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Power and Perception: The Special Tribunal for Lebanon

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POWER AND PERCEPTION: THE SPECIAL TRIBUNAL FOR LEBANON

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ABSTRACT

On March 1, 2009, the long-anticipated Special Tribunal for Lebanon finally opened its doors. The STL has been hailed as a triumph against impunity and “a decisive milestone” in the quest for justice.¹ Nonetheless, the Tribunal has been fraught with complications since the outset and faces significant challenges as it forges ahead. The use of Chapter VII powers to impose the Tribunal coupled with an exceedingly narrow mandate relying solely on domestic law, has led to criticisms that the Tribunal is impartial, and at the worst, illegal.² Moreover, with a contentious history of U.N. involvement, including an extensive and controversial investigation into the assassination, the tribunal risks *appearing* impartial, regardless of whether or not it can achieve real justice, thus jeopardizing the support and acknowledgment of the very people it is intended to serve.³

Thus, as the tribunal moves forward, it must convince the Lebanese that it is a fair and independent judicial body concerned with upholding justice and ending impunity. To do this, the Tribunal must overcome the controversial history leading up to its opening by coming forward with indictments that sound in truth and solid evidence; dispel perceptions that it is the product of political manipulations rather than a true desire to see justice done; and find a way to embrace the Lebanese people in a way that allows them to participate fully in the transition to justice and peace.

¹ *Start of Lebanon tribunal 'decisive milestone' in pursuit of justice – Ban*, UN News Centre, Mar. 1, 2009, available at <http://www.un.org/apps/news/story.asp?NewsID=30052&Cr=Lebanon%20&Cr1=tribunal>.

² See, e.g., Daoud Khairallah, *The Hariri and Saddam Tribunals: Two Expressions of Tortured Justice*, 4 CONTEMPORARY ARAB AFFAIRS, 589, 596 (Oct. 2008).

³ See, e.g., David M. Crane, Prosecutor for the Special Court of Sierra Leone, *White Man's Justice: Applying International Justice After Regional Third World Conflicts*, Address for the Cardozo Law School Symposium, *The Nuremberg Trials: A Reappraisal and Their Legacy* (Mar. 28, 2005) in 27 CARDOZO L. REV. 1683, 1686, 1687 (2006) (stating that international criminal tribunals must ensure that “justice is perceived to be done both internationally as well as locally and regionally” so as to ensure that “the universal principles laid out at Nuremberg sixty years ago, that mankind now holds all nations to, can be respected by all cultures and traditions as a just standard that can lead to just results; respected from not only a legal or political point of view, but culturally as well.”)

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This paper seeks to explore the creation of the Tribunal, the political climate in which it arose, and the various obstacles facing the Tribunal, in the context of international transitional justice.

I. BACKGROUND OF THE TRIBUNAL: A CIRCUITOUS ROUTE

ASSASSINATION

The brutal February 14, 2005 assassination of former Lebanese Prime Minister Rafiq Hariri, which killed 22 people in addition to the businessman-turned-politician, shook Lebanon at its core; while assassination attempts and arbitrary bombings had occurred not infrequently in Lebanon,⁴ no one as prestigious and prominent as Hariri had been targeted, let alone killed, since the Lebanese civil war.⁵ The world took notice; officials from Western countries decried the murder and pledged solidarity with the Lebanese people.⁶ Indeed it is rumored that then-French President Jacques Chirac, a close personal friend of Hariri's, announced his intention to set up an international tribunal to punish the killers as early as the day of the funeral, which he attended.⁷

Hariri's murder was immediately condemned by those inside and outside Lebanon as an act of aggression by Syria⁸, whose government had increasingly butted heads with

⁴ Aside from the 15-year civil war that ravaged Lebanon from 1975-1990 in which car bombs and assassinations were frequent occurrences, the early 2000s witnessed a number of seemingly politically-motivated assassinations of former politicians and military men. For example, former Christian Lebanese Forces commander and parliamentarian Elie Hobeika was killed in January 2002; Palestinian activist Mohammad Jihad Jabril was killed by a car bomb in May 2002; a Hezbollah member Ali Huseein Salah was killed in August 2003; and Hezbollah member Ghaleb Alawi was killed in July 2004. See <http://terrorism.about.com/od/originshistory/tp/Lebanon-Assassination-Timeline.htm>. On October 1, 2004, a car bomb almost killed Cabinet minister Marwan Hamade, in what is now considered the onset of the string of assassinations surrounding Hariri's death. See *Lebanese Minister Marwan Hamade Wounded in Beirut Blast*, DAILY STAR ONLINE, Oct. 1, 2004.

⁵ Revered or despised, Hariri was a central part of Lebanon's recent rehabilitation and recovery from its 15-year long civil war. Through his joint-stock company, Solidere, he single-handedly redeveloped the once-booming downtown area, giving himself both regulatory authority and eminent domain powers under an agreement with the government made while he was still Prime Minister in 1994. See Richard W. Carlson, *Mr. Hariri Goes to Washington*, THE WEEKLY STANDARD, May 12, 2003. He maintained notoriously close ties with both Paris and Washington. See, e.g., Patrick Seale, *Chirac, Hariri, and the International Court*, MIDDLE EAST ONLINE, Apr. 30, 2007.

⁶ See, e.g., *World Denounces Beirut Bomb Blast*, MERCURY (Australia), Feb. 16, 2005 ("Leaders from the White House to the Gaza Strip have denounced the Beirut bomb blast that killed former Lebanese prime minister Rafik Hariri.")

⁷ See Seale, *supra* note 5, at 1.

⁸ See Brian Knowlton, *Finger Pointing Begins as Nations Ask Who?* INT'L HERALD TRIBUNE, Feb. 15, 2005 ("Word of the assassination provoked a burst of finger-pointing directed at Syria.")

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the former Prime Minister over the country's continued military presence in Lebanon.⁹ As early as February 15, the White House insinuated that Syria had orchestrated the attack, saying that the bombing appeared to have been "an attempt to stifle . . . efforts to build an independent, sovereign Lebanon free of foreign domination."¹⁰ That very day, the U.S. withdrew its Ambassador from Syria.¹¹ France immediately called for an international inquiry.¹² Within Lebanon, the rift between pro-Syrian and anti-Syrian factions, which had been growing over the last two years, rent the country in two. Members of the anti-Syrian opposition in Lebanon publicly blamed Syria for the bombing and appealed to Western powers to compel the withdrawal of Syrian troops.¹³ Simultaneously, pro-Syrian groups, largely centered around Hezbollah, the Lebanese Shiite militia, rallied around Syria in opposition to what they deemed to be Western interference into internal affairs.¹⁴

United Nations involvement in the investigation began almost immediately, largely at the insistence of the U.S. and France who urged the Security Council to take measures "to punish those responsible for this terrorist attack."¹⁵ The following day, the

⁹ The assassination of Hariri took place amidst a background of growing tension between pro- and anti-Syrian forces in Lebanon. The tension came to a head in late 2004 when Syria pressured the Lebanese Parliament to extend the mandate of then Lebanese President Emile Lahoud, considered a Syrian "stooge," by another three years. After failed negotiations with the Syrians to stop the amendment from passing, Hariri, then Prime Minister, eventually voted in favor of the amendment. The next week he resigned from his post. He was killed six months later. *See, e.g.,* Weedah Hamzah, *Events in Lebanon Surrounding the Killing of Rafik Hariri*, TOPNEWS.IN, <http://www.topnews.in/events-lebanon-surrounding-killing-rafiq-hariri-2132107>.

¹⁰ *See* Knowlton, *supra* note 8 (White House Press Secretary Scott McClellan added that "it's premature to know who was responsible for this attack, but we continue to be concerned about the foreign occupation of Lebanon.") *See also* Steven R. Weisman, *Assassination in Beirut: U.S. Seems Sure of Hand of Syria, Hinting at Penalties*, N.Y. TIMES, Feb. 15, 2005, at A1.

¹¹ Press Release, U.S. State Department, U.S. Recalls Ambassador to Syria (Feb.15, 2005).

¹² *See* Knowlton, *supra* note 8.

¹³ *See* Neil Mac Farquhar, *Behind Lebanon's Upheaval, 2 Men's Fateful Clash*, N.Y. TIMES, Mar. 20, 2005.

¹⁴ On April 26, 2005, Lebanese and international pressures led Syria to withdraw its troops. *See* Hassan M. Fattah, *Syrian Troops Leave Lebanon After 29-Year Occupation*, N.Y. TIMES, Apr. 26, 2005.

¹⁵ *See* Khairallah, *supra* note 2, at 589.

U.N. condemned the attack as a terrorist act, linking it to the “fight against terrorism.”¹⁶ It called on the Lebanese government to “bring to justice the perpetrators, organizers and sponsors of this heinous terrorist act.”¹⁷ On February 25, following discussions with the Lebanese Government, the U.N. Secretary dispatched a Fact-Finding Mission to Beirut headed by international investigator Peter FitzGerald.¹⁸ Falling short of placing outright blame on Damascus, the report included testimony by unnamed sources that Syrian President Bashar Al-Assad had threatened Hariri just months before the assassination, and determined that Syria bore the primary responsibility for the “the political tension that preceded the assassination . . .”.¹⁹ Moreover, the Mission concluded that the Lebanese investigation process “suffer[ed] from serious flaws and ha[d] neither the capacity nor the commitment to reach a satisfactory and credible conclusion;” it thus recommended the creation of an international investigation commission and the removal of the leaders of the Lebanese security services whom it viewed as an impediment to any successful investigation.²⁰

THE INTERNATIONAL INDEPENDENT INVESTIGATION COMMISSION: FROM MEHLIS TO BRAMMERTZ

The Security Council adopted Resolution 1595 on April 7, 2005, calling for the establishment of the International Independent Investigation Commission to take over the investigation.²¹ International investigator Detlev Mehlis was appointed Commissioner of the IIC and was instructed to report to the Security Council in three months with his

¹⁶ The Secretary-General, *Statement of the Secretary-General on the Situation in the Middle East*, ¶ 5, delivered to the Security Council, U.N. Doc. S/PRST/2005/4 (Feb. 15, 2005).

¹⁷ *Id.*

¹⁸ *UN Team in Lebanon Starts Probe into Hariri Killing*, HAARETZ, Feb. 25, 2006.

¹⁹ Peter FitzGerald, *Report on the Mission of Inquiry into the Circumstances, Causes and Consequences of the 14 February Beirut, Bombing*, ¶ 61, delivered within a Letter from the Secretary-General to the Security Council, U.N. Doc. S/2005/203 (Mar. 24, 2005).

²⁰ *Id.* at ¶ 62.

²¹ S.C. Res. 1595, ¶ 9, U.N. Doc. SC/1559 (Apr. 7, 2005).

findings, with the option of extending his mandate.²² The Lebanese government signed an agreement with the UN to establish the Commission on June 13, 2005.²³

The Mehlis Commission faced tremendous obstacles at the outset, both practically and in terms of perception. Practically, by the time the Commission started its investigation, four months had passed since the bombing, allowing perpetrators plenty of time to destroy evidence or collude with each other.²⁴ Time restraints were compounded by the need to organize files and evidence as well as research Lebanese criminal law and procedure.²⁵ A full-scale crime scene investigation was not conducted until the third month of the mandate, almost seven months after the bombing.²⁶

The Mehlis Commission also had to contend with the enormous expectations of the international community and of the divergent Lebanese population, many of whom felt the FitzGerald report had been cursory and incomplete.²⁷ That the FitzGerald Report openly relied on hearsay from unnamed sources further alienated many Lebanese, who denounced it as “alien to reality” and “not based on documents or evidence.”²⁸ Pro-Syrian groups argued that the report was “political” rather than “of a technical-criminal nature.”²⁹ On the other hand, there were the concurrent pressures from the U.S. and France, who had worked hard to ostracize Assad and were openly hoping an investigation would topple the Syrian regime.³⁰

²² *UN investigator promises in-depth probe of fatal attack on former Lebanese premier*, UN.ORG, May 25, 2005.

²³ Detlev Mehlis, UNIIIC Commissioner, *Report of the International Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005)*, ¶ 5, delivered within a Letter from the Secretary-General to the Security Council, U.N. Doc. S/2005/662 (Oct. 20, 2005) [hereinafter MEHLIS REPORT].

²⁴ *Id.* at ¶ 88.

²⁵ *Id.* at ¶ 91.

²⁶ *Id.* at ¶ 93.

²⁷ See Adnan Al-Ghoul, *Assad Slams UN's Report on Hariri Assassination*, DAILY STAR, Mar. 31, 2005.

²⁸ *Lebanon Agrees to Hariri Inquiry*, BBC NEWS, available at http://news.bbc.co.uk/2/hi/middle_east/4383321.stm.

²⁹ Al-Ghoul, *supra* note 27.

³⁰ Joshua Hammer, *Getting Away with Murder?*, THE ATLANTIC, Dec. 2008, at 2, available at <http://www.theatlantic.com/doc/200812/hariri-assassination/2>; see also Nada Bakri, Majdoline Hatoum & Nafez

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Against this backdrop, the Mehlis Report, issued October 21, 2005, set off a maelstrom within Lebanon, splitting the Lebanese political divide wide open.³¹ Detailing an intricate web of conspiracies reaching up to the highest rung of the Syrian regime, the report pointed the finger squarely at Syria, finding that there was probable cause to believe that the decision to assassinate Hariri “could not have been taken without the approval of top-ranked Syrian security official[s]”³² While hailed as vindication by the pro-Hariri camp, the report was denounced by those already suspicious of U.N. motivations to question the report’s credibility and professionalism.³³

Indeed, despite its dramatic account, the report quickly began to unravel. Like its predecessor, the Mehlis Report relied chiefly on the testimony of a handful of witnesses, many of whom turned out to be unreliable, and some of whom later publicly recanted their testimony.³⁴ Physical evidence failed to corroborate the statements.³⁵ By that time, Mehlis had already recommended the arrest of three of Lebanon’s high-ranking former security generals and one former Parliamentarian, all pro-Syrian, based on witness testimony alone.³⁶

Qawas, *Full International Backing for Lebanon, □ Isolation for Syria*, DAILY STAR, Sept. 20, 2005 (“The U.S. and France increased Syria’s isolation as it demanded that it stop all meddling in Lebanon and Iraq”); Editorial, *Accountability for Syria*, WASH. POST, Oct. 23, 2005 (“The United States has plenty of reasons of its own to bring pressure on Mr. Assad, including his support for foreign terrorists and Sunni insurgents in Iraq.”)

³¹ See, e.g., INTERNATIONAL CRISIS GROUP, *LEBANON: MANAGING THE GATHERING STORM* 7 (Dec. 5, 2005), available at <http://merln.ndu.edu/archive/icg/syrialebanon.pdf>.

³² MEHLIS REPORT, at 33 (Conclusion).

³³ ICG, *supra* note 31, at 7 (“it is hard to find a Lebanese (or Arab) who does not entertain conclusive views about the German

prosecutor’s work – meticulous and unimpeachable evidence for some, politicised and hearsay evidence for others.”) The divide falls along sectarian lines: “more than 80 per cent of Sunnis and Christians trust Detlev Mehlis’s investigation, but two-thirds of Shiites did not.”) *Id.* at 8.

³⁴ Georg Mascolo, Holger Stark & Volker Windfuhr, *Kofi Annan’s Syria Problem*, DER SPIEGEL, Dec. 19, 2005. Der Spiegel reported that some of the witnesses were apparently paid for their testimony. See Robert Parry, *The Dangerously Incomplete Hariri Report*, CONSORTIUMNEWS.COM, Oct. 23, 2005 (reporting that the key witness called his brother in Paris shortly after testifying and declared “I’ve become a millionaire.”)

³⁵ See DER SPIEGEL, *supra* note 34.

³⁶ See Khairallah, *supra* note 2, at 590-91. The men remained in jail for nearly four years, until April 29 2009, when the STL ordered them released after a key witness recanted a statement alleging that the generals had a hand in planning the assassination. See Raed Rafei, *Lebanon Frees 4 Generals in Hariri Slaying*, L.A. TIMES, Apr. 30, 2009.

The report also seemed to suffer from a disregard for basic principles of criminal investigation.³⁷ In what appeared to be a breach of confidentiality at the least, and outright dangerous at the most, the report named both witnesses and suspects.³⁸ Perhaps the most obvious misstep, from the Lebanese perspective, was Mehlis's reliance on witness statements to corroborate Assad's alleged threat to Mr. Hariri, a fact the report repeatedly emphasized as indicative of the Syrian President's involvement.³⁹ Yet, all of the statements came from some of Syria's most outspoken Lebanese opponents,⁴⁰ none of whom had actually witnessed the alleged conversation.⁴¹ Apart from constituting hearsay, the statements raised questions of interference in the investigation on the part of the pro-Hariri camp. Such a notion was not lost on Mehlis who, in a comment that was later redacted from the October report, relayed that "the investigation had been influenced and manipulated at times by politicians in Lebanon."⁴²

At this stage, it is unclear whether or not the Mehlis reports have any legal value.⁴³ Mehlis was replaced as Commissioner in January 2006 by Serge Brammertz, a Belgian prosecutor who reportedly accused Mehlis of being "carried away by anti-Syrian sentiment" and having "raced ahead under international pressure to implicate Syria,

³⁷ See Khairallah, at 590-91.

³⁸ Jibrán Tuéni was killed a day after being named in the second report. *Id.*, adding that Mehlis's successor, Serge Brammertz, in his report of June 10, 2006, deemed it "inappropriate to disclose specific information at this stage of the investigation" for security and confidentiality reasons.

³⁹ MEHLIS REPORT, at ¶ 25-31.

⁴⁰ Including Saad Hariri, Hariri's son, and Walid Jumblatt, Marwan Hamadeh, Bassem al-Sabae, Ghazi al-Aridi, and Gibran Tuéni, who had all allied with Hariri against Syria before the assassination, and "were some of the loudest anti-Syrian politicians in Lebanon." Sami Moubayed, *The Ball is Now in Syria's Court*, ASIA TIMES, Oct. 25, 2005. Their impartiality, though apparently unrecognized by Mehlis, would have been obvious to any Lebanese. *Id.*

⁴¹ On the other hand, alternative accounts provided by Syrian officials who attended the meeting were summarily discredited as appearing rehearsed. MEHLIS REPORT, at ¶34. They may very well have been, but the double standard left critics questioning the reliability of the report as a whole. See Moubayed, *supra* note 40.

⁴² See Parry, *supra* note 34. Mehlis reiterated this sentiment following his resignation from the Commission in December 2005, shortly after he released his second report. Although the report largely reiterated the first, and recommended greater sanctions against Syria to force its cooperation, he complained that "every step his team took was politicized – sometimes by the pro-Syrian politicians, sometimes by the Hariri camp – at times prompting [him] to wonder whether his investigation was doing the country more harm than good." Mascolo, *supra* note 34.

⁴³ See Khairallah, *supra* note 2, at 591.

without checking the admissibility of the sources.”⁴⁴ Over the next two years, Brammertz released seven reports, all far more general and “technical” than Mehlis’s.⁴⁵ He downgraded “suspects” to “persons of interest” and restrained from providing details, cutting off the press entirely.⁴⁶ His discretion appealed to Syria, who agreed to talk with him under the condition of secrecy.⁴⁷

Mehlis’s report was not without its consequences however. Despite the critical evidentiary gaps in the report and its preliminary nature,⁴⁸ the Security Council used the report to take further steps to sanction Syria in response to Mehlis’s complaints that Damascus was refusing to cooperate.⁴⁹ Under Resolution 1636, the Security Council invoked its Chapter VII powers to require Syria to “fully and unconditionally” cooperate with the Mehlis investigation or face “further action.”⁵⁰ This was the first time in the investigation process that the U.N. had invoked Chapter VII powers, determining “that this terrorist act and its implications constitute a threat to international peace and security.”⁵¹

TALK OF THE TRIBUNAL

Throughout the U.N. investigation, violence continued to terrorize the Lebanese. Between October 2004, when the first attack occurred, through December 2005, dozens of targeted attacks were committed, killing at least nine people, many of them prominent

⁴⁴ See Hammer, *supra* note 30, at 2.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *New Approach to Hariri Probe, Say Analysts*, IRIN, Feb. 27, 2006.

⁴⁸ See Khairallah, at 591.

⁴⁹ MEHLIS REPORT, at ¶ 35.

⁵⁰ S.C. Res. 1636, ¶ 11(b), U.N. Doc. S/Res/1636 (Oct. 31, 2005). Previous versions drafted by the U.S. including specific threats of economic sanctions were contested by Russia and China. ALFRED P. PRADOS, CRS ISSUE BRIEF FOR CONGRESS: LEBANON 6 (Mar. 16, 2006), available at <http://www.fas.org/sgp/crs/mideast/IB89118.pdf>.

⁵¹ S.C. Res. 1636, at 3.

leaders and spokespeople, and wounding hundreds.⁵² The day after the second Mehlis report was released, Gibran Tuani, a preeminent journalist and outspoken critic of Syria who had been named in Mehlis's report, was killed by a car bomb.⁵³

The violence rekindled talk of establishing an international tribunal, an idea that had been tabled pending the outcome of the UN investigation.⁵⁴ On December 13, 2005, Prime Minister Siniora wrote to the Secretary General requesting the establishment of a "tribunal of an international character" to try those responsible for the crime and asked that the mandate be extended to all terrorist attacks that had occurred since October 1, 2004.⁵⁵ The Security Council approved the request two days later.⁵⁶ Following rounds of discussions between the Lebanese government and the U.N., the Secretary General issued a report on March 21, 2006, recommending the establishment of a "mixed tribunal" through an agreement between Lebanon and the U.N.⁵⁷ He emphasized that consultations with Lebanese authorities made clear that security concerns strongly suggested placing the tribunal outside of Lebanon and that the application of Lebanese substantive criminal law would play an important role in "ensuring that the tribunal would have a national dimension."⁵⁸

Once again, the Lebanese Parliament found itself at loggerheads; as debate over the tribunal and power-sharing in the government picked up following the Lebanon-Israel war of 2006, the Lebanese government came to a complete standstill. Hezbollah quit the

⁵² See Hamzah, *supra* note 9.

⁵³ *Id.*

⁵⁴ See Hammer, *supra* note 30, at 3.

⁵⁵ Fuad Siniora, Annex to the Letter dated 13 December 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General, U.N. Doc. S/3005/783 (Dec. 13, 2005).

⁵⁶ S.C. REs. 1644, U.N. Doc. S/Res/1644 (Dec. 15, 2005).

⁵⁷ Secretary-General, *Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005)*, ¶ 5, delivered to the Security Council, U.N. Doc. S/2006/176 (Mar. 21, 2006).

⁵⁸ *Id.* at ¶ 8.

government on November 11, 2006, alleging that they were not being consulted on “national issues like the Tribunal.”⁵⁹ Yet, despite Hezbollah’s allegations that the absence of the entire Shiite representation rendered the government *de facto* unconstitutional,⁶⁰ the government moved forward with negotiations, approving a UN draft for the Tribunal just two days later.⁶¹

Over the next year, the situation continued to deteriorate. The Pro-Hariri government accused Hizballah and its allies of walking out in order to prevent the tribunal from forming; Hizballah, by turn, claimed that it was not in fact opposed to the tribunal but merely concerned about the scope of its mandate.⁶² It claimed that the government, in urging a quick approval, had prevented “serious discussion.”⁶³ Either way, the Tribunal occupied a central concern in the stalemate between the two parties.⁶⁴ The stalemate in turn threatened to stall the formation of the Tribunal altogether as the Agreement required ratification by the Parliament: this became increasingly impossible as the Speaker of the House, Nabih Berri, a pro-Syrian Shiite, refused to convene Parliament until the stalemate was resolved.⁶⁵ Finally, sparking outrage among the pro-Syrian factions, in February 2007, Siniora asked the UN to use its Chapter VII powers to circumvent the Lebanese Parliament and unilaterally impose the tribunal.⁶⁶ On May 30, 2007, the Security Council did just that: Resolution 1757 gave the government until June

⁵⁹ Rym Ghazal, *U.N. Signs Seal on Hariri Court, Raising Pressure of Ratification*, DAILY STAR, Feb. 7, 2007 [hereinafter Ghazal, *U.N. Signs Seal*].

⁶⁰ Amal Saad Ghorayeb, *In Their Own Words: Hizballah’s Strategy in the Current Confrontation*, CARNEGIE ENDOWMENT POLICY OUTLOOK, Jan. 2007, at 3, available at http://www.carnegieendowment.org/files/saadghorayeb_hizballah_final.pdf.

⁶¹ Géraud De Geouffre de La Pradelle, Antoine Korkmaz & Rafaëlle Maison, *Lebanon: A Court Without Law, UN Manipulates International Justice*, LE MONDE DIPLOMATIQUE, Apr. 2007.

⁶² Khaled Yacoub Oweis, *Syria Tells UN’s Ban Lebanon Must Agree on Court*, REUTERS, Apr. 24, 2007; see also Ghorayeb, *supra* note 59, at 3-5.

⁶³ Ghorayeb, *supra* note 60, at 4.

⁶⁴ Peter Heinlein, *UN Chief Sends Top Lawyer to Lebanon to Break Hariri Tribunal Impasse*, VOICE OF AMERICA, April 14, 2007.

⁶⁵ See Ghazal, *U.N. Signs Seal*, *supra* note 59.

⁶⁶ *Id.*

10, 2007 to ratify the Agreement, at which point the Agreement would enter into force unilaterally.⁶⁷ Not surprisingly, the Parliament did not ratify, making the STL the first treaty-based tribunal in the history of the U.N. to be enforced by resolution under Chapter VII.⁶⁸

II. THE TRIBUNAL: ISSUES OF LEGALITY AND LEGITIMACY

LEGALITY OF THE STL: INNOVATIONS AND OBSTACLES

Much like the history of the creation of the Tribunal, the writing of the Statute was contentious, often characterized by a split Security Council and several abstentions on paramount issues.⁶⁹ The result is a unique statute containing several legal innovations, some more questionable than others, leading some critics to worry whether the “creature that the many parents of the STL in the Council have engendered may prove to be a cripple from birth.”⁷⁰

At the outset, the STL is characterized by a uniquely narrow mandate. Under Article 1, the Statute confers jurisdiction over persons responsible for the February 14, 2005 attack that killed Hariri and 22 others.⁷¹ It further provides the option of including “other attacks that occurred between 1 October 2004 and 12 December 2005, or any later date,” providing the Tribunal finds a sufficient connection between those attacks and

⁶⁷ S.C. Res. 1757, ¶ 1(a), U.N. Doc. S/RES/1757 (May 30, 2007).

⁶⁸ See Khairallah, *supra* note 2, at 591.

⁶⁹ See, e.g., Rym Ghazal, *U.N. Approves Hariri Court*, DAILY STAR, May 31, 2007; Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1125, 1128 (2007); Colum Lynch & Ellen Knickmeyer, *U.N. Council Backs Tribunal for Lebanon*, WASH. POST, May 31, 2007, at A1 (noting that the Council was “sharply divided” in its decision to create the Tribunal).

⁷⁰ James Cockayne, *The Special Tribunal for Lebanon – A Cripple from Birth?* 5 J. INT’L CRIM. JUST. 1061, 1063 (2007). Amnesty International describes the court as “essentially a Lebanese national court that has some international components, in that it comprises both Lebanese and international judges while applying national law for the definition of crimes.” For security reasons, it will sit in the Hague. AMNESTY INTERNATIONAL, *LEBANON: THE SPECIAL TRIBUNAL FOR LEBANON ‘SELECTIVE JUSTICE,’ available at* <http://www.amnestyusa.org/document.php?id=ENGMDE180012009&lang=e#4.4.%20THE%20SPECIAL%20TRIBUNALoutline> (accessed May 4, 2009).

⁷¹ Statute of the Special Court of Lebanon, art. 1, May 30, 2007 [hereinafter STL Statute].

Hariri's.⁷² Sufficient connection is defined as criminal intent (motive); purpose behind the attacks; nature of the victims targeted; pattern of attacks (modus operandi); and perpetrators.⁷³ "Any later date" is qualified by two restrictions: that the Lebanese government and U.N agree on such a date, and that the Security Council then consent to it.⁷⁴

Thus, unlike previous international courts established to try massive violations of international humanitarian law, the primary mandate of the STL relates to a single attack, with the possibility of trying others. Although recent reports from the IIC indicate that significant commonalities exist between the 17 attacks under its mandate, notably those between October 1, 2004 and December 12, 2005, and the Hariri case, the reports give no indication as to whether they will meet the threshold to be tried.⁷⁵ Because no indictments have been issued, it is impossible to know whether any cases other than the Hariri case will be tried. Moreover, because Article 11 allows the prosecutor to jointly try related cases, it is likely that the STL will "deal with a very limited number of cases,"⁷⁶ perhaps as few as one.⁷⁷

The uniquely narrow mandate has led to what is by far the most obvious departure from traditional international or hybrid courts: the Tribunal's exclusive reliance on Lebanese domestic criminal law as the source for its jurisdiction.⁷⁸ Defining the attack against Hariri as a "terrorist crime," the Statute conspicuously avoids reference to crimes

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Jurdi, *supra* note 69, at 1127, n.9; see also Cécile Aptel, *Some Innovations in Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1107, 1110, n.10 (2007).

⁷⁶ See Aptel, at 1110.

⁷⁷ *Id.*

⁷⁸ Article II(a) provides that the applicable criminal law is the Lebanese Criminal Code "relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy." STL Statute.

against humanity, or any other violations of international humanitarian law, both of which have previously constituted the substantive framework for both international and hybrid tribunals.⁷⁹ Indeed, while domestic law has played an important role in hybrid tribunals, this role has been limited, secondary to, or at least complementary of, international law concerning the massive human rights violations that justified the creation of the tribunals in the first place.⁸⁰

In part, the omission of international humanitarian law can be traced to the unique nature of the mandate, referring to the attack as a “terrorist crime.”⁸¹ As yet, there is no omnibus international definition of terrorism;⁸² and as it does not fulfill the requirements for a war crime or a crime against humanity, terrorism does not yet qualify as a “true discrete crime under international law.”⁸³ Had the Statute more forcefully included the “other attacks” that plagued Lebanon throughout 2004-05 and beyond, the justification for characterizing the crimes as crimes against humanity, defined in international law generally as: “acts of murder, persecution, extermination or other inhumane acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,”⁸⁴ might have been stronger.⁸⁵ Indeed, the

⁷⁹ See Jurdi, *supra* note 69, at 1126.

⁸⁰ *Id.*

⁸¹ STL Statute, Introduction.

⁸² Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L. J. 119, n. 384 (2008).

⁸³ Marko Milanovi, *Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1139, 1141 (2007).

⁸⁴ See Jurdi, *supra* note 69, at 1127. See Rome Statute Article 7(1) for the full definition.

⁸⁵ See *id.*, arguing that, given the nature, number, and scope of the attacks, coupled with the UNIIIC’s findings suggesting the acts were perpetrated by the same people, apparently targeting a single group (the anti-Syrian coalition) and apparently constituting part of a systematic attack, there would be reasonable grounds to believe that “both the material and mental elements of a crime against humanity could be discerned.”

Security Council considered including crimes against humanity within the STL jurisdiction, but ultimately chose not to, due to “insufficient support” for the inclusion.⁸⁶

The reliance on Lebanese law raises some potentially significant legal hurdles. For one, rather than resort to an extensive body of established international jurisprudence, the STL must depend solely on Lebanese jurisprudence, described by one scholar as, at best, “scattered and lacking consistency.”⁸⁷ Under Lebanese law, terrorist acts are defined under Article 314 of the Lebanese Penal Code as “all acts designed to create a state of alarm which are committed by means such as explosive devices, inflammable materials, poisonous or incendiary products or infectious or microbial agents likely to create a public hazard.”⁸⁸ While relatively comprehensive,⁸⁹ Lebanese jurisprudence is riddled with unusual holdings, some of which, if followed, could prove problematic if the court is to try cases other than the Hariri case. For example, in at least one case, the Lebanese Council of Justice found that the fatal shooting of a political figure in a public square in broad daylight did not qualify as a “terrorist act” because the act had been committed with a gun, a weapon that did not meet the requisite likelihood of creating a “public hazard.”⁹⁰ This ruling would have the potential of excluding attacks committed by gunfire, such as that of MP Pierre Gemayel, who was shot down on November 21, 2006, should his case be included.⁹¹

⁸⁶ See *id.*, at 1128. There is some reason to believe that the decision was, in part, political. Russia refused the inclusion of crimes against humanity as well as any reference to international instruments for the definition of terrorism, specifically the Arab Convention for the Suppression of Terrorism (the ‘Arab Convention’) to which Lebanon is a party. *Id.*, at n. 12 and n. 18. See also Milanovi, *supra* note 83, at n. 2.

⁸⁷ See Jurdi, at 1128.

⁸⁸ *Id.* at 1129.

⁸⁹ *Id.* at 1136.

⁹⁰ *Id.* at 1131, referring to Judgment 1/1975, Council of Justice, 23 June 1975. [In Arabic]. Cited in Samir Aalieh, *Ijtihad Al-Majlis Al-Aadli fi Al-Jarayem Aala Amn Al-Dawla 1949-1977* [Jurisprudence of the Council of Justice on Crimes against the Security of the State 1949-1977] (Beirut: University Collection for Studies, Publications and Distribution, 1987), 58. [Arabic].

⁹¹ *Lebanese Christian Leader Killed*, BBC NEWS, Nov. 21, 2006.

Perhaps a more troublesome aspect of the decision to apply Lebanese law relates to the STL's surprising decision to attach to it international forms of criminal responsibility, raising significant issues of legality.⁹² Under Article 3, individual criminal responsibility accrues not only for commission and complicity, but also for "common purpose/joint criminal enterprise responsibility" and "superior/command responsibility,"⁹³ forms of liability that are "almost uniquely international in character."⁹⁴ Indeed, rather than emanating from Lebanese law, both provisions appear to be based on the Rome Statute and, as per international standard, seem to be much broader than the typical domestic laws for accomplice liability.⁹⁵

Applying international theories of criminal responsibility to purely domestic crimes could potentially mean that individuals would be held accountable for crimes that they could not be punished for under Lebanese law.⁹⁶ This possibility has led at least one critic to assert that Article 3 is perhaps the Statute's "most grave legal defect," effectively amounting to *nullum crime sine lege*.⁹⁷ The problem becomes more pronounced when compared to the Statute for the Special Court for Sierra Leone, which conferred jurisdiction over both international and domestic crimes.⁹⁸ However, the SCSL Statute was careful to specify that international forms of individual criminal responsibility were not to apply to domestic laws: "[i]ndividual criminal responsibility for the crimes referred to in article 5 [i.e. crimes against Sierra Leonean law] shall be determined in accordance with the respective laws of Sierra Leone,' while international forms of

⁹² See Milanovi, *supra* note 83, at 1142.

⁹³ *Id.* at 1139-40.

⁹⁴ *Id.* at 1139.

⁹⁵ *Id.* at 1143-45.

⁹⁶ *Id.* at 1142.

⁹⁷ *Id.*

⁹⁸ See *id.*, at 1145.

responsibility are reserved solely for international crimes.”⁹⁹ Although the conundrum could potentially be remedied if Lebanese law provided substantially similar definitions for liability, such an outcome is not likely,¹⁰⁰ in which case the Tribunal will have to proceed very carefully to avoid violating the principle of legality, perhaps by conducting a “parallel” review of Lebanese law to ensure the outcome would be the same.¹⁰¹

In addition to the problems the STL faces with regards to its mandate, the STL looks to face some significant obstacles in carrying it out. One glaring omission from the Statute is a clause requiring the cooperation of third states. This is especially noticeable as mentions of such requirements, at least with regards to Syria, were included in all of the resolutions concerning the UNIIC.¹⁰² Under the Statute, Syria’s obligations to cooperate with the STL are thus non-existent.¹⁰³ This could greatly limit the STL’s ability to arrest or seize suspects or witnesses, or obtain evidence,¹⁰⁴ especially with regards to the principle of Dual Criminality, which only requires extradition of a suspect if the crime for which he is being extradited is also a domestic crime.¹⁰⁵ The peculiarities of Articles 2 and 3 suggest that such a finding could be hard to achieve.¹⁰⁶ One way around this would be for the STL to form its own agreements with third states or, alternatively, to appeal to the Security Council to compel cooperation through its Chapter VII powers, a solution that has had mixed results in the past.¹⁰⁷ Either way, it seems a question the STL will have to deal with moving forward.

⁹⁹ *Id.* at 1143.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1151-52. To do otherwise, Milanovi suggests, would be a “miscarriage of justice.” *Id.* at 1152.

¹⁰² Bert Swart, *Cooperation Challenges for the Special Tribunal of Lebanon*, 5 J. INT’L CRIM. JUST. 1153, 1156 (2007).

¹⁰³ *Id.* at 1162.

¹⁰⁴ See Aptel, *supra* note 75, at 1114.

¹⁰⁵ See Swart, at 1157.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1159-60. See also Aptel, at n. 30 and n. 31 (“The experience of the ICTY, the ICTR and the SCSL has shown that this procedure may not always be reliable, for it is subject to the usual political maneuverings in the Security

Perhaps because of its failure to force third party cooperation, the Statute includes yet another innovation: the ability to try individuals *in absentia*.¹⁰⁸ Traditionally, the U.N. has provided stringent limitations on trials *in absentia*,¹⁰⁹ thus the clause was reportedly debated at length and ultimately included at the insistence of the Lebanese.¹¹⁰ While provisions for trials *in absentia* are not unheard of in mixed tribunals, the breadth of Article 22 differentiates it; unlike the Statute for the Special Court for Sierra Leone, for example, which allows for *in absentia* trials only after the accused has already appeared once in court and then refuses to appear or absconds,¹¹¹ Article 22 allows for trials to take place from beginning to end without an accused ever having appeared in court,¹¹² coming dangerously close to violating notions of a fair trial as envisioned by fundamental international human rights instruments.¹¹³ Notably, the wide-reach of the provision is countered by limiting factors that suggest the power will only be used in “exceptional circumstances,”¹¹⁴ and provides for the right to be retried if the accused was convicted but did not designate a defense attorney of her choosing.¹¹⁵ Nonetheless, Article 22 could prove problematic should the STL seek cooperation from countries who categorically

Council. Nevertheless, concerning crimes of terrorism, it is noteworthy that the Security Council has adopted specific resolutions requesting certain States to extradite persons suspected of having conducted terrorist activities (see for example SC Res. 1267 (1999) and 1333 (2000) addressed to Afghanistan.)”

¹⁰⁸ STL Statute, art. 22. Here it appears the Secretary-General endorsed the provision because Lebanese law allows it and it “would ensure that those responsible for the Hariri assassination would be held accountable, even if they were to refuse to surrender to the STL.” Aptel, at 1121-22.

¹⁰⁹ This is because trials *in absentia* would not be consistent with Article 14 of the International Covenant on Civil and Political Rights which guarantees the right to be tried in one’s presence. See Aptel, at 1121. See also Paola Gaeta, *To Be (Present) or Not to Be (Present), Trials in Absentia before the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1165, 1167 (2007), noting that both the ICC and the two ad hoc international tribunals established by the Security Council (ICTY and ICTR) do not allow for *in absentia* trials.

¹¹⁰ See Aptel, at 1121.

¹¹¹ See Gaeta, at 1167 (“Rule 60 of the Rules of Procedure allows for trials *in absentia* when, after having made his initial appearance, the accused refuses to appear at his own trial, or is at large and does not appear in court.”)

¹¹² STL Statute, art. 22(a). The sole condition is that where the accused could not be reached for notification of the indictment, notice was given through publication in the media. *Id.* at art. 22(2)(a).

¹¹³ See Gaeta, at 1169.

¹¹⁴ Aptel, at 1122. Specifically, Article 22 will only apply if the accused has: expressly and in writing waived her right to be present; not been handed over to the Tribunal by the State authorities concerned; or has absconded or otherwise cannot be found and “all reasonably steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges.” Art. 22(1)(a)(b) and (c).

¹¹⁵ STL Statute, art. 22(3).

disapprove of *in absentia* trials, and will likely require the STL to negotiate agreements with such countries.¹¹⁶

Even if the STL were able to try perpetrators *in absentia*, however, it may be precluded from trying individuals who can claim personal or functional immunity. This is because, unlike any other international or hybrid court,¹¹⁷ the STL conspicuously lacks language eliminating immunities for heads of state or officials, a provision which would have been covered under customary international law had the Statute relied on crimes against humanity rather than domestic law.¹¹⁸ Yet it is not clear that the immunity exception qualifies as customary law outside of international human rights and humanitarian crimes.¹¹⁹ To the contrary, customary law has historically protected heads of state and other officials from prosecution of acts that violate national law.¹²⁰ There is reason to believe that failure to include such a provision in the STL statute was political¹²¹; but whatever the reason, it leaves open the possibility that the perpetrators of the crime will escape prosecution. This is especially problematic if any of Mehlis's

¹¹⁶ See Gaeta, at 1174.

¹¹⁷ See Art. 6 of the Charter of the International Military Tribunal of Tokyo; Art. 7(2) of the International Criminal Tribunal for Yugoslavia Statute; Art. 6(2) of the International Criminal Tribunal for Rwanda Statute; Art. 6(2) of the Special Court for Sierra Leone Statute; Art. 29 of the Law on the Establishment of Extraordinary Chambers for the Courts of Cambodia; and Art. 27 of the International Criminal Court Statute.

¹¹⁸ See Aptel, *supra* note 75, at 1111. This principle was first applied during the Nuremberg Trials, and codified in Principle III of the Nuremberg Principles: "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law;" see also Article 27 of Rome Statute: "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence...Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

¹¹⁹ See Aptel, at 1111, adding that derogations to the general rules on immunity of state officials are usually limited to international crimes "*stricto sensu*."

¹²⁰ See Shobha Varughese George, *Head-Of-State Immunity in the United State Courts: Still Confused After All These Years*, 64 *FORDHAM L. REV.* 1051, 1055 (1995).

¹²¹ See Raghida Dergham, *Talk of 'Deals' Between Washington, Damascus, and Tehran*, *AL-HAYAT*, Mar. 11, 2006, available at <http://english.daralhayat.com/opinion/OPED/11-2006/Article-20061103-adddc79b-c0a8-10ed-0108-ea49b6cb4496/story.html>, suggesting that Russia sought to ensure immunity for Syria by refusing to consider crimes against humanity as a crime.

accusations concerning the involvement of highly ranked Lebanese and Syrian officials are found to have merit.

A final hurdle to the court's legality is the most obvious: the use of Chapter VII to bypass Parliament and enforce the Agreement. This approach differs dramatically from previous U.N. uses of Chapter VII to establish international courts. In the case of both the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda, for example, the establishment of the tribunals under Chapter VII arose in the context of egregious human rights violations; in both instances, the Security Council had passed numerous Resolutions relating to the violations, suggesting that the establishment of the courts was merely one of many exercises of the Council's Chapter VII powers to maintain international peace and security.¹²² By contrast, instances in which the U.N. established hybrid or internationally assisted courts have traditionally been achieved through treaty or national statute,¹²³ in an effort to address crimes of international concern as well as assist the nation's transition to peace and rule of law.¹²⁴ In such cases, the nation has agreed to international intervention to aid in its own recovery.¹²⁵ Here, neither model applies: Lebanon was neither dealing with massive human rights violations necessitating international intervention, nor, by virtue of the Parliament failing to ratify, did it agree to permit international intervention in its internal

¹²² See Khairallah, *supra* note 2, at 597.

¹²³ The tribunals for Sierra Leone and Cambodia were both created through bi-lateral agreements with the U.N.; The Supreme Iraqi Criminal Tribunal was established by national statute.

¹²⁴ See Open Justice Initiative, *Hybrid Tribunals*, available at <http://www.justiceinitiative.org/activities/ij/hybrid> (accessed May 4, 2009).

¹²⁵ For example, the establishment of the Sierra Leone tribunal was "consensual, and its legal status, applicable law, composition, and organizational structure were negotiated and agreed upon between the parties." Khairallah, at 591, referencing Daphna Shraga, *The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions*, in INTERNATIONALIZED CRIMINAL COURTS & TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 16 (Cesare P.R. Romano *et al*, eds. 2004).

affairs.¹²⁶ In this sense, by enforcing the Resolution, the Council was not acting on behalf of Lebanon, but rather, “sid[ing] politically with the Lebanese Government” at the expense of at least a portion of the population.¹²⁷

There is another way to look at the Security Council’s use of Chapter VII to establish the STL. At the point of establishment, the Security Council had already issued several Resolutions related to the assassination both with regards to Lebanon and Syria;¹²⁸ Lebanese politics had been paralyzed for months, with sporadic violence threatening to spread;¹²⁹ and the chances for bringing the perpetrators to justice were waning. In this context, the Security Council was merely exercising its rightful powers under Chapter VII to establish an international court in order to maintain international peace and security.¹³⁰ Under its Chapter VII powers, the Council was not obliged to limit the tribunal’s jurisdiction to international law as it had done in the past for the ICTY or ICTR, but free to enact what it deemed appropriate and best suited for the situation.¹³¹ That it had already consulted with the Lebanese government on many of the substantive issues could constitute further proof of its legitimacy.¹³²

¹²⁶ Arguably, in enacting Resolution 1757, the Security Council not only violated Lebanese sovereignty, but violated international treaty law by using its power as a lever to force a binding decision. See Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1091, 1091, 1104-05.

¹²⁷ *Id.*, at 1098.

¹²⁸ S.C. Res. 1559, U.N. Doc. S/RES/1559 (Sept. 2, 2004) (ordering Syria to withdraw its troops from Lebanon); S.C. Res. 1595, *supra* note 21 (establishing the IIC); S.C. Res. 1636, *supra* note 50 (requiring Syria to cooperate and threatening “further action”); S.C. Res. 1644, *supra* note 56 (extending the mandate of the IIC); S.C. Res. 1664, U.N. Doc. S/RES/1664 (Mar. 29, 2006) (requesting the Secretary-General to negotiate an agreement with the Government of Lebanon to establish an international criminal court); S.C. Res. 1686, U.N. Doc. S/RES/1686 (June 15, 2006) (extending the mandate of the IIC); S.C. Res. 1748, U.N. Doc. S/RES/1748 (Mar. 27, 2007) (extending the mandate of the IIC by one year); S.C. Res. 1757, *supra* note 67 (establishing the Tribunal).

¹²⁹ See Sam Ghattas, *Memo Seeks UN Action in Hariri Case*, ASSOCIATED PRESS, Apr. 4, 2007.

¹³⁰ See Fassbender, at 1101.

¹³¹ *Id.*

¹³² *Id.* at 1100.

LEGITIMACY: THE APPEARANCE OF JUSTICE

Even if the Tribunal overcomes its many hurdles to achieving justice, if it is to have any meaning for the Lebanese, it must still contend with appearing to have achieved it.¹³³ To some degree, by their very nature as interventionist organs of justice, every international jurisdiction has had to contend with some antipathy and skepticism.¹³⁴ The Special Court for Sierra Leone, for example, struggled with African leaders' attempts to manipulate "popular thinking" by condemning the court as "white man's justice."¹³⁵ Milosevic often downplayed the legitimacy of the ICTY by referring to it as a creation of NATO.¹³⁶ And Sudan has objected to the International Criminal Court and its investigations into crimes in Darfur as "Western imperialism."¹³⁷ Lebanon brings its own peculiarities to the table: a long history of violence treated with utter impunity has left the population weary and skeptical of international powers as well as of the rule of law.¹³⁸ In addition, the country has long been deeply divided, often along sectarian lines, each group appealing to a different foreign power and accusing the other of violating Lebanon's sovereignty.¹³⁹

But the long and complicated involvement of the UN in the Lebanese investigation, and its appearance of having taken sides with the Government at the expense of the population, have merely fed fears of politicization,¹⁴⁰ and alienated those

¹³³ See Crane, *supra* note 3.

¹³⁴ See Marieke Wierda, Habib Nassar, & Lynn Maalouf, *Early Reflections on Local Perception, Legitimacy and Legacy of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1065, 1075 (2007). See also Crane, at 1686-88.

¹³⁵ See Crane, at 1686.

¹³⁶ See Wierda, et al., at 1075 (referring to E. Suljagic, 'Justice Squandered? The Trial of Slobodan Milosevic, in E. Lutz and C. Reiger (eds), *Trying Heads of States* (Oxford: Oxford University Press, forthcoming 2007) at 211-213).

¹³⁷ *Id.*

¹³⁸ See Wierda, et al., at 1067-1072.

¹³⁹ *Id.* at 1067. See also, Nick Blanford, *Hariri Trial a Bellwether of Mideast Clout*, CHRISTIAN SCIENCE MONITOR, Apr. 19, 2007.

¹⁴⁰ See Wierda, at 1065-1067.

who otherwise approved of international intervention.¹⁴¹ The sloppiness of the Mehlis report and its unfounded accusations against Syria exacerbated fears that the U.S. was manipulating the investigation for its own ends, namely bringing Syria into line with the war in Iraq.¹⁴² By April 2007, Lebanese on both sides began to feel as though the tribunal had become an excuse for world powers to play out their strategies; reporter Nicholas Blanford noted that “the tribunal has morphed from an instrument of international justice to try the killers of former Prime Minister Rafik Hariri into the nexus of a regional struggle over Lebanon’s future played out in the Mideast and the corridors of the UN headquarters in New York.”¹⁴³ The use of Chapter VII merely clinched this notion.¹⁴⁴ Indeed, there will always be individuals who believe the use of Chapter VII was an abuse of power that renders the Tribunal illegitimate.¹⁴⁵

Fears of politicization are compounded by the perception that the tribunal, with its exceedingly narrow mandate, is an exercise in selective justice.¹⁴⁶ Since 1975, Lebanon has suffered through two major wars resulting in mass destruction and gross violations of human rights. The 1975-1990 civil war, which resulted in hundreds of thousands killed and wounded, close to a million forcibly displaced, and tens of thousands missing, ended in a general amnesty,¹⁴⁷ brokered in an agreement supported by the U.S.¹⁴⁸ In 2006, the

¹⁴¹ See Khairallah, *supra* note 2, at 607.

¹⁴² *Id.* at 594. These fears were not unfounded: the U.S. often tied together its requests for Syria to withdraw from Lebanon with its concerns that Syria was not doing enough to stem the flow of insurgents from its borders into Iraq. See Bakri, *supra* note 30; see also Robin Wright, *US, France to Introduce U.N. Resolutions Against Syria*, WASH. POST, Oct. 19, 2005, at A16; and Blanford, *supra* note 139 (“Analysts say Washington is gambling on Syria being held responsible for Hariri’s murder, believing that indictments against senior Syrian officials will effectively cripple the Damascus regime.”)

¹⁴³ See Blanford, *supra* note 139.

¹⁴⁴ See Wierda, et al., *supra* note 134, at 1066-67, quoting Hezbollah spokesman Mohammad Hussein Fadlallah as asking: “How can this tribunal achieve legal results and establish judicial rights when it is rejected by a large segment of the Lebanese population and by Syria? How can its resolutions be implemented without creating tension?”

¹⁴⁵ See Khairallah, *supra* note 2, at 7-9.

¹⁴⁶ See Wierda, et al., at 1072-73.

¹⁴⁷ *Id.* at 1067-68.

Lebanon-Israel war claimed 40 civilians in Israel and more than 1000 in Lebanon, resulted in massive displacement, and caused rampant destruction of civilian sites on both sides.¹⁴⁹ Although both these wars consisted of egregious violations of the Geneva Conventions, some potentially qualifying as war crimes or genocide, the Lebanese are painfully aware that no U.N. action has ever been taken to bring these crimes to justice.¹⁵⁰ Nor can it be said that the decision to prosecute Hariri's killers reflected a sudden will on the part of the international community to "expand jurisdiction of the international criminal justice system, thus establishing a precedent for similar situations."¹⁵¹ Pakistani appeals to establish an international tribunal or even a commission to investigate the assassination of former Pakistani Prime Minister Benazir Bhutto went absolutely unheeded.¹⁵² Against this background, the selection of one man's death as the impetus for international concern seems hollow and overtly political.

Which is not to suggest that the chances of reaching the Lebanese are hopeless. Indeed, the U.N. has already taken steps to ameliorate the perceptions of impartiality, starting with the replacement of Mehlis with Brammertz as Commissioner of the UNIIIC, which, because of Brammertz's reliance on forensic evidence rather than witness statements, went some way in depoliticizing the investigation.¹⁵³ The Lebanese have also seemed to embrace Daniel Bellemare, who replaced Brammertz in January 2008 and is now acting as the Chief Prosecutor for the Tribunal.¹⁵⁴ Bellemare took great steps in endowing a sense of impartiality to the Tribunal when, on April 29, 2009, he

¹⁴⁸ *Id.* at 1072; Hassan Krayem, *The Lebanese Civil War and the Taif Agreement*, AMERICAN UNIVERSITY OF BEIRUT, available at <http://ddc.aub.edu.lb/projects/pspa/conflict-resolution.html>.

¹⁴⁹ De Goeuffre, *supra* note 61.

¹⁵⁰ *Id.*

¹⁵¹ See Khairallah, at 594.

¹⁵² *Id.*

¹⁵³ See Wierda, et al., at 1075-76.

¹⁵⁴ See Hammer, *supra* note 30, at 3.

recommended that the four pro-Syrian Lebanese generals be released for lack of evidence.¹⁵⁵ The decision set off fireworks and celebration throughout the pro-Syrian parts of Lebanon; while the pro-Hariri camp acknowledged the soundness of the decision.¹⁵⁶ Analysts believe the decision, by relying on evidence as its basis, preserved the Tribunal's credibility.¹⁵⁷

III. CONCLUSION

Like all courts of international jurisdiction before it, the STL is faced with a number of hurdles that threaten its ability to adjudicate fairly and impartially, as well as to appear to have done so. The U.N.'s long and questionable involvement in the investigation of Hariri's death deepened divisions in Lebanese society rather than alleviated them. Security Council politics, prevalent since the onset of the investigation, have rendered the Statute of the STL unique and potentially problematic, requiring at the least some intensive vigilance on the part of Tribunal officials to ensure that justice is done. Politicization remains the primary concern for many of the Tribunal's biggest Lebanese skeptics.¹⁵⁸ Yet recent steps by the Tribunal's Chief Prosecutor to preserve an aura of independence and impartiality have gone a long way towards beginning to restore a sense of trust in the Tribunal.¹⁵⁹ That the Tribunal will be the first of its kind to apply domestic law and to try the crime of terrorism could result in precedent that will guide the international community for years to come.¹⁶⁰ Moreover, if the Tribunal can maintain an

¹⁵⁵ See *Lebanon Tribunal Orders Release of Generals*, REUTERS, Apr. 29, 2009.

¹⁵⁶ *Id.*, quoting Saad Hariri as saying, "I ... don't feel one iota of disappointment or fear over the fate of the international tribunal. What has happened is a clear declaration that the international tribunal has started work and it will reveal the truth."

¹⁵⁷ See Alistair Lyon, *Analysis: Lebanon Tribunal Fuels Doubt by Freeing Generals*, REUTERS, May 1, 2009, quoting Mareike Wierda.

¹⁵⁸ See Wierda, at 1075-6.

¹⁵⁹ See *Lebanon Tribunal Orders Release of Generals*, *supra* note 155.

¹⁶⁰ See Wierda, at 1076-78.

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approach rooted in evidence and committed to truth, it has the potential to provide the Lebanese with what has long eluded them: justice.