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The Politics of International Justice – US Policy and the Legitimacy of the Special Tribunal for Lebanon

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Professor of Law and Director of the Center for International Law and Policy

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In 2009, the Issam Fares Institute for Public Policy and International Affairs (IFI) launched the United Nations in the Middle East Research Initiative with the objective of exploring and analyzing the role of the United Nations (UN) in the Middle East and the impact it has had on regional politics and societies.
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Contents

Introduction

In June 2011 the International Criminal Court (ICC) issued arrest warrants for Moammar Qaddafi, his son Seif al-Islam, and his intelligence chief. As Libya is not a party to the ICC Statute, the Court's jurisdiction arose from a Security Council resolution referring the situation in Libya to the Court. Alternatively the Security Council could have followed past practice and established an ad hoc, international criminal tribunal, such as the International Criminal Tribunal for Rwanda, or a hybrid tribunal, such as the Special Tribunal for Lebanon, to prosecute international crimes perpetrated in Libya.

The decision to establish an ad hoc tribunal is necessarily a political one. In elaborating the statute of such tribunal, the Security Council could decide the personal, geographic, and temporal scope of its jurisdiction, as well as the crimes that would fall within its subject matter jurisdiction. The law establishing and shaping the tribunal's jurisdiction is similarly driven by a political process. The jurisdiction of such a tribunal could be limited temporally to a relatively narrow period of a few months – perhaps January through March 2011. It could be limited geographically to the territory of Libya, or even to subdivisions of Libyan territory. Its personal jurisdiction could be limited to Libyan nationals, or to those fighting on behalf of the Qaddafi regime. It is even conceivable that its personal jurisdiction could be limited to certain named individuals.

The US government has played a key role in establishing and circumscribing the jurisdiction of international and hybrid criminal courts. In so doing, the US has not been shy about insisting on certain jurisdictional exclusions. It is debatable whether the fashioning of the contours of an international tribunal's jurisdiction is subject to any legal constraints. The present article focuses on whether there are constraints of a different nature. Is there a point at which the fine-tuning of a tribunal's jurisdiction deprives it of legitimacy?

This article traces the evolution of policy strands underpinning the US government's attitudes toward international criminal courts and examines how these policy strands converged in a position of support for the Special Tribunal for Lebanon (STL). It also demonstrates how US foreign policy interests helped to shape the contours of the STL. The article then discusses some of the features of the tribunal that flow from these interests, and examines the merits of challenges to the legitimacy of the tribunal made at least in part on the basis of these features. It concludes with an examination of a spectrum of policy choices in relation to the creation of international criminal courts and implications for their legitimacy.

I. The Evolution of US Policy Toward International Criminal Courts[1]

Assessing the state of US policy toward international criminal courts is a complex, if not impossible, undertaking. Indeed, there is no coherent U.S. policy on international criminal courts generally. This is attributable on the one hand to the multifaceted nature of international criminal courts, and on the other to the fact that U.S. policy is an amalgamation of diverse views reduced in some cases to written form, which is itself subject to varying interpretations. Policy is also in a continual state of flux, and its fluctuations in this arena are particularly dynamic at the present moment in history.

Nonetheless, examining the behavior of the US government over the past one hundred years or so reveals a pattern of identifiable policy lines relevant to the establishment of international criminal tribunals. The US has been generally supportive of the development of international law, and of the law of armed conflict in particular. It has also supported the establishment of international courts and the incidental development of international legal jurisprudence. Nonetheless, its support of international courts has never been absolute, and has always been subject to competing foreign policy interests.

Its selective use of international courts is most visible, and perhaps most controversial, in the realm of international criminal justice. While the US has been generally supportive of ad hoc international criminal tribunals, it has consistently taken the position that there should be no international criminal court of universal compulsory jurisdiction, and in particular vis-à-vis the United States and its nationals.

US Attitudes in the Pre-WorldWar II Era

The U.S. has been a strong supporter of the development of the international law of armed conflict since at least the mid-nineteenth-century. However, the issue of whether international law should provide rules regulating armed conflict is quite different from whether there should be an international mechanism to adjudicate whether those rules have been violated.

During the Hague Peace Conferences of 1899 & 1907, the US supported the creation of an arbitral tribunal to resolve inter-state disputes. Although it was unwilling to submit to compulsory jurisdiction matters implicating strong national interests, the US nonetheless welcomed the creation of the Permanent Court of Arbitration, with its purely consent-based jurisdiction, in part because of the role it would play in developing an international jurisprudence.

At the conclusion of World War I, the victorious powers at the Paris Peace Conference considered the creation of an international criminal court to prosecute abuses committed during the war. The U.S. was opposed to the creation of such a court for a range of reasons. Perhaps most significantly, accountability for war crimes simply did not rank high on President Woodrow Wilson's post-war list of priorities. He was far more concerned with a "moderate peace, a viable democratic government for Germany, and, most of all, a League of Nations to secure future peace."[2] The U.S. delegation was instructed to express serious reservations, rejecting the tribunal and opposing the trial of the Kaiser, who, in the meantime, had found refuge in the neutral Netherlands.[3] Specifically, the US argued that there was no "precedent, precept, practice, or procedure" for such a tribunal, and that perpetrators should instead face prosecution before national military justice machinery.[4] Specifically, the US favored the creation of a joint, multinational tribunal or commission. In this way "existing national tribunals or national commissions which could legally be called into being would be utilized, and not only the law and the penalty would be already declared, but the procedure would be settled."[5]

1 This section summarizes a more extensive historical analysis first published by the present author in the European Journal of International Law. "Dynamic Equilibrium: The Evolution of U.S. Policy Regarding International Criminal Courts," European Journal of International Law, vol. 18, no. 2 (2007).
2 Telford Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir 15 (Alfred A. Knopf, 1992).
3 *Id.*
4 Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 29, 1919, Annex II: Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, reprinted in 14 Am. J. Int'l L. 95 (1920).
5 *Id.*

The creation of an international criminal court was also considered under the auspices of the League of Nations. Proposals to create such a court never came to fruition. The U.S. view at that time, and indeed the prevailing contemporary position, was that the creation of such a court was premature. Manley Hudson, U.S. jurist and former judge of the Permanent Court of International Justice, wrote in 1944, "Instead of attempting to create an international penal law and international agencies to administer it, perhaps attention may more usefully be given to promoting the cooperation of national agencies in such matters as extradition, judicial assistance, jurisdiction to punish for crime, and coordinated surveillance by national police."[6] Hudson speculated that "[t]he local impact of anti-social acts inspires the desire of States to safeguard local condemnation and local punishment, and impingement on national prerogatives in this field will become possible only as the need for international action is clearly demonstrated."[7]

US Attitudes toward International Criminal Courts in the Post-WorldWar II Era

The horrors of World War II provided the necessary catalyst to overcome the inertia of the international community. In striking contrast to its position at the 1919 Paris Conference, the U.S. was strongly supportive and played a central role in the establishment of both the Nuremberg and Tokyo International Military Tribunals (IMTs). While the US was initially reluctant to endorse the proposal to create these tribunals, Secretary of War Henry L. Stimson is credited with persuading the US government to adopt a "judicial solution" to dealing with Axis war criminals.[8]

Although U.S. support for the creation of the IMTs may appear irreconcilable with the position taken by the U.S. delegation to the 1919 Paris Conference, it is worth noting the similarities between the IMTs and the U.S. counterproposal to create a multinational commission or tribunal. In addition to being run by the military, the tribunals were operating in Germany and Japan, territories over which the US was exercising authority as an Occupying Power. Another key feature of the tribunals is that their personal jurisdiction was expressly limited to those acting on behalf of enemy states. Thus, there was no possibility that those acting on behalf of the Allies would face prosecution.

A key difference from the "mixed tribunals" proposed by the US in 1919, however, is that the IMTs were mandated to prosecute violations of international law, and not the domestic law of any country. Both tribunals were given jurisdiction to prosecute crimes against peace, war crimes, and crimes against humanity.

Early UN Efforts to Create an International Criminal Court

From the earliest days of the United Nations, the creation of an international criminal court was on its agenda. In 1946, acting on the initiative of the U.S. delegation,[9] the UN General Assembly affirmed the principles of international law recognized in the Charter and judgment of the Nuremberg Tribunal. Not long after, the US expressed support for the creation of an international criminal tribunal during debates surrounding the drafting of the 1948 Genocide Convention. However, the US also took the position that a treaty creating a permanent court was of such a magnitude as to necessitate a separate project, and thus opposed creating a tribunal in the Genocide Convention itself.

In 1950, the General Assembly designated a Committee that included the U.S. to prepare a preliminary draft convention relating to the establishment of an international criminal court. Initially, there was a wide range of views on the subject, which included strong opposition from the U.K. Although the U.S. appeared supportive, it insisted that the envisioned court should only be able to try individuals whose state of nationality had recognized the court's jurisdiction by treaty. After five years of work attempting to draft a statute, differences among UN Member States, exacerbated by the Cold War, led the UN to abandon the project. It was not until the end of the Cold War in 1989 that the creation of an international criminal court would once again find a place on the UN agenda.

6 Manley O. Hudson, *International Tribunals: Past and Future* 186 (Carnegie Endowment for International Peace and The Brookings Institution 1944).
7 *Id.*
8 Taylor, *supra* n. 5, at 35.
9 *Formulation of the Nürnberg Principles* – Report by J. Spiropoulos, Special Rapporteur, *Yearbook of the International Law Commission*, 1950, vol. II, A/CN.4/22, at para. 29.

The International Criminal Tribunals for the Former Yugoslavia and Rwanda

US support for ad hoc international criminal justice mechanisms was clearly visible in the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The U.S. was the driving force behind the establishment of both tribunals, contributing the greatest share of political and financial muscle. With the end of the Cold War, the U.S. gained a substantial degree of control, primarily through the Security Council, over UN mechanisms, and was thus more inclined to make use of them.

Both the ICTY and ICTR have jurisdiction to prosecute war crimes, genocide and crimes against humanity. However, unlike the IMTs, violations of the jus ad bellum are not within either tribunal's subject matter jurisdiction. The geographic jurisdiction of both tribunals is strictly limited. For conduct occurring outside the territory of Rwanda, the jurisdiction of the tribunal is limited by nationality. The temporal jurisdiction of the ICTR is limited to calendar year 1994.

Overall, the U.S. has been highly supportive of both tribunals and criticism has generally focused on bureaucratic and financial concerns. Nonetheless, US support has weakened in situations where the work of the tribunals has conflicted with other US foreign policy objectives, such as the ICTY Prosecutor's review of the NATO bombing of Serbia and the indictment of Radovan Karadzic in the run-up to the Dayton Accords.

The International Criminal Court

US policy toward the International Criminal Court has been the most visible and perhaps the most notorious. From the 1998 Rome Conference to the present time, US policy toward the ICC shifted from the traditional US pragmatic approach to firm opposition and then back to pragmatism.

In the early 1990s, the United States was generally supportive of the idea of a permanent international criminal court, but the US was quite clear that such an institution should not have jurisdiction absent either the consent of the state of nationality of the perpetrator or a Security Council referral. After the Rome Conference, at which the United States was not completely successful in having its concerns addressed, U.S. support waned. Nonetheless, it remained engaged in the preparations for the establishment of the Court and ultimately signed the Rome Statute to enable its continued participation.

U.S. support lessened upon the election of George W. Bush, who brought with him an administration that was generally anti-internationalist. This sentiment was augmented following the attacks of September 11, 2001. By the spring of 2002, while the US maintained an official position of neutrality towards the Court, as expressed by the US in its notification that it would not proceed with ratification of the ICC Statute, US opposition to the ICC was clear. This opposition became increasingly visible, manifesting itself in the passage of legislation and the adoption of diplomatic strategies that appeared to constitute frontal attacks against the ICC.

Later developments, including the Security Council's Darfur referral, the transfer of the Charles Taylor trial to The Hague, and the waiver of legislative sanctions on states cooperating with the ICC, indicated a lessening propensity for ideologically rooted or visceral responsesand a recognition of the value of the ICC in the attainment of other foreign policy objectives. Toward the end of the George W. Bush administration, this led the then State Department legal adviser to characterize the U.S. attitude as "pragmatic." [10]

10 Statement of John Bellinger, U.S. Department of State Legal Adviser, 29th Roundtable on Current Problems of International Humanitarian Law, September 8, 2006. See also "The United States and International Law," remarks of John Bellinger at The Hague, June 6, 2007: the Darfur referral, the offer assistance of the OTP in Darfur, and the transfer of the Taylor proceedings "reflect our desire to find practical ways to work with ICC supporters to advance our shared goals of promoting international criminal justice."

Internationalized, Hybrid and Related Criminal Tribunals

This pragmatic approach is also visible in US support for so-called hybrid tribunals, such as the Special Court for Sierra Leone (SCSL). The SCSL is distinct from the ICTY and ICTR in a number of respects. The Special Court was established by a treaty between the UN and Sierra Leone, and the Sierra Leonean government was heavily involved in its creation. The Court is not a subsidiary body of the Security Council. Oversight is carried out by a Management Committee drawn from a group of interested states (who are also the principal funders), including the United States. The substantive criminal law to be applied by the Court, codified in the Statute of the SCSL, was derived from both international law and domestic law. The personnel of the Court are also mixed, including both foreign and national staff.

The US was the prime sponsor of the Court as it was an opportunity to build an international justice mechanism that it viewed as preferable to the ICC. The US was also insistent that the SCSL Prosecutor be a US national with a military background.US support came not only from the Executive branch. For a variety of reasons, the Congress was also extraordinarily and uncharacteristically supportive of the SCSL.

Another key feature of the Special Court for Sierra Leone is found in its jurisdictional limitations. The scope of personal jurisdiction of the SCSL was a matter of concern for a number of UN Member State delegations.[11] These delegations initially sought to limit the personal jurisdiction of the Court to Sierra Leonean nationals.[12] Indeed, this was stipulated in the original draft statute of the Court.[13] In the course of the negotiations, the nationality limitation was dropped in exchange for an exemption for peacekeepers.[14] This exemption is subject to Security Council override, which of course would require the consent of its permanent members.

The US has also been generally supportive[15] of the Extraordinary Chambers in the Courts of Cambodia (ECCC). The Extraordinary Chambers differ from the Special Court in a number of respects. They form part of the Cambodian judiciary, they were created on the basis of domestic legislation, and their subject matter jurisdiction is circumscribed by this same domestic law. A treaty between Cambodia and the UN regulates UN participation in the operation of the ECCC. In addition, as with the other hybrids, US support was facilitated by the inclusion of restrictive language in circumscribing the scope of the Chambers' jurisdiction. The Chambers have jurisdiction to prosecute only "Suspects," who are defined essentially as those members of the Khmer Rouge who committed international crimes from 1975 – 1979.[16]

The U.S. has also been largely supportive of other courts with an international dimension, including the internationalized Kosovo and East Timorese court systems, and the Bosnian War Crimes Chamber. Similar to the ad hoc courts mentioned above, the U.S. has provided political, financial and personnel support in the work of each of these institutions. All of these institutions bring justice closer to the national level in some respect, and the establishment of each dovetailed with other U.S. foreign policy objectives.

In general, as hostility toward international institutions increased, the United States began to show increasing support for hybrid institutions. However, as with other international criminal justice mechanisms, U.S. support for the hybrids has been strongly influenced by competing foreign policy objectives, as well as the possibility of prosecution of U.S. nationals, especially U.S. agents.

11 Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005.
12 *Id.*
13 *Id.*
14 *Id.*
15 At times, U.S. political support for the ECCC has been tepid. This is attributable in part to conflicting views within Congress and opposition to the Chambers on the part of a number of human rights NGOs. Congressional ambivalence results from the fact that different Cambodian diaspora groups, as constituencies of several members of Congress, have different views on the Chambers. Although all of these groups want to see an accountability process, they are divided as to whether the Extraordinary Chambers can provide credible justice.
16 Law on the Establishment of the Extraordinary Chambers, with inclusion ofamendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 2.

The Obama Administration and the Policy of "Principled Engagement"

The Obama Administration has adopted a policy of "principled engagement" with international organizations, including the International Criminal Court. The generally positive tone adopted by his administration heralded a continuation of the trend toward constructive engagement already in evidence during the latter years of the Bush administration. It also signaled a continuation of a pragmatic approach.

The US under Obama re-engaged with the ICC Assembly of States Parties, and was a highly visible and intensely activeparticipant at the ICC Review Conference in Kampala in June 2010. The large US delegation exerted intense pressure to narrow the definition of the crime of aggression, and to limit its personal scope of application. It strove to ensure that the Court would not have jurisdiction for the crime of aggression over US nationals or nationals of NATO allies. While it was unable to secure agreement on giving the Security Council the exclusive power to trigger aggression prosecutions, the US did succeed in obtaining an exemption for nationals of non-States Parties, even when their conduct occurs on the territory of States Parties.

Nonetheless, the Obama administration has undertaken initiatives that indirectly support the work of the ICC. In October 2011, President Obama "authorized a small number of combat equipped U.S. forces to deploy to central Africa to provide assistance to regional forces that are working toward the removal of Joseph Kony from the battlefield."[17] The ICC has been seeking the arrest of Kony since 2005. At the same time, Obama's announcement of this initiative made no mention of the International Criminal Court arrest warrant, or indeed of any criminal justice response.

Principles and Themes of US Policy Toward International Criminal Courts

The US continues to publicly base its policy toward international criminal courts on the following principles.

1. The United States is in principle committed to justice and accountability for all. This does not mean, however, that the United States seeks accountability at any cost. Even in cases in which the U.S. attitude toward international criminal courts is at its most favorable, these institutions are not viewed as ends in themselves. The U.S. approach is pragmatic – each institution is assessed in terms of its ability to advance U.S. interests, which include, but are not limited to, promoting accountability and the rule of law on the international level. When accountability efforts at the domestic level fail, the U.S. resorts to a balancing of interests. When international accountability efforts conflict with strong US national interests, those interests will prevail.

2. It is best to prosecute crimes, including all international crimes, at the national level. Prosecution by any other court (including domestic courts of other countries)[18] should be the last resort.

3. The Security Council should have the final word on prosecution by any other court. The United States is strongly interested in maintaining the primacy of the Security Council in matters of peace and security. The United States regards the existence of the ICC as a threat to this primacy. Most observers assert that this position is a direct consequence of the status of the United States as a permanent member of the Council.

In addition, the historical survey above reveals certain consistent themes underlying U.S. attitudes toward international criminal courts. One consistent element would appear to be the (un)likelihood of prosecution of U.S. nationals. The United States has tended to support international criminal courts when the U.S. government has (or is perceived by U.S. officials to have) a significant degree of control over the court or when the possibility of prosecution of U.S. nationals is either expressly precluded or otherwise remote. This was certainly the case for the post–World War II military tribunals, as well as the Security Council ad hoc tribunals. U.S. support for the hybrid tribunals was similarly facilitated by the inclusion of jurisdictional limitations and other assurances of nonprosecution of U.S. nationals.

If the United States is assured that U.S. nationals will not be prosecuted (or, at least, not without its consent), it will engage in a balancing of interests to determine its level of support or opposition. Ideological leanings will of course color this balancing of interests and at times define some of those interests. To the extent an administration's ideological strain in favor of criminal accountability is stronger than its ideological strain opposed to the creation of international authority, the prospect of U.S. support of a given international criminal court seems to increase.

17 Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the Lord›s Resistance Army, October 14, 2011.

18 There are of course strong parallels with the U.S. position on the exercise of universal jurisdiction.

II. The US and the Special Tribunal for Lebanon

The Special Tribunal for Lebanon (STL) was established in the wake of the assassination of former Lebanese prime ministerRafiq Hariri, and the STL's jurisdiction is tightly focused on this crime.

France was the driving force behind the creation of the tribunal. France was keen to establish the STL for a number of reasons, including its historical ties to Lebanon as well as the close personal relationship that had existed between Hariri and Jacques Chirac, then President of France. In its quest to have the tribunal established, the French government was willing to accommodate concerns of other permanent members of the Security Council.

The STL was originally envisioned as a hybrid tribunal to be established by bilateral treaty between the UN and Lebanon, modeled after the treaty establishing the Special Court for Sierra Leone. In early 2006, "[r]ecalling the letter of the Prime Minister of Lebanon to the Secretary-Generalof 13 December 2005 (S/2005/783) requesting inter alia the establishment of a tribunal of an international character to try all those who are found responsible for" the Hariri assassination, the UN Security Council requested the Secretary General to negotiate an agreement with Lebanon for the establishment of such a tribunal. The Secretary General proceeded to do so. However, the Lebanese government failed to take the necessary internal steps to bring the agreement into force. In response to this impasse, the Security Council decided to use its Chapter VII authority to bring the agreement into force.

The US is extremely supportive of the mission and work of the Special Tribunal for Lebanon (STL).[19]The US is the largest funder, after Lebanon; it is a member of the Tribunal's Management Committee; and it is actively supporting the extension of the Tribunal's mandate.[20] The US has also made clear that its support is not contingent on the continued support of the Lebanese government. A spokesperson for the US State Department recently reminded the Lebanese government of its obligations, stating, "The Special Tribunal's work represents a chance for Lebanon to move beyond its long history of impunity for political violence. The Lebanese authorities' support for, and cooperation with, the work of the Special Tribunal for Lebanon is a critical international commitment." [21]

A review of some of the Tribunal's features demonstrates why US support for the Tribunal is unsurprising. The initial request for the creation of a Tribunal came from Lebanon. Although based in the Hague, it is a hybrid tribunal, with both Lebanese and foreign personnel. The STL, while originally envisioned as being a treaty based court, was ultimately created on the basis of the Security Council's Chapter VII authority. Oversight is conducted by a Management Committee, of which the US is a member.

The jurisdiction of the Tribunal is very narrowly circumscribed. The STL's jurisdiction encompasses only the assassination of Hariri and other related "attacks" between October 1, 2004, and December 12, 2005. The Tribunal can take jurisdiction over subsequent related attacks only with the consent of the Security Council. Thus, any member of the Security Council may veto jurisdiction over acts committed after December 2005. The tight focus of its jurisdiction lessens the chance of mandate creep, and is backed up by the requirement of Security Council authorization for expansion.

Further, the STL's subject matter jurisdiction is limited to crimes under Lebanese law, including those "provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism."[22] As a hybrid institution, it conformed to the US position that justice should be done as close to the domestic level as possible, and that prosecution should only be internationalized to the extent strictly necessary. Internationalization was deemed necessary for security and for capacity reasons, including bolstering judicial independence. Lebanese law was deemed a sufficient basis for criminal responsibility.

In addition, the Statute of the Tribunal does not expressly abrogate immunities. It also includes a somewhat higher threshold for the liability of superiors than that set forth in the ICC Statute. These features arguably help to keep the Tribunal focused on Lebanese actors by creating additional obstacles to prosecuting foreign officials.

19 See, e.g., March 1, 2009 statement of Robert Wood, Acting Department of State Spokesman. The full text of the statement is available at www.state.gov/r/pa/prs/ps/2009/03/119896.htm. See also U.S. Perspectives on International Criminal Justice, John B. Bellinger, III, Legal Adviser to the Secretary of State, Remarks at the Fletcher School of Law and Diplomacy, Medford, Massachusetts, November 14, 2008.

20 The Agreement establishing the Tribunal included a three year sunset provision.

21 United States Welcomes the Funding of the Special Tribunal for Lebanon, Statement By Mark Toner, Deputy Spokesperson, U.S. Department of State Office of the Spokesperson, November 30, 2011, 2011/2034.

22 UN SC Resolution 1757 (2007).at Annex.

Other foreign policy interests factored into US policy toward the STL. The US had been keen on supporting Lebanon against Syria. The focus on the assassination of the pro-Western / anti-Syria Hariri meant that the tribunal's findings would likely implicate forces unfriendly to the west, namely Hezbollah and Syria.

However, the Statute of the STL was being drafted during the summer of 2006, while an armed conflict raged between Israel and Hezbollah on Lebanese territory. The conflict inflicted extensive harm to life, infrastructure, and property, and was accompanied by grave allegations that international crimes were being committed by Hezbollah and Israeli forces. This of course added an additional dimension to US concern over possible mandate-creep by the Tribunal. As such, the US pushed strongly for the tight jurisdictional limitations.

The US also insisted that the subject matter jurisdiction be limited to crimes under Lebanese law. The US feared that the inclusion of war crimes and crimes against humanity within the Tribunal's jurisdiction would lead to difficult questions as to why its temporal jurisdiction did not extend to the armed conflict with Israel, or perhaps to requests to the Security Council to extend the temporal jurisdiction on that basis.

The US had an unlikely ally in Russia in its attempts to preclude prosecution of foreign officials. Russia was keen to protect Syria, and similarly insisted on the exclusion of international crimes, as well as the exclusion of any abrogation of immunity.

All of these features – the exclusion of international crimes; the absence of a provision abrogating immunity; the heightened standard for superior liability; the tight, event-based jurisdiction; the temporal limitation with extension subject to Security Council approval -- make prosecution of US officials or those of US allies highly unlikely, clearing the way for US support.

III. Legitimacy and the Limits of Pragmatism

The legitimacy of the STL has been challenged on a number of grounds. Some have impugned the legitimacy of the STL by reference to the fact that its jurisdiction is focused on only one event; that the applicable criminal law is limited to domestic Lebanese law; that the Statute of the Tribunal, because it was initially drafted as a treaty, could not be brought into force by Security Council resolution; that the temporal jurisdiction was limited to preclude the possibility of prosecuting Israelis for conduct committed in the 2006 armed conflict; that the Statute permits trials in absentia; that the creation of the STL constitutes an impermissible interference in the internal affairs of Lebanon; that it was an inappropriate use of the Security Council's Chapter VII power; and that it constitutes selective justice.

Most of these challenges can be readily dismissed whether by reference to existing, accepted practice or on the level of principle. Nonetheless, it is useful to examine each challenge, as well as their cumulative effect.

That its jurisdiction is focused on only one event: There is no reason in principle to object to the creation of a tribunal with jurisdiction to prosecute conduct related to a single event. To begin with, international criminal justice is still primarily rendered on an ad hoc basis. To the extent that this essentially reduces to a charge of selective justice, it will be addressed below. If for now, we accept the principle of ad hoc justice as legitimate, then the breadth or narrowness of jurisdiction is not of itself problematic. Each ad hoc tribunal created to date has had jurisdictional limitations tied to an event, or series of related events. The jurisdiction of the Rwanda tribunal centers around the genocide that took place there in 1994, and the tribunal's temporal jurisdiction is thus limited to calendar year 1994. Of course there is a difference in the scale of the violence perpetrated there and the Hariri assassination, but that distinction goes to the legitimacy of the decision to create a tribunal in response to the event, which will be addressed below.

That the applicable criminal law is limited to domestic Lebanese law: The STL is not the only hybrid tribunal to apply domestic law. Indeed most of the hybrid tribunals created to date were given jurisdiction to prosecute certain violations of the domestic law of the relevant state. Indeed, the subject matter jurisdiction of the ECCC consists entirely of Cambodian law. Many of those crimes are derived from international law, but the same could be said of the crime of terrorism within the subject matter jurisdiction of the STL. Indeed the STL has drawn upon international law to inform its interpretation of the crime of terrorism under Lebanese law.

That the Statute of the Tribunal, initially drafted as a treaty, could not be brought into force by Security Council resolution: This challenge is limited to the technical issue of the Security Council's legal authority, and whether that authority extends to the bringing into force of a treaty. If the Security Council is properly acting pursuant to its Chapter VII authority (an issue that will be discussed below), there is no doubt that it would have the power to create the Tribunal and to impose upon Lebanon all of the obligations set forth in the Agreement and Statute of the STL. This is settled by the accepted practice of the United Nations and its Member States in relation to the creation and operation of the ICTY and ICTR.

The particular objection here is thus of a highly technical nature – whether the Security Council can bring into force the treaty as such. Is it is now generally accepted that the Security Council when acting within the scope of its mandate may impose legal obligations on UN Member States. Indeed, this power has even been interpreted to extend to a quasi-legislative authority, as seen in the Security Council resolutions following the September 11, 2001 attacks in the Unites States that required all states to adopt domestic legislation to criminalize certain terrorism related conduct. The International Court of Justice has opined that in ascertaining the legally binding character of Security Council resolutions, the touchstone is whether the Council intends to bind Member States, as gleaned from the text. The clearest expression of this intent is the use of the term "decides," as it is "decisions" of the Security Council that all Member States are legally obliged to carry out under Article 25 of the UN Charter. By expressly invoking its Chapter VII authority and by using the term "decides," the Security Council clearly demonstrated its intent tolegally establish the Tribunal and to impose upon Lebanon the legal obligations contained in the Tribunal Agreement and Statute, which were annexed to that Resolution.

More broadly, the Security Council's Chapter VII authority is now generally understood to include the power to impose legal obligations on all UN Member States, and indeed even on those states that are not members of the UN; to override the non-intervention principle; and, essentially, to substitute its consent for that of Member States (e.g. waiving immunities of a Member State's officials or substituting consent to a treaty).

That the temporal jurisdiction was limited to preclude the possibility of prosecuting Israelis for conduct committed in the 2006 armed conflict: The exclusion of the 2006 armed conflict from the STL's jurisdiction follows directly from the ad hoc nature of the tribunal. The STL was created, as are all ad hoc tribunals, to deal with a particular event, or series of connected events, occurring in a particular time and place. Is there a principled basis for excluding crimes committed during the 2006 armed conflict from the jurisdiction of

the STL? It is simply that that is not the event for which the tribunal was created. In order to keep the work of the STL focused on the Hariri assassination, the tribunal's jurisdictional limitations were intentionally designed to prevent mandate-creep. The fact that the international community has not decided to employ a tribunal to deal with the issues that arose in the 2006 armed conflict is a separate matter, and will be addressed below under the charge of selective justice.

That the Statute permits trials in absentia: The STL Statute provides for trials in absentia, and the STL Trial Chamber recently decided to proceed with trials in absentia for the four accused, all of whom are members of or otherwise connected to Hezbollah. Not since the post-World War II IMTs has an international criminal tribunal been empowered to hold trials in absentia. At the same time, the inclusion of this facility in the STL Statute is unsurprising since the domestic law of Lebanon expressly permits trials in absentia within the Lebanese criminal justice system. Trials in absentia are also permitted under international human rights law, subject to certain conditions. The drafters of the Statute included these conditions in the Statute in order to ensure compliance with international human rights law.[23]

That the creation of the STL constitutes an impermissible interference in the internal affairs of Lebanon: The Lebanese government, and indeed Lebanese society, is deeply divided between primarily two political camps. Those who assert that the STL is illegitimate regard this political dispute, of which the Hariri assassination is one element, as a purely internal matter, and that interference by foreign states or by the United Nations constitutes a violation of the principle of non-intervention, one of the bedrock principles of the international legal system. The most straightforward response[24] to this challenge may be found in Article 2(7) of the UN Charter, which codifies the non-intervention principle. Article 2(7) states, "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." This last phrase is a sufficient rejoinder to claims of unlawful intervention. The Security Council expressly invoked its Chapter VII authority in bringing into force the legal basis of the Tribunal. Whether the Security Council acted properly in invoking its Chapter VII authority in the context of the situation in Lebanon is addressed next.

That it was an inappropriate use of the Security Council's Chapter VII power: The decision to invoke Chapter VII authority is essentially apolitical decision. The Security Council's official justification for creating the STL is that the climate of impunity for political assassination in Lebanon must be challenged. There have been dozens of political assassinations in Lebanon over the past few decades. The Tribunal's supporters claim that the prosecution of the perpetrators of the Hariri assassination will serve as a deterrent, discouraging continuation of the practice of assassination as a political tool.

While this decision is essentially political, there are legal restraints on the Security Council's discretion. The ICTY, in its seminal *Tadic* Appeal decision of 1995, set forth the legal limits on the scope of the Security Council's Chapter VII authority. It recalled that article 39 of the UN Charter empowers the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." The ICTY Appeals Chamber held that the Security Council had broad discretion to make this determination and to fashion measures in response. It is not unreasonable for the Security Council to find the political instability in Lebanon to constitute a threat to peace and security. Nor is it unreasonable to determine that a tribunal focused on ending impunity for political assassinations is a measure directed toward the maintenance or restoration of international peace and security. This is supported by ample practice. The Security Council has repeatedly found the situation in Lebanon to constitute a threat to peace and security, and it has used its Chapter VII power in other contexts to create tribunals as measures to maintain or restore international peace and security.

That it constitutes selective justice: In light of the above analyses, it is apparent that the technical legal objections to the STL's legitimacy are relatively easily overcome. Legitimacy, however, entails more than just legality.

Several of the charges above relate orreduce to the assertion that the STL is illegitimate as it constitutes an instance of selective justice. This is the most complex challenge to the legitimacy of the Tribunal, as it can be understood on a number of levels. It is also the charge against which US policy in relation to the STL is most vulnerable.

23 STL Statute, art. 22.

24 It could also be argued that there has been no interference since the Prime Minister of Lebanon initially requested the establishment of the Tribunal. However, this argument is subject to the challenge that Lebanon failed to take the necessary steps to bring the Agreement into force, necessitating the use of the Security Council's Chapter VII authority.

On one level, all justice is selective, both in the international legal system and in domestic legal systems. In no legal system is every crime prosecuted. Indeed, it would be impossible to do so. Prosecutorial discretion is a common feature of legal systems around the world.The failure to prosecute every crime does not by itself undermine the legitimacy of assigning criminal responsibility for those crimes that are prosecuted.

This is all the more true in the international legal system, with its lack of central authority and absence of a universal justice system; its relatively fragile and immature institutions; the challenges in accommodating the diversity of values and of infrastructures of national systems; and the lack of a democratic basis for international authority[25] as the system is presently constituted. US pragmatism in relation to international courts is largely a response to this reality.

The US "pragmatic" approach was summed up by former State Department Legal Advisor John Bellinger when he stated in May 2006: "In our view, such courts and tribunals should not be seen as an end in themselves but rather as potential tools to advance shared international interests in developing and promoting the rule of law, ensuring justice and accountability, and solving legal disputes. Consistent with this approach, we evaluate the contributions that proposed international courts and tribunals may make on a case-by-case basis, just as we consider the advantages and disadvantages of particular matters through international judicial mechanisms rather than diplomatic or other means."[26]

A pragmatic approach meant that there was an international criminal tribunal for Rwanda, a hybrid tribunal for East Timor, and no tribunal for Colombia. In this sense, selective justice refers to the decision to employ an international tribunal to deal with the situation in one country or region, and not in another. The idea put forward by the US is that international courts are but one tool in the toolbox, and that the international community should use that tool when it would be appropriate, helpful, and otherwise in its interests. This type of selective justice is a consequence of the political nature of the decision to create a court in a system where courts are not a given. It is seen as an inevitable consequence of the present phase of development of the international legal system, and has been accepted as a legitimate feature in a fragmented system.

To say that international tribunals are policy tools, however, is not to say that the US does not regard them as courts. In a sense, all courts, whether international or domestic, are tools – tools for governance and dispute resolution. They can serve other interests as well. The important caveat is that there are certain features of courts that make them courts, and these features cannot be erased without delegitimizing the institution as a "court." It might become something else, and might be a legitimate 'something else,' but it would no longer be a court.

An indispensable feature of any court is independence. The notion of judicial independence, and indeed of judicial supremacy in determining and interpreting the applicable law, is deeply rooted in US constitutional history. It is because of this recognition of the independence of courts, and the understanding that courts as independent organs will take on a life of their own, that the US has been careful to front-load jurisdictional limitations that will restrict the scope of who can be prosecuted.

This of course leads to a different kind of selective justice. Instead of referring to the decision to create a tribunal here and not there, selective justice in this sense refers to delineation of the scope of possible accused. Once a decision is taken to employ a tribunal in response to a particular event or series of events, do the tribunal's creators have discretion to define its jurisdiction. Are there limits to this discretion?

Certain jurisdictional limitations flow from traditional principles of international law. Thus, limiting jurisdiction by reference to territory would seem uncontroversial. Hence, the territorial jurisdiction of the ICTY extends only to the territories of the former Yugoslavia, which is a reasonable limitation in light of the Tribunal's mandate. But would it be permissible to limit the ICTY's personal jurisdiction to a particular ethnic group? Jurisdictional limitations on grounds of ethnicity, race, religion, gender, or national origin would seem to conflict with basic principles of human rights law, and would arguably deprive a tribunal of legitimacy.

25 The United Nations was not designed to be a democratic system. It is embedded in the traditional interstate system. The General Assembly is sometimes referred to as a more democratic organ than the Security Council because each state has a vote in the General Assembly. Of course it is hardly democratic that China and Tuvalu should each have one vote considering the vast difference in population size. More importantly, there is no requirement that government delegations represent the views of the people of that state.

26 "International Court and Tribunals and the Rule of Law," Statement by John Bellinger, legal advisor, at George Washington School of Law, Washington, D.C., May 11, 2006.

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Would it be more acceptable if the limitation were based on nationality? Would it be legitimate if the ICTY's personal jurisdiction had been limited to prosecuting only those of Croatian nationality? Can such a question only be answered by reference to generally accepted facts about a given situation? Another critical feature of courts is even-handedness. This would clearly be compromised in the case of the ICTY if it were restricted to prosecuting only perpetrators of one nationality.

Is it ever permissible to limit the personal jurisdiction of a tribunal to one group? The ECCC's personal jurisdiction is essentially limited to members of the Khmer Rouge. There would likely be very little objection on the part of states if an international tribunal were established to prosecute exclusively members of Al Qaeda, or even if a tribunal had been established just to prosecute Osama bin Laden. Is the key difference here that there is political consensus on the identity of the 'bad guys'?

The IMT at Nuremberg was limited to prosecuting only those acting on behalf of the Axis Powers. Consider also the jurisdiction of the Rwanda tribunal. Some have suggested that the restriction of the Tribunal's jurisdiction to calendar year 1994 essentially meant that only Hutus would be prosecuted. If international crimes were committed by all parties to these conflicts, are jurisdictional restrictions justified by reference to the relative scale of criminality by each group?

Coming back to the Special Tribunal for Lebanon, it might be argued that the selection of the event that would form the focus of the STL's jurisdiction was essentially a proxy for prosecuting a particular group. As such, even if the Tribunal's independence is guaranteed, its deployment constitutes selective justice in the narrow sense – that it was essentially deployed against one party in an ongoing political conflict that has deeply divided Lebanon. Is it a case where there is political consensus on the identity of the 'bad guys'? The US regards Hezbollah as a terrorist organization, but this perception is not universally shared among states. Is it sufficient that Hezbollah is seen as more prone to utilize the tool of political assassination than the other political camp?

It is in this sense that the charge of selective justice resonates to a degree – that the jurisdiction of the STL was not fashioned with an even-handedness with respect to the ongoing political conflict in Lebanon.

Ultimately, however, the legitimacy of the STL can be grounded in a few simple observations. The Tribunal's jurisdiction is focused on what appears to be the intentional killing of a human being. Murder is universally recognized as a crime. It is criminally prohibited in every legal system in the world. The final characterization of the crime and the determination of criminal responsibility is left to the Tribunal. The STL is mandated to provide a fair process and to comply with international human rights standards. In this manner it provides protection against unwarranted accusations and unjustified assertions of criminal responsibility. The Tribunal's jurisdiction is broad enough to thoroughly investigate the circumstances surrounding the assassination and to make a reliable determination of criminal responsibility. It is certainly the case that there have been other serious crimes committed in Lebanon and that there are many other victims deserving of justice, but that fact does not delegitimize this murder prosecution.

Nonetheless, of all the ad hoc tribunals created to date, the STL arguably represents the clearest example of the instrumental use of international courts, and as such, comes the closest to legitimacy's tipping point.[27] Although it may be appropriate for politics to play a role in shaping a court's subject matter jurisdiction, even in relation to conduct that has already been committed, it must be undertaken with caution. Excessive manipulation of a tribunal's jurisdiction could compromise the perception of even-handedness and could also lead to a de-contextualization of, and thus misapprehension of, conduct.

This is also the greatest challenge to the U.S. pragmatist position. The idea of a court comes with a lot of ideological baggage, some of which resounds in other value-laden areas of international law. Indeed, international law as a whole has been permeated by the development of human rights law, as well as older notions of equality before the law and other principles of natural justice. Although this baggage may not be essential to a court's technical operation, it still serves an important purpose. Courts find their credibility and legitimacy in that baggage.

27 This instrumental use appears all the more stark when seen against the backdrop of the overall trend in international criminal justice. While this type of selective justice might not have seemed unusual 60 years ago, international criminal justice mechanisms have evolved significantly since the post-World War II tribunals rendered their judgments. The establishment of the ICC, a permanent international criminal court with broad jurisdiction, has gone a long way toward mitigating fragmentation in the field of international justice, and reflects a reduced tolerance for selective justice.