence to the contrary*”.⁶⁷ In other words, there is no great argue against STL decision, that terrorism is an act, that must be criminalised (at least in some sectors) according to international treaty and customary law, but it is not proven yet, that it must be criminalised at the international level - in other words if it is not only an obligation of states and other subjects of universal society.

Academics are acknowledging that act of terrorism may be on its way to become a “true” international crime and are mindful of fact, that some serious acts, that might be defined

⁶² Ibid., pp. 1009-1011.

⁶³ See Case No. STL-11-01/1, 16. February 2011, par. 103.

⁶⁴ The Tadić criteria, proposed to assimilate violations of international humanitarian law in international and non-international armed conflicts by also criminalizing the latter. AMBOS, K. Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law? *Leiden Journal of International Law*. 2011, Vol. 24, No. 3, p. 666. Available at: <[http://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/epapers/Ambos,TerrorismSTL,LJIL24\(2011\),655-675.pdf](http://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/epapers/Ambos,TerrorismSTL,LJIL24(2011),655-675.pdf)>. See p. 666.

⁶⁴ Case No. STL-11-01/1, 16. February 2011, par. 104.

⁶⁵ The decision equates an assumption to be proven (‘individual criminal responsibility’) with the actual conclusion (‘individual criminal liability at the international level’), or the argument is nonsensical because assumption and conclusion cannot be equal. AMBOS, K. Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law? *Leiden Journal of International Law*. 2011, Vol. 24, No. 3. Available at: <[http://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/epapers/Ambos,TerrorismSTL,LJIL24\(2011\),655-675.pdf](http://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/epapers/Ambos,TerrorismSTL,LJIL24(2011),655-675.pdf)>. See p. 666.

⁶⁶ Ibid., p. 670.

⁶⁷ AMBOS, K., TIMMERMANN, A. Terrorism and Customary International Law. In: BEN, S. (ed.). *Research handbook on international law and terrorism*. Elgar, 2014. See p. 36. Available at: <<https://ssrn.com/abstract=2400446>>.

as terrorism, are already punishable as a war crimes or as crimes against humanity. The lack of precision is not harming the existence of obligation of states, but it is at the same time a proof of lacking consensus by universal society⁶⁸ and that is not compatible with *nullum crime sine lege certa* principle, which must be respected by international criminal law in order to serve the purpose of justice.

At the end of this section it should be noted that as an Australian author Bernhard said,⁶⁹ despite of that this finding was widely criticised by scholars, it is with no doubt serving as an authoritative statement, of the law, even if not strictly creating legal precedent.

Practical impact of definition of terrorism on STL's cases

As was stated afore, definition introduced in STL's interlocutory decision was just hypothetical, as this decision was not adjudicated in concrete case. Special Tribunal for Lebanon did not issued a single judgement against certain accused in case of attack against Lebanese prime minister yet. It passed judgements on only two (minor) cases of contempt and obstruction of justice. Even though all "terroristic" proceedings are ongoing, it might be concluded, that examined extensive interpretation will not be used, as all of the cases are clearly criminal also under narrower interpretation of Lebanese criminal code by Lebanese courts (all accused are indicted of terrorism committed by using an explosive material), in other words, there will be no need to use such extensive interpretation.

In respect of its extensive definition of terrorism accused has a right to demand a reconsideration of distinct advisory decision of STL. But as was mentioned afore there is no need to take this extensive interpretation in account, which was also implicitly recognised by the STL's Appeals Chamber in its decision on defence request for reconsideration of its interlocutory decision, which was rejected on the ground that "*Defence has failed to show how the Accused suffered an injustice from it,*"⁷⁰ and also noted, that its definition of terrorism as a crime under international law indeed could be used as a interpretative guidance (i. e. not directly by STL) but "*neither the indictment nor the confirmation decision relies on the definition of terrorism as set out in the Interlocutory Decision*".⁷¹

To show difference between Lebanese case law and STL opinion, murder of Pierre Gemayel (Lebanese Minister of Industry) could be shown as theoretical example (as its death did not fall under STL's jurisdiction, which is restricted to assassination of Hariri). In this case victim was murdered by gunfire just after Lebanese Cabinet approved the final draft of STL Agreement and Statute. This assassination "*would not have qualified as terrorism according to the Lebanese courts ... it would prima facie fall within the Appeals Chamber's interpretation ...*"⁷²

⁶⁸ Ibid., p. 38.

⁶⁹ BERNHAUT, M. Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging. *Australian International Law Journal*. 2011.

⁷⁰ Case No. STL-11-01/PT/AC/R17bis of 18. July 2012, par. 3.

⁷¹ Ibid., par. 49.

⁷² GILLET, M., SCHUSTER, M. Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism. *Journal of International Criminal Justice*. 2011, Vol. 9, No. 5, p. 1002.

Hypothetical implication of STL's definition was introduced by Lebanese author Jurdi at example of a Mexican drug dealer who is threatening to kill a US policeman as he wants to coerce public authorities to release his companions from jail. This conduct is fulfilling all elements of terrorism definition: 1) a threat to commit a criminal act - murder 2) an intend to coerce public authorities 3) transnational element (Mexican citizen and US police). To such example one might argue, that for such act there is need to constitute a threat to international values as STL also alleged in its decision, but according to Jurdi this element is not included to its definition and for its weight it should be included *expressis verbis* in it. With such opinion author of this paper disagrees as there is no need to include such element to concrete definition as it is general *conditio sine qua crimine internationale non est*. What is more important as an implication from this example is the necessity of political, ideological, religious etc. motive to be involved in such definition. Otherwise this definition might criminalise also conduct, which is commonly not considered as terrorism.⁷³

It is very possible that if STL refused to answer such a hypothetical question, there would be no discussion about such extensive interpretation of terrorism or respectively this discussion would be just in academic and not in practical sphere and that could be considered in some ways as a pity. Despite of criticism of such definition it is possible, that there would not be any constructive discussion at all or that discussion would not be so dynamic. This decision might serve (and is serving) as a working material; as an idea with which academics (or maybe next treaty conference?) might agree or disagree and might help them to introduce other opinions or perhaps also definitions of terrorism as a crime under international law, or as an obligation to the states.

For now, such definition might be considered as over and under inclusive at the same time. Under inclusive as it lacks political, ideological, religious, philosophical, racial or ethnic motive and is excluding time of armed conflicts (exclusion should address the perpetrators, not the time of act). Over inclusive as it contains also vague expression "so on" in its objective element of crime, which could lead to misuse by some (namely authoritarian) governments.

CONCLUSION

The Special court for Lebanon introduced a definition of a transnational terrorism as a crime under international law in its interlocutory decision, which has been criticised by many academics that argue that a) decision provides strong concerns about its conformity with principle of legality, b) decision arises question of possible *ultra vires* approach and lastly c) there is no such a crime under international law and the custom making is not finished yet (if it even started). There was no consensus about existence of this crime before decision of the STL in the academic world, rather on contrary – the Defence office as well as Prosecutor, before the decision of Appeals Chamber was issued, were of the same mind, that there is no such crime under international law. Therefore, scholars mostly agree

⁷³ JURDI, N. N. *The Special Tribunal for Lebanon: Law and Practice*. Oxford: Oxford University Press, 2014, pp. 80–81.

in that STL's definition is abrupt and even if there would be such crime under international law, its definition should be different.

This decision, alike as any other judgements of international courts, should not be accepted uncritically as it has not precedential character. But on the other hand, if this decision would be borrowed also by other international institutions or states, or it would be followed with (at least implicit) approval, it may be considered as a significant moment in evolution of customary international law and/or in finding a definition for crime of terrorism in international treaty law. Either we agree on existence of customary crime of transnational terrorism with STL or not, there will still be need for a universally accepted definition of terrorism as a crime under international law, in the source of universal international written law, as punishing on the grounds of customs in the field of criminal law in general should not be considered as a satisfying state.