Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (United Nations Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01/I, 16 February 2011)

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I Factual background

The mandate of the United Nations (UN) Special Tribunal for Lebanon is to prosecute persons responsible for the attack of 14 February 2005 in Beirut, which resulted in the death of the former Lebanese Prime Minister Rafik Hariri and the death and injury of many more persons, as well as additional attacks connected with that killing.[1] The UN and the Republic of Lebanon first negotiated an agreement on the establishment of a hybrid international and domestic law tribunal pursuant to Security Council Resolution 1664 (2006).[2] Further to Security Council Resolution 1757 (2007), the *Statute of the Special Tribunal* entered into force on 10 June 2007.[3]

In the present case,[4] the Appeals Chamber was exercising its power under rule 68(G) of the Tribunal's *Rules of Procedure and Evidence* to clarify in advance the law to be applied by the Pre-Trial Judge and the Trial Chamber to enable them to rule on the indictment before them.[5] The Appeal Chamber's task was, thus, one of making legal findings in the abstract, without any reference to specific facts or defendants.

II The decision

The judgment of Judge Antonio Cassese, Presiding and Judge Rapporteur, outlined below, was adopted unanimously by all presiding members of the Appeals Chamber. The complex and extensive decision is significant for its identification of both the requirements of Lebanese law and the extent, if any, to which the application of that body of law is

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1 *Statute of the Special Tribunal for Lebanon*, established 29 March 2006 (entered into force 30 May 2007). Article 1 of the Statute provides that:

> if the Tribunal finds that attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a gravity and nature similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks.

2 SC Res 1664, UN SCOR, 1664th mtg, UN Doc S/Res/1664 (29 March 2006).

3 SC Res 1757, UN SCOR, 1757th mtg, UN Doc S/Res/1757 (30 May 2007).

4 *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (United Nations Special Tribunal for Lebanon, Appeals Chamber, Case No STL 11-01/I, 16 February 2011) ('*Interlocutory Decision*').

5 UN Special Tribunal for Lebanon, *Rules of Procedure and Evidence*, Doc No STL/BD/2009/01/Rev 3 (adopted 20 March 2009) r 68G.

modified or overridden by the Tribunal's Statute. Crucial to the determination of that question was the issue of whether the relevant criminal law of Lebanon should be construed in light of international law.

The most important aspects of the decision are the Appeals Chamber's analysis of the relevant principles of statutory interpretation and the substantive law of terrorism to be applied, holding that although the Tribunal must look first to the Lebanese *Criminal Code* in this regard, international law binding upon Lebanon may also be relevant as an aid to interpretation. Controversially, the Appeals Chamber concluded that a customary rule of international law has now developed defining and outlawing terrorism, at least in time of peace. While that finding has been widely criticised by scholars,[6] it will no doubt serve as an authoritative statement of the law, even if not strictly creating legal precedent.

This case note will outline the Appeals Chamber's: findings on the appropriate method of statutory interpretation to be applied by the Tribunal; findings on the definition of terrorism and the substantive law of terrorism to be applied; reconciliation of the modes of criminal responsibility contemplated by Lebanese law with those of international criminal law; and its analysis of whether charges brought against an accused should be stated alternatively or cumulatively. However, critical analysis of the decision will be limited to the most controversial of these matters, namely the appropriate method of statutory interpretation and the substantive law of terrorism.

A Interpretation of the Special Tribunal Statute

Given that the Statute entered into force pursuant to Security Council Resolution 1757, the Appeals Chamber found that in construing the Statute it was required take into account the statements made by members of the Security Council and its practice in relation to the adoption and implementation of that Resolution. As an overarching principle of interpretation, the Appeals Chamber held that it was bound to interpret the Statute in a way that 'best enables the Tribunal to achieve its goal to administer justice in a fair and efficient manner', failing which it should adopt that interpretation that is more favourable to the rights of the accused in accordance with the general principle of criminal law of *favor rei* ('in favour of the accused').[7]

The implementation of the above principles of interpretation led the Appeals Chamber to conclude that article 2 of the Statute expressly and unequivocally requires the Tribunal to apply Lebanese law as the substantive law governing the crimes prosecuted within its jurisdiction. It held that in doing so, the Tribunal is bound to apply Lebanese law as interpreted and applied by Lebanese courts, which permits it to take into account international law binding upon Lebanon in accordance with the general presumption that

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6 See, eg, Ben Saul, 'Legislating from A Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 24 *Leiden Journal of International Law* 677; Kai Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?' 24 *Leiden Journal of International Law* 655; Matthew Gillett and Matthias Schuster, 'Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism' (2011) 9(5) *Journal of International Criminal Justice* 989; Stefan Kirsch and Anna Oehmichen, 'Judges Gone Astray: The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon' (2001) 1 *Durham Law Review* 32.

7 *Interlocutory Decision* (UN Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01/I, 16 February 2011) [32].

Parliament does not intend to act in beach of international law.[8] It is the latent tension between the provisions of the *Criminal Code* and those of international law that ostensibly form part of the Statute — best typified by the contrast between articles 2 and 3 of the Statute — that informs much of the Appeals Chamber's decision. Indeed, much of the decision is concerned with the question of whether and, if so, to what extent and with what effect, the law of Lebanon may be held to have been overridden by international law.

B The applicable substantive criminal law

1 Terrorism

The Appeals Chamber observed that it is mandated under article 2 of its Statute to apply the provisions on terrorism contained in the *Criminal Code*, as well as articles 6 and 7 of the Lebanese law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith struggle'.[9] Accordingly, it concluded that the Tribunal must apply the criminal law of Lebanon and not international criminal law in order to define the crime of terrorism. However, it held that although the Tribunal may not apply international law directly, because of the express and unambiguous words of article 2 of the Statute, it may refer to international law — whether customary or treaty-based — in order to *interpret* and *apply* Lebanese law. It did so on the basis of the Tribunal's status as an international tribunal, the transnational character of the circumstances giving rise to its establishment, and the fact that the customary rule is binding upon Lebanon as a member of the international legal order.

The Appeals Chamber observed that Lebanese courts have generally placed a narrow interpretation on the notion of the means used to commit a terrorist attack under article 314 of the *Criminal Code*. That provision provides as follows:

> 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.

The Appeals Chamber found that Lebanese courts have tended to find that the means which are 'liable to create a public danger' under article 314 of the *Criminal Code* are limited to those that are expressly stated in the *Criminal Code*, to the exclusion of all other means. According to this interpretation, the means listed in article 314 are exhaustive, rather than illustrative, such that an attack perpetrated by way of an implement such as a firearm, knife or letter-bomb is not one which can amount to a terrorist attack for the purposes of article 314. In other words, 'the special intent to spread terror will not suffice, by itself, to make an offence terrorist in nature, if the means used are not those required by Article 314'.[10]

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8 See, eg, *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 139, 143 (Lord Denning); *Post Office v Estuary Radio Ltd* [1968] 2 QB 752, 756 (Lord Diplock).

9 This mandate is circumscribed by the exclusion of penalties such as the death penalty and forced labour, which may otherwise be applicable under Lebanese criminal law.

10 *Interlocutory Decision* (UN Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01/I, 16 February 2011) [60].

Further, having conducted an extensive analysis of the jurisprudence on terrorism, the Appeals Chamber found that a customary rule of international law has evolved defining and outlawing transnational terrorism in times of peace. Importantly, that rule was found not to contain any such limitation on the means used in carrying out an attack.[11] Accordingly, it declined to adopt the interpretation of article 314 propounded by Lebanese courts in favour of one devoid of any such limitation and asserted to be in accordance with international law. The customary rule, as applied by the Tribunal, was held to contain the following elements: (i) the commission of a criminal act; (ii) through means which are liable to create a public danger, whatever their exact type; and (iii) the intent of the perpetrator to spread fear among the population or coerce authority.

2 Crimes against personal integrity

(a) Homicide

The Appeals Chamber held that the Tribunal should apply only the Lebanese law of homicide since international criminal law does not provide for a separate definition of murder independent of the underlying crime, whether it is war crimes, crimes against humanity or genocide.

(i) Intentional homicide

The elements of the crime of intentional homicide under Lebanese law to be applied by the Tribunal were held to be as follows: (i) an act or omission aimed and endangering life; (ii) resulting in the death of a person; (iii) a causal connection between the act and the death; (iv) knowledge of the circumstances of the offence; and (v) intent, whether direct or indirect, to commit homicide. The Appeals Chamber also stated that premeditation in the perpetration of intentional homicide is an aggravating circumstance, rather than an element of the offence.

(ii) Attempted homicide

The elements of the crime of attempted homicide under Lebanese law to be applied by the Tribunal were held to be as follows: (i) a preliminary act undertaken in order to commit the crime of homicide; (ii) intent to commit homicide; and (iii) the absence of a deliberate abandonment of the crime before it is committed. As for intentional homicide, the Appeals Chamber stated that premeditation in the commission of attempted homicide is an aggravating circumstance, rather than an element of the offence.

(b) Conspiracy

As for homicide, the Appeals Chamber held that the Tribunal should apply only the Lebanese law of conspiracy since international criminal law contemplates no equivalent offence. The elements of the crime of conspiracy under Lebanese law to be applied by the Tribunal were held to be as follows: (i) two or more persons; (ii) making an agreement; (iii) aimed at committing crimes against State security (which for the purposes of the Tribunal must be a terrorist act); (iv) agreeing on the means to be used to commit the crime (which

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[11] Similarly, the Appeals Chamber observed that neither does the *Arab Convention for the Suppression of Terrorism*, opened for signature 22 April 1998 (entered into force 7 May 1999) ('*Arab Convention*') contain any such limitation: ibid [69].

for the purposes of the Tribunal must satisfy the 'means' element of article 314); and (v) criminal intent.

3 Modes of criminal responsibility

Article 2 of the Statute requires the Tribunal to apply Lebanese law concerning 'criminal participation', 'conspiracy', 'illicit association' and 'failure to report crimes and offences' (as crimes per se). Article 3 delineates various modes of criminal liability specified in international criminal law including commission, complicity, organising and directing others to commit a crime, contribution to crimes by a multitude of persons or an organised group, superior responsibility and criminal liability for the execution of superior orders.

The Appeals Chamber held that *either* Lebanese law (enshrined in article 2 of the Statute) *or* international criminal law (enshrined in article 3 of the Statute) could apply to modes of responsibility in a particular set of circumstances. It stated that the Pre-Trial Judge and Trial Chamber must: (i) evaluate on a case-by-case basis whether there is any actual conflict between the application of Lebanese law and that of international criminal law in relation to modes of responsibility in the circumstances of the particular facts in issue; (ii) if there is no conflict, apply Lebanese law; and (iii) if there is a conflict, apply the law that would lead to a result more favourable to the rights of the accused in accordance with the principles of *favor rei* and *nullum crimen sine lege* (a prohibition on the retroactive application of criminal law).

4 Concurrence of offences

The Appeals Chamber found that matters relating to the concurrence of offences are regulated largely along the same lines by Lebanese law and international criminal law, and thus there is no need to reconcile any conflict between the two bodies of law. It observed that there is no clear general rule under either Lebanese or international criminal law as to whether cumulative or alternative charges are to be preferred, but stated that it is generally preferable to charge the crimes of terrorist conspiracy, terrorism and intentional homicide cumulatively rather than alternatively.

III Critical analysis

A Consistency with existing law

The decision of the Appeals Chamber continues and extends the prevailing trend in domestic courts in recent years towards recognising a discrete rule of customary international law defining and criminalising terrorism. Judicial authority, to the effect that no generally accepted definition of terrorism exists,[12] has been now largely displaced by the contrary view.[13] Although the decision of the Appeals Chamber does not have strict

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12 See, eg, *Tel-Oren v Libyan Arab Republic*, 726 F 2d 774, 806-7 (DC Circuit, 1984) (Judge Bork); *Gaddafi case*, French Court of Cassation [cass crim], 13 March 2001, reprinted in English in 125 ILR 490; *United States v Yousef*, 337 F 3d 56, 106–8 (2d Circuit, 2003). See also the decision of the Supreme Court of India in *Singh v State of Bihar* (2004) 3 SCR 692.

13 See, eg, the decision of the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1; [2002] 1 SCR 3, [96]–[98]. See also *Zrig v Canada (Minister of Citizenship and Immigration*), 2003 FCA 178, 229 DLR (4th) 235; *Cavallo Case*, Case No 140/2002, 10 June 2003 (First Judge of Amparo on Criminal Matters in the

precedential value outside the framework of the Special Tribunal, it is likely that the decision will significantly influence the development of the jurisprudence, both domestic and international, on terrorism.

This is especially true given the status of the Tribunal as a specially-constituted international tribunal, the influence generally accorded to the scholarly writings of its Presiding Judge, Antonio Cassese — a leading international law scholar — and the weight of evidence that the Appeals Chamber was able to invoke in order to forcefully conclude that a customary rule has now crystallised. Thus, although the interpretation adopted is not binding, per se, on courts other than the Special Tribunal, it is likely that it will come to be used as a persuasive interpretation of the applicable legal provisions in other cases in which terrorism is charged. This is so despite the widespread criticism that this aspect of the decision has attracted from scholars.[14]

B *Appropriateness and accuracy of the decision*

1 *Identification of a customary rule*

The conclusion of the Appeals Chamber that a customary rule of international law exists concerning transnational terrorism during peacetime was premised upon a thorough analysis of the sources of international law relevant to the question at issue. Having traversed international conventions and regional treaties,[15] UN Security Council[16] and General Assembly resolutions,[17] as well as national legislation[18] and case law,[19] it is

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Federal District of Mexico; upheld by the Supreme Court of Mexico, although for different reasons); *Enrique Lautaro Arancibia Clavel Case*, Case No 259 (2004), 24 August 2004 (Judge Boggiano, concurring, Supreme Court of Argentina); *EHL Case*, 15 February 2006 (Belgian Court of Cassation); *Bouyahia Maher Ben Abdelaziz et al*, sez I, 17 January 2007, n 1072, [2.1] (Italian Court of Criminal Cassation); *Almog v Arab Bank*, 471 F. Supp 2d 257, 284 (EDNY, 2007); *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222 (18 March 2009), [31]–[32] (Sedley LJ).

14 See above n 6.

15 See, eg, Council of the European Union, *Council Framework Decision 2002/475/JHA, On Combating Terrorism*; Organization of African Unity, *Convention on the Organisation of the Islamic Conference on Combating International Terrorism*, 1 July 1999, Res 59/26-P; Commonwealth of Independent States, *Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism*, 4 June 1999; Communauté Economique et Monétaire de l'Afrique Centrale, *Convention relative à la lute contre le terrorism en Afrique Centrale*, 5 February 2005, Règlement No 08/06-OEAC-057-CM-13; Cooperation Council for the Arab States of the Gulf, *Convention on the Cooperation Council for the Arab States of the Gulf on Combating Terrorism*, 4 May 2004; Shanghai Cooperation Organization, *Shanghai Convention on Combating Terrorism, Separatism and Extremism*, 15 June 2001.

16 See, eg, SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001); SC Res 1566, UN SCOR, 1566th mtg, UN Doc S/RES/1566 (8 October 2004).

17 *Measures to Eliminate International Terrorism*: GA Res 49/60, UN GAOR, 49th sess, 84th plen mtg, UN Doc A/RES/49/60 (9 December 1994) annex; GA Res 50/53, UN GAOR, 50th sess, 53rd plen mtg, UN Doc A/RES/50/53 (11 December 1995); GA Res 51/210, UN GAOR, 51st sess, 200th plen mtg, UN Doc A/RES/51/210 (17 December 1996); GA Res 52/165, UN GAOR, 52nd sess, 165th plen mtg, UN Doc A/RES/52/165 (19 January 1998); GA Res 53/108, UN GAOR, 53rd sess, 108th plen mtg, UN Doc A/RES/53/108 (26 January 1999); GA Res 54/110, UN GAOR, 54th sess, 210th plen mtg, UN Doc A/RES/54/110 (2 February 2000); GA Res 55/158, UN GAOR, 55th sess, 158th plen mtg, UN Doc A/RES/55/158 (12 December 2000); GA Res 56/88, UN GAOR, 56th sess, 88th plen mtg, UN Doc A/RES/56/88 (24 January 2002); GA Res 57/27, UN GAOR, 57th sess, 27th plen mtg, UN Doc A/RES/57/27 (15 January 2003); GA Res 58/81, UN GAOR, 58th sess, 81st plen mtg, UN Doc A/RES/58/81 (8 January 2004); GA Res 59/46, UN GAOR, 59th sess, 46th plen mtg, UN Doc A/RES/59/46 (16 December 2004); GA Res 60/43, UN GAOR, 60th sess, 43rd plen mtg, UN Doc A/RES/60/43 (6 January 2006); GA Res 61/40, UN GAOR, 61st sess, 40th plen mtg, UN Doc A/RES/61/40 (18 December 2006); GA Res 62/71, UN GAOR, 62nd sess, 71st plen mtg, UN Doc A/RES/62/71 (8 January 2008); GA Res 63/129, UN GAOR, 63rd sess, 129th plen mtg, UN Doc

submitted that the Appeals Chamber was justified in concluding that there is sufficient evidence of the formation of a general *opinio juris* in the international community, accompanied by State practice consistent with such *opinio*, to the effect that a customary rule, at least in time of peace, has emerged. The precise definition contained within the rule is sufficiently coalescent among States as to convincingly justify its existence, contrary to the views of both the Defence Office and the Prosecutor in their respective submissions.

One should certainly query the assertion of the Appeals Chamber that a customary rule, presently in the process of formation, also covers terrorism in time of armed conflict.[20] It is acknowledged, as suggested by the Appeals Chamber,[21] that a majority of States presently takes the view that an act of terrorism committed during armed conflict may violate international law. However, it is submitted that the Appeals Chamber's conclusion that 'the very few States still insisting on an exception for "freedom fighters" and therefore objecting to the coalescing definition of terrorism could, at most, be considered persistent objectors thereof',[22] is an overstatement.

Specifically, the *Arab Convention*, a treaty to which, at present, 18 Middle Eastern States, including Lebanon, are parties, excepts from the category of terrorists the class of 'freedom fighters' (those engaged in a war of self-determination). Given the centrality of this geographical area to the so-called 'war on terrorism', and consequently the vital role its member States play in facilitating the development of a global agreement on a definition and prohibition of terrorism, one cannot legitimately ignore the *opinio juris* and accompanying practice of its constituent States as to whether such a rule presently exists or is presently crystallising and, if so, its nature.

2 Application of international law for the purposes of the Tribunal

It is suggested that the Appeals Chamber may not have been entirely justified in its decision to construe the Lebanese domestic crime of terrorism in accordance with international law. As stated above, article 2 of the Tribunal's Statute is explicit in proscribing the application of any provisions relating to terrorism beyond those contained within the confines of the *Criminal Code*. That provision, entitled 'Applicable criminal law', provides as follows:

> The following shall be applicable to the prosecution and punishment of the crimes referred to in Article 1, subject to the provisions of this Statute:
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> (a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit association and failure to report on crimes and offences, including the

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A/RES/63/129 (15 January 2009); GA Res 64/118, UN GAOR, 64th sess, 118th plen mtg, UN Doc A/RES/64/118 (15 January 2010).

18 Including the laws of South Africa, New Zealand, Jordan, Iraq, United Arab Emirates, Egypt, Tunisia, Belgium, Sweden, Germany, Austria, The Netherlands, France, Finland, UK, Australia, Canada, Pakistan, Colombia, Peru, Chile, Panama, Mexico, Argentina, Ecuador, United States, Russian Federation, The Philippines, India, Uzbekistan, and The Seychelles.

19 See above n 12.

20 *Interlocutory Decision* (UN Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01/I, 16 February 2011) [109].

21 Ibid [108].

22 Ibid [110].

> rules regarding the material elements of a crime, criminal participation and conspiracy, and
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> (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith struggle.

The drafters of the Statute clearly and expressly intended that the Tribunal shall not apply any international substantive rule on terrorism, whether customary or treaty-based. This much is acknowledged and accepted by the Appeals Chamber.[23] However, it asserts that the qualification contained in article 2 of the Statute that article 314 is 'subject to the other provisions of this Statute', which, in certain respects, incorporate elements of international criminal law, entitles the Tribunal to *interpret* and *apply* the *Criminal Code* using international law.

(a) Introductory remarks

Before moving to the question of whether the Appeals Chamber was entitled, in the first place, to interpret and apply article 314 in light of international law, it is submitted that a process of simple statutory construction tends toward the construction of that provision adopted by the Appeals Chamber. Article 314 states that '[t]errorist acts are all acts intended to cause a state of terror and committed by means liable to create a public danger *such as* …' (emphasis added). The ordinary meaning of the words 'such as', when followed by an enumerated list, as is the case here, is that the items referred to in that list provide a mere illustration of the statement referred to beforehand. In this way, it is suggested that the more appropriate interpretation of Article 314, contrary to that employed by Lebanese courts, is that the list of means contained therein is intended to be illustrative, rather than exhaustive.

(b) The *Arab Convention*

The Appeals Chamber acknowledges that it cannot apply the *Arab Convention* directly, in the face of the clear words of article 2 of the Tribunal's Statute as well as the fact that the Convention merely *superimposes* a system for the suppression of terrorist activities upon the legislative framework of each of its member States, rather than substituting its own definition of terrorism for those contained in the national law of each of those States.[24] Its insistence that the Tribunal may, nevertheless, legitimately invoke the definition of terrorism contained in the Convention as an element of the context in which to construe the *Criminal Code* is premised upon an understanding that Lebanese courts often look to ratified treaties in order to interpret Lebanese law, as well as the general principle that a national law should, where possible, be construed so as to make it consistent with a State's international obligations.[25]

However, as expressly acknowledged by the Appeals Chamber, the crime of terrorism is defined in the *Arab Convention* purely for the purposes of judicial cooperation among States in the repression of terrorism; it does not purport to override or oust any domestic

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[23] *Interlocutory Decision* (UN Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01/I, 16 February 2011) [44].
[24] Ibid [82].
[25] Ibid.

interpretation implemented by its State parties in domestic legislation.[26] It is submitted that the principle that a State does not intend to violate international law is ousted in the present instance by the clear words contained in article 2 of the Statute. The line of reasoning adopted by the Appeals Chamber, while paying lip service to the paramountcy of article 2 of the Tribunal's Statute, fails to provide true deference to the will of the Lebanese legislature, which has not chosen to modify the definition used in the *Criminal Code*, and to the drafters of the Tribunal's Statute in including such a clear and unambiguous provision as article 2.

(c) Custom

As noted above, the Appeals Chamber acknowledged that article 2 of the Statute requires codified Lebanese law, not customary international law, to be applied to the substantive crimes prosecuted therein. However, it refused to disregard completely international law, instead holding that the Tribunal is justified in employing international legal standards on terrorism as a means of construction of the *Criminal Code*. Its strongest justification for doing so was the fact that customary international law is binding upon Lebanon and, despite acknowledging that Lebanese courts occasionally disregard customary rules, it found that such rules are generally applied where relevant in Lebanese courts.

However, once again, the Appeals Chamber's reasoning fails to adequately acknowledge the express words included by the drafters of the Tribunal's Statue in article 2. The invocation of particular domestic cases in support of its contention that most Lebanese courts do indeed advert, where relevant, to customary international law,[27] overlooks the fact that those courts are *domestic* courts bound to apply customary law binding upon Lebanon, in contrast to the dual nature of the Tribunal, which is bound by the clear words of its Statute in article 2 to apply solely the law of Lebanon. Given the finding of the Appeals Chamber that a customary international rule on terrorism may not be applied absent incorporation by the Lebanese Parliament of the specific provisions of that rule into the *Criminal Code*, the Appeals Chamber's conclusion that it may nevertheless employ customary law in *construing* Lebanese criminal law is questionable.

Perhaps the strongest justification for the decision to invoke customary international law in its interpretation of the substantive criminal law of Lebanon lies is its analysis of the particular circumstances giving rise to the establishment of the Tribunal. The Appeals Chamber correctly asserts that the attacks of February 2005 were deemed by the UN Security Council in various resolutions to be particularly grave acts of terrorism with international implications, constituting a serious 'threat to international peace and security', thereby justifying the establishment of an international Tribunal entrusted specifically with the task of prosecuting its perpetrators.[28]

Article 314 makes no distinction between acts of terrorism that occur wholly within Lebanon and those that have a cross-border element, whereas the customary rule, at least in its present form (as asserted by the Appeals Chamber), does so. One might, therefore, argue that the transnational character of the attacks to be prosecuted by the Tribunal necessitate an interpretation of article 314 based on a consideration of the customary rule.

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26 Ibid [64].
27 Ibid [117].
28 Ibid [124].

Furthermore, as noted above, the Statute of the Tribunal incorporates elements of both Lebanese domestic law (in article 2) and international criminal law (article 3). There is, therefore, some force in the Appeals Chamber's assertion that the establishment of an *international* tribunal to deal with the allegations, rather than entrusting with the domestic courts of Lebanon the task of trying and prosecuting the alleged authors of the attacks, justifies the interpretation and application of Lebanese law on terrorism in light of international law.

It is, nevertheless, uncertain whether these justifications are sufficient for the Appeals Chamber to adopt an interpretation of the 'means' used to perpetrate an attack within the meaning of article 314 that is more congruous with international law. Indeed, there is much force in the submissions of both the Prosecutor and the Defence Office that international law, either conventional in nature or (assuming it exists, which both deny) customary, is not relevant to the interpretation or application of the Lebanese law on terrorism.

(d) Further justifications for the application of international law

The Appeals Chamber asserts that its construction of article 314 is necessary to render this provision more consistent with the relevant international law, which is binding on Lebanon even if not yet implemented in domestic legislation.[29] However, as a sovereign State, it is arguably more appropriately to defer to the decision of the Lebanese Parliament not to incorporate such provisions into its domestic legislation. Furthermore, as stated above, although the general principle is that domestic legislation should be construed, where possible, so as to make it consistent with a State's international obligations, arguably this is an instance where the express words of the Statute are so clear and unambiguous as to oust that presumption of consistency. To be sure, a failure on the part of the Lebanese Parliament to criminalise the particular conduct referred to in the customary rule — which contains no limitation on the 'means' used to commit a terrorist attack — has the effect that judges may not apply those provisions of international origin, and Lebanon thereby may find itself in breach of international law.

Similarly, one may object to the justification proffered by the Appeals Chamber that its interpretation of article 314 is 'better suited to address modern forms of terrorism',[30] on the basis that the Lebanese Parliament has not seen fit to amend that provision, despite the expansion in potential means of perpetrating a terrorist attack in the time since the *Criminal Code* was enacted 68 years ago. In any case, if the Lebanese Parliament disagreed with the interpretation placed upon the 'means' element of article 314 by its courts over the course of many years, it would arguably have made appropriate amendment to that legislation.

C *Policy implications*

The existence of a customary rule of international law as identified by the Appeals Chamber has concrete and important implications in terms of the rights and obligations it may impose. As identified in the decision,[31] the implications are threefold. First, such a rule would require all States (as well as other international subjects and non-State actors taking part in international relations and dealings) to refrain from engaging in acts of terrorism, as

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29 Ibid [129].
30 Ibid.
31 Ibid [102].

defined in the rule. Second, it would oblige each and every State (and other international subjects and non-State actors with the necessary civic structure and judicial means) to prevent and repress terrorism, specifically by prosecuting persons allegedly involved in terrorist activities, as defined in the rule, committed in its territory.

Finally, it would allow any State (and other international subjects and non-State actors with the necessary civic structure and judicial means) to prosecute persons allegedly involved in terrorist activities, as defined in the rule, committed in its territory. It would also impose an obligation upon any other State to refrain from objecting to such prosecution against their own nationals, subject to the personal immunities granted under international law to certain individuals in their capacities as State agents. Given these ramifications, the decision of the Appeals Chamber will likely lead to greater cooperation between States in their efforts to prevent and repress terrorism, subject to the extent to which States prove willing to accept that a customary rule concerning terrorism has indeed crystallised and to act on its specific requirements.

IV Conclusion

The difficulty in the task of the Appeals Chamber in this decision was to harmonise and give effect to the intent of the various lawmakers who played a part in the establishment of the Tribunal and its Statute. These include the Parliament of Lebanon in respect of the applicable substantive law, the UN and the Government of Lebanon as the makers of the Statute, and the authors of the Lebanese *Code of Criminal Procedure*.

The Appeals Chamber's finding that the Tribunal is justified in interpreting and applying Lebanese law on terrorism in light of international standards on terrorism — in particular, in relation to the means or instrumentalities used to carry out a terrorist attack — will broaden the range of crimes over which the Tribunal is able to exercise jurisdiction. It will enable the Prosecutor to lay charges of terrorism for offences committed not only by way of those means enumerated in article 314 of the Lebanese *Criminal Code*, but also by way of a firearm or other device.

Furthermore, the forcefulness with which the Appeals Chamber asserted the existence of a customary rule of international law on terrorism will no doubt have a significant effect on jurisprudence, both of domestic courts and internationally. It will not only help to guarantee the concrete formation of such a rule, but also, over time, potentially expand the scope of its application beyond peacetime to times of armed conflict.