

# The Special Tribunal for Lebanon: A Court “Off the Shelf” for a Divided Country

**Jan Erik Wetzel\***

Visiting Fellow, City University of Hong Kong (academic year 2007/2008)

PhD candidate, University of Cologne, Germany

**Yvonne Mitri\*\***

Legal trainee (Rechtsreferendarin) District Court of Cologne, Germany

---

## Abstract

The Special Tribunal for Lebanon is the most recently established international criminal tribunal. Controversially created by the UN Security Council in 2007 amid rising political tensions in the country, it is designed to investigate a number of politically motivated killings, including the assassination of the former Lebanese Prime Minister Rafik Hariri in 2005. It shares many characteristics of other hybrid (or “internationalized”) criminal tribunals, especially the Special Court for Sierra Leone, which facilitated its speedy establishment. But it breaks new ground as an international effort to specifically end impunity for terrorist acts. This article argues that in many respects, the legal framework of the Special Tribunal distills the “best practices” of prior tribunals. At the same time, the debate over its creation and its chances to assist the peace process in Lebanon continues.

## Keywords

Assassination; crimes against humanity; international criminal courts and tribunals; internationalized criminal tribunals; International crimes; Lebanon; Terrorism; Threat to international peace and security

## I. Introduction

On 30 May 2007 the UN Security Council passed Resolution 1757 (2007), in which it decided, acting under Chapter VII of the UN Charter,

---

\*) An earlier version of this paper was presented by Jan Erik Wetzel at the First Postgraduate Conference on Criminal Justice and Human Rights, University of Cork, Ireland, 3 May 2007. For a more specialized discussion, see now also the symposium on the Special Tribunal for Lebanon, published in *Journal of International Criminal Justice* 5 (2007), pp. 1061–1174.

\*\*) The authors would like to thank Prof. Dr. Claus Kress and Dr. Noëlle Quénivet for their comments on earlier drafts of this paper. The usual caveat applies.

that a Special Tribunal for Lebanon (the Tribunal) would be established according to the terms of a draft agreement previously negotiated between the UN and the Government of Lebanon, unless the Lebanese Parliament ratified the agreement and therefore consented to the establishment of the Tribunal on its own account by 10 June 2007. The latter did not happen. In fulfilment of this “sunrise clause”, the Agreement between the United Nations and the Lebanese Republic as well as the Statute of the Special Tribunal for Lebanon (STL-Statute) therefore automatically entered into force on that date.<sup>1</sup> The process of the practical establishment of the Tribunal was already under way in late 2007. It will be exclusively tasked with prosecuting persons responsible for high-level terrorist attacks in Lebanon since the end of 2004. The main event to be prosecuted is the assassination of the former Lebanese Prime Minister Rafik Hariri<sup>2</sup> in early 2005, which is the reason why the Tribunal is also referred to as the “Hariri-Tribunal”. Other regional issues of potential relevance for international criminal law, such as e.g. the so-called “summer war” between Israel and the Hezbollah in Lebanon in August 2006, will not be subject to juridical scrutiny by the Tribunal. This armed conflict lasted over 30 days, cost the lives of approximately 1200 persons on the Lebanese and approximately 150 on the Israeli side and was only ended by Security Council Resolution 1701 (2007).<sup>3</sup>

## II. Background

On 14 February 2005 Rafik Hariri and 22 others were killed, approximately 220 injured, and the wider surrounding area severely damaged in a massive explosion in Beirut. Approximately 1,800 kilograms of TNT detonated inside a parked Mitsubishi van as his convoy passed. The assassination caused massive demonstrations in Lebanon and eventually led to the

<sup>1</sup> The Agreement and the Statute are annexed to SC Res. 1757 (2007) of 30 May 2007.

<sup>2</sup> Hariri had resigned as Prime Minister in October 2004.

<sup>3</sup> On this issue, see Ch. Tomuschat, “Der Sommerkrieg des Jahres 2006 im Nahen Osten – Eine Skizze”, *Die Friedenswarte* 81 (2006), pp. 179–190, and “Der Sommerkrieg des Jahres 2006 – Ein Schlusswort”, *Die Friedenswarte* 82 (2007), pp. 107–116; see also St. Kirchner, “Third Party Liability for Hezbollah Attacks Against Israel”, *German Law Journal* Vol. 7, No. 9 (2006), p. 777; T. Ruys, “Crossing the thin blue line: An inquiry into Israel’s recourse to self-defense against Hezbollah”, *Stanford Journal of International Law* 43 (2007), p. 265; J. G. Stewart, “The UN Commission of Inquiry on Lebanon: A Legal Appraisal”, *Journal of International Criminal Justice* 5 (2007), p. 1039.

withdrawal of Syrian forces from the country after nearly 30 years.<sup>4</sup> On the international level, a UN mission found that Lebanon's own inquiry had been flawed and that Syria had responsibility for risen tensions at the time. The UN Security Council quickly decided to establish an International Independent Investigative Committee (IIIC) to examine the exact circumstances of the bombing.<sup>5</sup> In October 2005 the Security Council determined that the terrorist bombing of Hariri constituted a threat to international peace and security and hence obliged all UN Member States, including Syria, under Chapter VII of the UN Charter to cooperate with the IIIC.<sup>6</sup> The commission is based in Lebanon and was first headed by the German Prosecutor Detlev Mehlis. Early allegations as to the responsibility for the attack involved, inter alia, Syrian and Lebanese security agencies and led to the arrest of four high-ranking members of the Lebanese military on 30 August 2005.<sup>7</sup> Syria strongly denied any involvement. In January 2006 Mehlis was succeeded by the Belgian Serge Brammertz, who until 2007 also was a Deputy Prosecutor at the International Criminal Court (ICC).<sup>8</sup> In subsequent reports of the IIIC Brammertz declared to have identified "a number of persons",<sup>9</sup> but declined to name specific suspects or witnesses for reasons of security and in order not to prejudge possible court proceedings in the future.<sup>10</sup> According to findings released so far it appears that the bombing itself was carried out by a young male

---

<sup>4</sup> These had been stationed in Lebanon since the civil war of 1975 to 1989. Israel had withdrawn its forces from Lebanon in May 2000.

<sup>5</sup> SC Res. 1595 (2005) of 7 April 2005. The mandate of the IIIC has been continuously extended since, most recently until June 2008 (SC Res. 1748 (2007) of 27 March 2007).

<sup>6</sup> SC Res. 1636 (2005) of 31 October 2005.

<sup>7</sup> See 1st Report of the IIIC of 20 October 2005, UN Doc. S/2005/662, esp. paras. 174–175.

<sup>8</sup> Brammertz resigned from the ICC on 14 June 2007; see ICC Newsletter No. 16 (June/July 2007), p. 2. However, he decided that he would not stay on as Commissioner of the IIIC beyond the year 2007. Therefore the Secretary-General informed the Security Council of his intent to appoint Mr. Daniel Bellemare, who until recently served as Deputy Attorney General of Canada and Special Adviser to the Deputy Minister of Justice; see Letter dated 12 November 2007 from the Secretary-General to the President of the Security Council, UN Doc. S/2007/669.

Upon proposal by the Secretary-General (see Letter dated 12 November 2007; UN Doc. S/2007/678) Brammertz was appointed as the new Prosecutor of the ICTY succeeding Carla Del Ponte after 1 January 2008 by the Security Council on 28 November 2007; see UN Doc. S/2007/683.

<sup>9</sup> See the 8th Report of the IIIC of 12 July 2007, UN Doc. S/2007/424, para. 55.

<sup>10</sup> See e.g. the 6th Report of the IIIC of 12 December 2006, UN Doc. S/2006/962, para. 10.

suicide-bomber of non-Lebanese origin,<sup>11</sup> who however had had considerable logistical and other support by a number of persons with a high degree of “security awareness” and “experience in handling explosives”; this bomb team had apparently prepared the attack over a longer period of time.<sup>12</sup>

In December 2005, in reaction to a request by the government of Lebanon, the Security Council decided to modify the mandate of the IIIC to include the investigation of other attacks of a similar nature since 1 October 2004; but more importantly, it also extended the assistance of the UN beyond the technical work of investigations and requested the UN Secretary-General to examine the creation of a “tribunal of an international character”.<sup>13</sup> Following a first report in March 2006,<sup>14</sup> the Security Council requested the Secretary-General to negotiate an agreement with the government of Lebanon aimed at the establishment of such a tribunal.<sup>15</sup> Several rounds of negotiations followed.<sup>16</sup> On 13 November 2006 the Lebanese cabinet agreed to the final draft. One week later the Lebanese cabinet minister Pierre Gemayel was shot on the street in Beirut. On the same day, just a few hours after the shooting, the Security Council approved the tribunal as proposed.<sup>17</sup> Hence, the legal framework of the Tribunal was finalized within less than two years after the underlying events had happened and within one year after the basic decision had been taken by the Security Council.

---

<sup>11</sup> However, the person claiming responsibility in a video, Ahmed Abu Adass, is seen as likely being neither the bomber nor the instigator of the attack; see 7th Report of the IIIC of 15 March 2007, UN Doc. S/2007/150, paras. 43–44.

<sup>12</sup> So far the IIIC has issued ten reports, the latest on 28 March 2008, UN Doc. S/2008/210. The Commission utilizes highly sophisticated technologies in its investigations, especially with regard to the analysis of DNA samples, communications traffic by mobile phones, and blast simulations. Its 2007 budget allowed for 188 international and 51 national staff; at the end of 2007, approximately 190 posts altogether had been filled.

<sup>13</sup> SC Res. 1644 (2005) of 15 December 2005; the resolution was passed under Chapter VII of the UN Charter.

<sup>14</sup> UN Doc. S/2006/176 of 21 March 2006.

<sup>15</sup> SC Res. 1664 (2006) of 29 March 2006, OP 1.

<sup>16</sup> Meetings between experts of the UN and the Government of Lebanon took place in May, June, and July 2006. In September 2006 Nicolas Michel, the Legal Counsel of the UN and Under-Secretary-General for Legal Affairs, presented a draft agreement to the Government of Lebanon.

<sup>17</sup> Letter to the Secretary-General of 21 November 2006, UN Doc. S/2006/911.

However, the draft agreement had at this point only been accepted by the Security Council and the Lebanese Cabinet; it was furthermore signed by the United Nations Legal Counsel Michel and a representative of the Lebanese Ministry of Justice in January and February 2007. The constitutionality of the respective acts of the Lebanese government, headed by Prime Minister Fouad Siniora, has been questioned, since the cabinet was partially depleted by resignations of six ministers, among these all Shi'ite ones; the President of Lebanon Emile Lahoud challenged the government's approval on the grounds that the cabinet had thus lost its "legitimacy",<sup>18</sup> and claimed that according to the Lebanese constitution all international agreements must also be reviewed by him.<sup>19</sup> In any event, these acts had not gone through the complete constitutional process.<sup>20</sup> Since the agreement would have functioned as an international treaty between the UN and Lebanon, it still needed the approval by that State's parliament in order to enter into force.

During the following months the Lebanese parliament was unable to do so. As part of the political crisis that ensued in Lebanon between the government and the Hezbollah-led opposition after November 2006, the Speaker of Parliament Nabih Berri did not convene a session, thereby in effect preventing the majority of government Members of Parliament to approve the agreement. These even called on the newly elected Secretary-General of the United Nations Ban Ki-moon to initiate the establishment of the Tribunal by a binding resolution under Chapter VII of the UN

---

<sup>18</sup> The main aspects of the division of power between the different confessions are laid down in the Taef (Saudi Arabia) Accord of 22 October 1989. According to this document, parliament is to be divided equally between Christians and Muslims (section II, B, 6). Concerning the decision-making on the STL-Agreement within the cabinet, the remaining 18 ministers out of a total of 24 still provided for the constitutional quorum of two thirds. The Taef Accord is silent on the question of the distribution of power among the different muslim factions. For an English translation of the full text see <http://www.monde-diplomatique.fr/cahier/proche-orient/region-liban-taef-en> (accessed on 21 November 2007).

<sup>19</sup> See Letter to the Security Council of 17 May 2007, UN Doc. S/2007/286. According to Art. 52 of the Lebanese Constitution, the President has to be involved in the negotiations of international treaties. For an English translation of the Lebanese Constitution, see G. H. Flanz (ed.), *Constitutions of the Countries of the World*, (Dobbs Ferry, NY, 1998); see also [http://www.servat.unibe.ch/law/icl/le00000\\_.html](http://www.servat.unibe.ch/law/icl/le00000_.html) (accessed on 21 November 2007).

<sup>20</sup> Comp. Art. 19(1) STL-Agreement. See also the statement by UN Legal Counsel Michel before the Security Council on 20 November 2006, UN Doc. S/2006/893/Add. 1.

Charter, although this would imply bypassing their own legislature.<sup>21</sup> The United States, France, and the United Kingdom had also underlined their willingness to use a Chapter VII resolution as a last resort, but Russia and other council members had expressed reservations. At first, Ban Ki-moon had preferred a consensual agreement;<sup>22</sup> but he soon changed his mind after subsequent attempts to break the stalemate had failed, including visits by himself to the region in April 2007. In addition, the Lebanese Prime Minister Siniora had called on the Security Council to take action.<sup>23</sup> All of this prompted the passing of UNSC Resolution 1757 in May 2007, when the United States held the Presidency of the Security Council.<sup>24</sup>

### III. Legal Character of the Special Tribunal

#### A. *Hybrid Tribunals in International Criminal Law*

The Special Tribunal for Lebanon belongs to the relatively recent category of hybrid international criminal tribunals.<sup>25</sup> As their most notable distinctive elements, these tribunals provide for mixtures of national and international staff, including the judges, as well as of the applicable law. They also differ from the “traditional” international criminal tribunals of modern times – namely the ICTY, the ICTR, and the ICC – in their mode of establishment, in the location of their seat and in the way in which they are financed. It is not easy to categorize hybrid tribunals due to their varying forms and degrees of mixture of these national and international elements. One possibility would be to distinguish between hybrid tribunals set up

<sup>21</sup> See “Ban Ki-moon receives Lebanese memo on planned tribunal for Hariri killing”, UN News Centre, 4 April 2007.

<sup>22</sup> See Interview with AP, International Herald Tribune, 26 April 2007.

<sup>23</sup> See Letter to the Security Council of 16 May 2007, UN Doc. S/2007/281.

<sup>24</sup> SC Res. 1757 (2007) was passed with a vote of 10 to 0, with China, Indonesia, Qatar, Russia, and South Africa abstaining. The resolution had been sponsored by Belgium, France, Italy, Slovakia, the United Kingdom, and the United States.

<sup>25</sup> See generally, K. Ambos / M. Othmann (eds.), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (Freiburg 2003); C. Romano / A. Nolkaemper / J. Kleffner (eds.), *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford 2004); T. Kuosmanen, *Bringing Justice Closer: Hybrid Courts in Post-Conflict Societies* (Helsinki 2007).

within or outside of a national legal framework.<sup>26</sup> An alternative approach would be to divide hybrid tribunals into three sub-categories according to their respective legal bases: first, tribunals within UN-administrations, such as the internationalized panels in Kosovo and Timor-Leste, whose authority ultimately stems from the Security Council resolutions establishing the peacekeeping operations; second, tribunals set up on the bases of bilateral agreements, such as the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and possibly a future Special Chamber for Burundi;<sup>27</sup> and third, tribunals set up essentially as domestic courts by national law, which however contain a considerable degree of international impetus, such as the War Crimes Chambers in Bosnia and Herzegovina and Serbia, respectively, as well as the Iraqi Special Tribunal.<sup>28</sup>

The Secretary-General has characterized the Tribunal, which was originally planned to be treaty-based, as an international one, since the elements in this regard outweighed the national ones.<sup>29</sup> For example, it deviates from most of the other hybrid tribunals in that it operates outside of the national system of justice, matched only by the SCSL. The government of Lebanon will have the duty to cooperate with the Tribunal, which will have primacy over domestic court proceedings concerning crimes within its jurisdiction.<sup>30</sup> Now that it was directly created by the Security Council, no doubt remains as to its international character. But it was not supposed to be a UN-tribunal either. While being set up with the support of the United Nations and for a specific situation of the past, making it another ad hoc-tribunal, it was designed to be independent from that institution. Only the Registrar of the Tribunal will be a UN staff member, as it

---

<sup>26</sup> Comp. S. Meisenberg, Book Review, *Journal of International Law of Peace and Armed Conflict* 19 (2006), p. 253, at p. 256.

<sup>27</sup> Comp. SC Res. 1606 (2005) of 20 June 2005.

<sup>28</sup> For a similar approach, see R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge 2007), pp. 149–162. The inclusion of the Iraqi Special Tribunal in this list is controversial; however, its institutional set-up has enough similarities to the other examples to do so. See also D. Scheffer, “Blueprint for Legal Reforms at the United Nations and the International Criminal Court”, *Georgetown Journal of International Law* 36 (2005), p. 683, at p. 693.

<sup>29</sup> Report of the Secretary-General on the establishment of a special tribunal for Lebanon to the Security Council of 15 November 2006 (UN Doc. S/2006/893), paras. 6, 7.

<sup>30</sup> Art. 4(1) STL-Statute.

is also the case in Sierra Leone.<sup>31</sup> No funding will be granted from the regular UN budget. As a further important element, the Tribunal shall especially be independent from the Security Council. For example, during the negotiations Russia had proposed to let the judges be appointed by the Security Council which however would have given a veto-power – and hence considerable influence – to its five permanent Members. This proposal was eventually rejected.<sup>32</sup>

*B. The Competence of the Security Council to Establish the Tribunal as a Measure to Restore International Peace and Security*

As mentioned before, at the outset the Tribunal had been planned to be a treaty-based tribunal. At present, this seems to be the preferred method of setting up new international criminal tribunals, since, among other reasons, hybrid tribunals are hoped to lead to an increase in support for juridical prosecutions within the affected population, while decreasing the financial burden on the United Nations.<sup>33</sup> But in the end the base of the Tribunal's creation is a resolution of the UN Security Council. The decision to pass a Chapter VII resolution on the subject was controversial and largely centred on the classification of the attacks on Rafik Hariri and the other victims as terrorist activities of international concern. It would be beyond the scope of this paper to re-examine the present discussion on terrorism in international law in its full complexity; in contrast, the following observations will address only two issues relevant in this regard, namely terrorism as a threat to international peace and security under Article 39 of the UN Charter, and terrorism as an international crime,<sup>34</sup> without attempting to resolve these questions completely.

Politically, the supporters of the approach to create the Tribunal by a Security Council resolution stressed the fact that all options for a consen-

---

<sup>31</sup> Comp. Art. 12(3) STL-Statute and Art. 4(2) of the Statute of the SCSL (all documents related to the SCSL can be accessed at: <http://www.sc-sl.org> (accessed on 21 November 2007)).

<sup>32</sup> Another Russian suggestion was that convicted persons should be allowed to serve their sentences in their respective home states. The latter would have led to substantial insecurity over whether convicted persons from e.g. Syria would indeed have to serve their full sentence or would be released early by the local authorities.

<sup>33</sup> Comp. A. McDonald, "Sierra Leone's Shoestring Court", *International Review of the Red Cross* 84 (2002), p. 121.

<sup>34</sup> See *infra*, section V. B.

sual agreement had been tried unsuccessfully and that therefore the Security Council had had to act in order to show its determination in fighting impunity for political assassinations and to deter such acts in the future. Qatar's representative criticised the grace period of ten days for parliamentary ratification as too short and warned that the stability in the country could further deteriorate; but the ambassador of France insisted on a speedy beginning to react firmly to violent developments on the ground in Lebanon.<sup>35</sup> With regard to legal arguments, the opponents of the chosen way of establishment by a Chapter VII resolution were of the opinion that a resolution of this kind was either unnecessary, because all Security Council resolutions were binding under Article 25 of the UN Charter, or illegal, because the constitutional requirements for ratification were in essence a domestic affair and no international crime was in question.<sup>36</sup> During the negotiations it was decided to pass only the most important parts of the resolution under Chapter VII of the UN Charter,<sup>37</sup> but this did not satisfy the critics.

The argument that a Chapter VII resolution would not have been necessary, since all Security Council resolutions were binding under Article 25 of the UN Charter, cannot convince. First, it remains doubtful what practical difference the supporters of this approach envisaged. Second, although it is true that the Security Council can make binding decisions outside of Chapter VII,<sup>38</sup> these can, according to the prevailing interpretation of Article 25 of the UN Charter, nevertheless only have a binding effect if they are made in accordance with the Charter.<sup>39</sup> This interpretation is based on the

---

<sup>35</sup> See "Revised U.N. Resolution to establish tribunal in Hariri assassination would give Lebanese until June 10", *International Herald Tribune*, 25 May 2007.

<sup>36</sup> See "Security Council authorizes establishment of Special Tribunal to try suspects in assassination of Rafiq Hariri", SC/9029, 30 May 2007.

<sup>37</sup> See Res. 1757 (2007), OP 1; this paragraph concerns the entry into force of the agreement, the location of the Tribunal, and the mode of financing. The start of practical operations (OP 2 and 3) were left outside of Chapter VII.

<sup>38</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), ICJ Reports 1971, p. 16, para. 113. Here the ICJ held that a confinement of binding decisions to measures under Chapter VII would make Art. 25 superfluous in the light of Arts. 48 and 49 UN Charter.

<sup>39</sup> J. Delbrück, Art. 25 MN 18 in: B. Simma (ed.), *The Charter of the United Nations*, 2nd ed. (Oxford 2002); R. Lagoni, *Resolution, Declaration, Decision*, in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. 2 (Dordrecht and Munich 1995), p. 1081, at p. 1085 et seq.

drafting history of Article 25 as well as on a systematic approach. This approach takes into account that with a view to Article 2(5) of the UN Charter, which can be read as allowing States not to assist the United Nations in actions not in accordance with the Charter, a second statement in Article 25, which would merely be aimed towards an obligation of the Member States to carry out decisions of the Security Council in accordance with the Charter would be superfluous.<sup>40</sup> Hence, Article 25 of the UN Charter does not serve as a general norm of authorisation, but clarifies that also the Security Council must observe the general principle as laid down in Article 2(5) and hence that its resolutions are only binding if they are achieved according to the procedure provided for in the Charter. In the present case the applicable procedure is actually the one provided for in Chapter VII of the UN Charter.

It is generally accepted by now that the creation of international criminal tribunals falls within the Security Council's mandate of securing international peace and security.<sup>41</sup> It is true that the ICTY and ICTR were created under different circumstances, namely with regard to serious violations of international humanitarian law, involving hundreds of thousands of victims killed. Still, the creation of this Special Tribunal also falls within the Council's mandate. First, the concept of a threat to the peace in the sense of Article 39 of the UN Charter was deliberately phrased in an indeterminate, broad way which is open to interpretation, in order to give leeway to the Security Council.<sup>42</sup> The Security Council itself had declared Hariri's assassination to be a terrorist act and a threat to international peace and security.<sup>43</sup> Hereby, it reiterated its former declarations that terrorism

<sup>40</sup> J. Delbrück (supra n. 39).

<sup>41</sup> Early doubts have largely been put to rest after the Tadic-Decision of the Appeals Chamber of the ICTY; see *The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, Decision of 2 October 1995, ILM 35 (1996), 32. Comp. also e.g. Ch. Tomuschat, *Human Rights* (Oxford 2003), p. 286; P. Arnold, *Der UNO-Sicherheitsrat und die strafrechtliche Verfolgung von Individuen* (Geneva et al. 1999), at p. 68 et seq.

<sup>42</sup> R. Heinsch, *Die Weiterentwicklung des humanitären Völkerrechts durch die Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda* (Berlin 2007), p. 60 et seq., at p. 63; J. A. Frowein, Art. 39 MN 4 et seq. in: B. Simma (supra n. 39); W. Heintschel von Heinegg, *Die Errichtung des Jugoslawien-Strafgerichtshofes durch Resolution 827 (1993)*, in: H. Fischer, S. R. Lüder (eds.), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof: Beiträge zur Entwicklung einer effektiven internationalen Strafgerichtsbarkeit* (Berlin 1999), p. 63, at p. 69.

<sup>43</sup> SC Res. 1636 (2005) of 31 October 2005.

constitutes a threat to peace and security in the sense of Article 39 of the UN Charter.<sup>44</sup> Extra-judicial assassinations of political opponents, at least if State officials are involved, as well as suicide-bombings by non-State actors in peacetime, have been accepted as terrorist acts.<sup>45</sup> The killings of Hariri and the other victims also qualify as terrorist acts as they differ from simple criminal offences, since the death of the victims was not the decisive aim. Instead, there had been other targets and motives behind those acts, presumably the destabilization of the whole region.<sup>46</sup>

Second, to make the number of casualties the decisive factor would lead to the arbitrary question where exactly to draw the line between national and international prosecutions. The attacks of 11 September 2001, although “only” leading to the – in comparison with the situation in Rwanda or the Former Yugoslavia relatively – small number of approximately 3,000 deaths, were qualified as a threat to the peace, albeit the existence of the United States itself had never been in danger.<sup>47</sup> Furthermore, in most cases of terrorism the immediate harm of the attacks is disproportionate to the larger consequences for the concerned State.<sup>48</sup> Hence, a series of attacks, albeit of a smaller scale, especially if it can be attributed to the involvement of a third state and is aimed at the destabilisation of a State as a whole, can also qualify in this regard. It follows that, since a situation in the sense of

---

<sup>44</sup> See already Res. 731 (1992) of 21 January 1992, in which the destruction of Pan Am flight 103 and Union de transports aériens flight 772 were seen as “acts of international terrorism that constitute threats to international peace and security” (Preamble, para. 2); for more recent examples see SC Res. 1566 (2004) of 8 October 2004, and especially SC Res. 1368 (2001) of 12 September 2001, 1373 (2001) of 28 September 2001, and 1377 (2001) of 12 December 2001. In its resolutions, the Security Council has repeatedly affirmed “the imperative to combat terrorism in all its forms and manifestations by all means”. See also the 2005 World Summit Outcome, UNGA Res. 60/1 of 24 October 2005.

<sup>45</sup> B. Saul, *Defining Terrorism in International Law* (Oxford 2006), p. 318.

<sup>46</sup> Comp. T. Stein, *International Measures Against Terrorism and Sanctions By and Against Third States*, *Archiv des Völkerrechts* 30 (1992), p. 38, at p. 40, who argues that “what makes an offence a terrorist act is the fact that there is something behind the obvious offence, another target and another motive, object or purpose”, and similar A. Cassese, “The Multifaceted Criminal Notion of Terrorism in International Law”, *Journal of International Criminal Justice* 4 (2006), p. 933, at p. 941.

<sup>47</sup> See St. Marks, “Branding the ‘War on Terrorism’: Is there a ‘New Paradigm’ of International Law?”, *Michigan State Journal of International Law* 14 (2006), p. 71, at p. 73f et seq.

<sup>48</sup> For a description of the several behaviour patterns of terrorists, see Y. Dinstein, “Terrorism as an International Crime”, *Israel Yearbook on Human Rights* 19 (1989), p. 55, at p. 57 et seq.

Article 39 of the UN Charter existed, the measures of Chapter VII were open to the Security Council, including Article 41 of the UN Charter and therewith the creation of an international tribunal. One major line of argument concerning the authority of the Security Council to create ad hoc tribunals is the attempt to break the circle of violence within long-lasting conflicts and thereby to forgo the resumption of hostilities in the future. This rationale also seems to be applicable to the conflict in Lebanon.

Third, a Chapter VII resolution is generally warranted in cases of international criminal prosecutions, where the assistance of third states is necessary, e.g. with regard to the handing over of suspects or evidence.<sup>49</sup> In the present case, Res. 1757 (2007) failed to explicitly establish any obligation for third states, especially for Syria, despite the proposal of the Secretary-General.<sup>50</sup> However, only a resolution under Chapter VII, which is capable of justifying an intervention in the domestic affairs of a Member State, otherwise prohibited by Article 2(7) of the UN Charter, could also bind Lebanon directly. Res. 1757 (2007) thereby effectively put an end to the Lebanese debate over the constitutionality of the Tribunal.<sup>51</sup> Hence, the prohibition of interference in domestic affairs by the UN, as laid down in Article 2(7) of its Charter, was not a bar, but a reason for the passing of Res. 1757 (2007).

Fourth, while the process of parliamentary approval of an international treaty can be seen as such a matter that is essentially within the domestic jurisdiction of a State, the precedents concerning international prosecutions of crimes of interest to the wider State community also point towards a resolution under Chapter VII. Not only were the ICTY and the ICTR established in such a manner;<sup>52</sup> also the so-called “Lockerbie-Trials” concerning the bombing of Pan Am Flight 103 over Scotland in 1988, which were conducted by Scottish judges on Dutch territory between 1999 and 2001, were authorized by a resolution under Chapter VII.<sup>53</sup> Another inci-

<sup>49</sup> Comp. A. McDonald (supra n. 33), at p. 126.

<sup>50</sup> See Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon of 15 November 2006, UN Doc.S/2006/893, at para. 53.

<sup>51</sup> Ch. Sader, “A Lebanese Perspective on the Special Tribunal for Lebanon: Hopes and Disillusions”, *Journal of International Criminal Justice* 5 (2007), p. 1083, at p. 1084.

<sup>52</sup> See Res. 827 (1993) of 25 May 1993, and Res. 955 (1994) of 8 November 1994, respectively.

<sup>53</sup> Res. 1192 (1998) of 27 August 1998. See generally A. Aust, “Lockerbie: ‘The other case’”, *International and Comparative Law Quarterly* 49 (2000), pp. 278–296. This trial needs to be

dent which can be seen to be comparable to the present case is the assassination attempt on the Egyptian President Mubarak in Ethiopia in 1996, which the Security Council qualified as an attempt to disturb the peace and security of the region; subsequently, it ordered Sudan to cooperate by extraditing three alleged offenders, acting under Chapter VII.<sup>54</sup>

Lastly, taking the rule on complementarity of Article 17 of the Rome Statute of the ICC to reflect a general principle of the subsidiarity of criminal proceedings by other bodies than those of the home States of the victims or the perpetrators,<sup>55</sup> the prolonged inability of the Lebanese parliament could be seen as a situation in which a State is “unwilling or unable” to fulfil the task of prosecution of a crime itself. This would then trigger a collective response, in this case by the UN Security Council.

These considerations lead to the overall conclusion that the UN Security Council acted lawfully when it passed Res. 1757 (2007). This is also evidenced by the fact that despite alleged legal reservations, no Member State of the Security Council voted against it. Since it is primarily the responsibility of the Security Council to determine the legality of its acts itself,<sup>56</sup> especially the “Permanent-5” are expected to apply their vetoes to situations of alleged illegality.<sup>57</sup> Whether it was politically expedient to do so is another question.

---

distinguished from the parallel proceedings at the ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom and United States of America)*, Preliminary Objections, 27 February 1998, ICJ Reports 1998, 9; see also supra n. 44.

<sup>54</sup> Res. 1044 (1996) of 31 January 1996; Res. 1054 (1996) of 26 April 1996; and Res. 1070 (1996) of 16 August 1996.

<sup>55</sup> On this generalization of the principle of complementarity, see the decision of the German Prosecutor General not to indict Donald Rumsfeld, *Juristen Zeitung* 2005, pp. 311, 312; critically on this point A. Fischer-Lescano, “Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law”, *German Law Journal* Vol. 6 No. 3 (2005), p. 689, at pp. 712–715.

<sup>56</sup> Comp. M. N. Shaw, *International Law*, 5th ed. (Cambridge 2003), p. 1151; see also the limited judicial oversight exercised by the International Court of Justice in: *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom and United States of America)*, Preliminary Measures, Decision of 14.04.1992, ICJ Reports 1992, p. 144 et seq.

<sup>57</sup> Art. 24(2) UN Charter states that the Council must act within the purposes and principles of the United Nations, and among these observe the requirement to act in conformity with principles of justice and international law, Art. 1(1) UN Charter.

### C. *The Special Tribunal as a Resolution-Based Tribunal*

Since the Security Council created the Tribunal directly, for the first time since the establishment of the ICTY and the ICTR, it is closer to the group of resolution-based tribunals. Thus, the Tribunal is more than just another “UN-backed” tribunal.<sup>58</sup> First, the Tribunal can now only be terminated by the Security Council. Second, a tribunal created under Chapter VII generally has greater authority to request international cooperation from third States. A bilateral agreement cannot create binding obligations for third States,<sup>59</sup> unless the Security Council adopts a supporting resolution under Chapter VII.<sup>60</sup> However, in practise Chapter VII powers alone do not always ensure cooperation either, as this depends more on the political will of the respective state and the possibilities of enforcement on the part of the institution.<sup>61</sup> As already indicated, the STL-Statute does not explicitly provide for obligations of third States to cooperate with it.<sup>62</sup> This is due to the original approach to establish the Tribunal by a bilateral treaty. When the Tribunal was eventually established by Res. 1757 (2007) instead, only the provisions of that draft agreement were put into force, without additional language requesting outside cooperation besides provision of a seat and contributions to the budget. This may be seen as a major shortcoming of the Tribunal.<sup>63</sup> However, as the example of the SCSL shows, this

<sup>58</sup> The Secretary-General seems to prefer the term “UN-assisted tribunal” in his report; however, “UN-based” is also used (*supra* n. 29, para. 17).

<sup>59</sup> Comp. Art. 34 and 35 of the Vienna Convention on the Law of Treaties of 22 May 1969, 1155 UNTS 331.

<sup>60</sup> Comp. SG-Report (*supra* n. 29), para. 53. See C. Denis, “Le tribunal spécial pour la Sierra Leone”, *Revue Belge de Droit International* 34 (2001), p. 236, at p. 241; in the case of the SCSL, the Security Council has passed a number of specific resolutions in order to enable that court to try former Liberian President Charles Taylor, such as SC Res. 1638 (2005) of 11 November 2005, which mandated the UN mission in Liberia to apprehend Taylor, and SC Res. 1688 (2006) of 16 June 2006 for his transfer to The Hague. See G. Bigi, “The Decision of The Special Court for Sierra Leone to Conduct the Charles Taylor Trial in The Hague”, *Law and Practice of International Courts and Tribunals* 6 (2007), p. 303.

<sup>61</sup> Comp. Y. Beigbeder, *International justice against Impunity* (Leiden 2005), p. 127.

<sup>62</sup> Art. 15 of the STL-Agreement only refers to cooperation by the Government of Lebanon.

<sup>63</sup> Comp. J. Cockayne, “The Special Tribunal for Lebanon – A Cripple from Birth?”: Foreword, *Journal of International Criminal Justice* 5 (2007), p. 1061, at p. 1063 et seq., who also points to potential shortcomings with regard to the immunity of government officials and the doctrine of superior responsibility.

may not be decisive.<sup>64</sup> Furthermore, it is arguable that these obligations to cooperate are now implied in the Statute, as they may be needed for the Tribunal to function effectively, and all Member States are under the obligation to assist and to carry out the measures decided by the Security Council under Chapter VII (Article 48, 49 UN Charter).<sup>65</sup> In fact, a treaty-based Tribunal would have had less legal leverage to demand international cooperation than the resolution-based IIIC. While Syria has recently cooperated with the IIIC to the general satisfaction of its Commissioner,<sup>66</sup> it has stated it would not cooperate with the Tribunal. It remains to be seen whether Syria will cling to this attitude.

The greatest disadvantage of the present approach is that the Tribunal can now be seen – and exploited – as being imposed on Lebanon. A consensual approach, despite its legal shortcomings, would have been preferable, since the long-term acceptance by the affected society is of paramount importance in the field of post-conflict justice. Ratification by the elected Lebanese legislators would have gone a long way toward increasing its perceived legitimacy. If Lebanon had voluntarily subscribed to the Tribunal, no intrusion into national sovereignty could have been claimed. Now obstacles with regard to domestic law were circumvented,<sup>67</sup> but it remains to be seen whether this is an advantage or a disadvantage, and especially whether the Lebanese population in its majority is still willing to accept the Tribunal.

#### **IV. Institutional Characteristics**

Initially, according to Article 7(a) STL-Statute, three chambers will be created.<sup>68</sup> The trial chamber will consist of two international judges and one

---

<sup>64</sup> Compare the Decision on Immunity from Jurisdiction of the Appeals Chamber of the SCSL of 31 May 2004 in the case of Charles Taylor, SCSL-2003-01-I, esp. para. 38.

<sup>65</sup> See generally on this issue, B. Swart, “Cooperation Challenges for the Special Tribunal for Lebanon”, *Journal of International Criminal Justice* 5 (2007), p. 1153.

<sup>66</sup> See e.g. the 8th report of the IIIC (supra n. 9), para. 5. Contrary to earlier practise, by now also most other states have complied with the request of the IIIC; see 7th Report of the IIIC (supra n. 11), para. 102.

<sup>67</sup> See supra n. 20 and accompanying text.

<sup>68</sup> The creation of a possible second trial chamber is possible pursuant to Art. 2(2) STL-Agreement if one of several bodies so requests.

national judge; the Appeals Chamber will include three international and two national ones. Hence, the international judges would form the majority needed for a judgment. This is generally thought to ensure greater neutrality of a tribunal. The so-called “super-majority” of the ECCC, where the Cambodian national judges form the majority in a chamber but need the support of at least one international judge,<sup>69</sup> therefore continues to constitute the exception. The presiding judge of the Appeals Chamber is also going to be the President of the Tribunal as a whole. In addition, two alternate judges, one of them Lebanese, and as a third “chamber” a single international pre-trial judge will be designated from the beginning.<sup>70</sup> Hence any pre-trial issues, including the confirmation of indictments,<sup>71</sup> could be addressed quickly; by the same token, should any of the sitting judges be unable to continue his or her duties, a replacement would be available immediately. All of this is designed to avoid unnecessary delays in the proceedings.

All of the judges, as well as the Prosecutor and the Registrar, will be appointed by the Secretary-General of the UN.<sup>72</sup> With the exception of the Lebanese Deputy Prosecutor,<sup>73</sup> the government of Lebanon therefore only has the right to propose candidates. In comparison, at the SCSL the government appoints the national judges; at the ECCC all judges are appointed by a Cambodian council, albeit in the case of international personnel only upon nomination by the Secretary-General.<sup>74</sup> Second, at the Tribunal all judges and the Prosecutor are screened by a selection panel of two sitting or former international judges and a representative of the Secretary-General before appointment.<sup>75</sup> This is a new method of ensuring a high

---

<sup>69</sup> Com. Art. 9 and Art. 14 of the Statute of the ECCC (all documents related to the ECCC can be accessed at: <http://www.eccc.gov.kh>; accessed on 21 November 2007); on this issue see also D. Cohen, “‘Hybrid’ Justice in East Timor, Sierra Leone, and Cambodia: ‘Lessons Learned’ and Prospects for the Future”, *Stanford Journal of International Law* 43 (2007), p. 1, at p. 29, who holds the view that the super-majority will be one of the most significant and difficult challenges for the ECCC.

<sup>70</sup> Art. 8 STL-Statute.

<sup>71</sup> Art. 18 STL-Statute.

<sup>72</sup> Comp. Arts. 2 and 3 STL-Agreement.

<sup>73</sup> Art. 3(3) STL-Agreement.

<sup>74</sup> Comp. Art. 2(2a) of the Statute of the SCSL and Art. 11 of the Statute of the ECCC.

<sup>75</sup> Arts. 2(5) lit. d and 3(2) STL-Agreement. In October 2007, Secretary-General Ban Ki-moon informed the Security Council of his intention to appoint Judge Mohamed Amin El Mahdi (Egypt, formerly with the ICTY) and Judge Erik Mose (Norway, formerly with the ICTR) as

degree of judicial expertise. Third, the national candidates need to be Lebanese; at the SCSL, the national judges only need to be appointed by the government,<sup>76</sup> and in fact only two of the present four “national” judges are of Sierra Leonean nationality.

Another innovation is that the Office of the Prosecutor (OTP) of the Tribunal will take over from the IIIC.<sup>77</sup> Therefore much investigative work will already be conducted before the Tribunal itself comes into existence. In effect, the IIIC serves as somewhat of a “preliminary OTP”. It has been suggested that the IIIC, as a creation of the Security Council, does not provide for sufficient legal safeguards, especially with regard to the rights of persons detained since August 2005, and that the take-over of its results by the planned Tribunal would only perpetuate this “denial of national and international justice”, leading to a “state of permanent lawlessness”.<sup>78</sup> While it is true that human rights safeguards against Security Council actions are limited,<sup>79</sup> the IIIC has continuously stressed its adherence to the highest legal standards available in order to ensure the admissibility of the evidence found before a future tribunal.<sup>80</sup> In addition, the eventual creation of the Tribunal could instead serve to remedy any possible violations of e.g. any defendant’s right to a fair trial within a reasonable time, since then judges would be able to look into all matters, including any alleged unlawful or unnecessarily prolonged detentions.<sup>81</sup>

Besides the Chambers, the Prosecutor, and the Registry, the Tribunal will also have a Defence Office. This additional branch is designed to ensure the equality of arms and to support the proceedings where the accused has not chosen legal counsel. It is the first time that the Defence

---

members of the selection panel; see Letter to the Security Council of 10 October 2007, UN Doc. S/2007/609 of 16 October 2007.

<sup>76</sup> Comp. Art. 12(1) of the Statute of the SCSL.

<sup>77</sup> Art. 19 STL-Statute.

<sup>78</sup> See G. de Geouffre de La Pradelle / A. Korkmaz / R. Maison, “Douteuse instrumentalisation de la justice internationale au Liban”, *Le Monde diplomatique*, April 2007, p. 18.

<sup>79</sup> See e.g. on the issue of the “black-listing” of alleged supporters of international terrorism the case-note of Ch. Tomuschat, Court of Justice Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*; Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, *Common Market Law Review* 43 (2006), p. 537.

<sup>80</sup> See e.g. the 6th report of the IIIC (supra n. 10), para. 114.

<sup>81</sup> The rights of suspects during investigations and accused during trial are spelled out in Arts. 15 and 16 STL-Statute, respectively.

Office is explicitly institutionalized in the statute of an international tribunal. This gives it a higher formal status than at other tribunals; for example, at the SCSL, where such an office was first established, this was done only by the court's rules of procedure.<sup>82</sup> Furthermore, the role of victims is strengthened. Like in other tribunals, the Registry will have a special victims and witnesses unit. But in addition, victims will have the right to present their views in proceedings and the right to bring a claim for compensation before competent national bodies based on a decision of the Tribunal.<sup>83</sup>

## V. Jurisdiction and Applicable Law

### A. *The Situations to be Prosecuted*

The personal jurisdiction of the Tribunal covers “persons” in general; no qualification concerning the degree of responsibility<sup>84</sup> or nationality is added. Hence, the international Prosecutor enjoys wide discretionary powers for his or her strategy.<sup>85</sup> The Tribunal will have subject-matter jurisdiction over the assassination of Rafik Hariri as well as other acts between 1 October 2004 and 12 December 2005, if it finds them to be similar in gravity and nature and to be connected to that incident; later incidents may also be investigated, if the parties and the Security Council consent.<sup>86</sup> But the decision actually to prosecute any cases apart from Hariri's death will be up to the Tribunal. Ultimately, the Tribunal itself will define its mandate under a potentially open-ended temporal jurisdiction.

It has been suggested that the Tribunal would be the first international tribunal to tackle a political crime against a single person.<sup>87</sup> While the IIC

<sup>82</sup> Rule 45 of the Rules of Procedure and Evidence of the SCSL.

<sup>83</sup> Art. 17 and 25 STL-Statute.

<sup>84</sup> Comp. Art. 1(1) of the Statute of the SCSL: “persons who bear the greatest responsibility”.

<sup>85</sup> Comp. SG-Report (supra n. 29), para. 20.

<sup>86</sup> Art. 1 STL-Statute.

<sup>87</sup> This allegation was made by M. Milanovic, “The Oddity that is the Hariri Tribunal”, Social Science Research Network Paper (5 September 2007), available at SSRN: <http://ssrn.com/abstract=1014906> (downloaded on 28 October 2007); however it was not repeated in a latter version of the paper; see “An Odd Couple – Domestic crimes and International Responsibility in the Special Tribunal for Lebanon”, *Journal of International Criminal Justice* 5 (2007), p. 1139.

has indeed devoted most of its resources to the Hariri investigation, the possibility of the inclusion of other related instances makes it obvious that the Tribunal is not tasked with “revenge” the death of one politician with good relations to Western states. The Security Council already added the shooting of Pierre Gemayel to the list of 14 possibly related incidents.<sup>88</sup> It furthermore included a double bus bombing in Ain Alaq near the town of Bikfaya in February 2007 into the mandate of the IIIC.<sup>89</sup> In June 2007, the Member of Parliament Walid Eido and seven others were killed by a car bomb, further diminishing the slight majority of the government coalition. On 19 September 2007, another member of the majority in the Lebanese Parliament, Antoine Ghanem, was killed by an apparent car bomb attack in Beirut, together with at least eight others.<sup>90</sup> He was the tenth anti-Syria figure targeted since Hariri’s assassination. A further attack took place on 12 December 2007 when the Lebanese General Francois al-Hajj was killed by yet another car bomb.<sup>91</sup> At the end of 2007, the IIIC was investigating nine non-targeted bombings against the general public and ten targeted attacks against individuals in addition to the Hariri-assassination. In January 2008 the Security Council added the recent murder of the Lebanese investigator Major Wissam Eid and five others to that list. Hence, the Tribunal could examine a total of 21 cases with approximately 60 victims killed and approximately 500 wounded. This number could even grow if further bombings aimed “only” at civilians were added, which have taken place especially in the first half of 2007. The victims of all of these attacks encompass, inter alia, a former prime minister, a sitting cabinet minister, other high profile politicians, including Members of Parliament,

---

<sup>88</sup>) Letter to the Secretary-General of 22 November 2006, UN Doc. S/2006/915. The other 14 incidents involve 6 attacks on specifically targeted persons and 8 against the general public; they are listed in Annex II to the SG-Report (*supra* n. 29), UN Doc. S/2006/893.

<sup>89</sup>) UN Doc. S/2007/91 of 15 February 2007.

<sup>90</sup>) See “Ban Ki-moon condemns latest murder of Lebanese Lawmaker”, UN News Centre, 19 September 2007. More than 70 people were wounded in the attack. The assassination took place on the same day that the Security Council received a briefing on the Special Tribunal. Ghanem was, as well as Gemayel and Eido, a participant in the so called “Cedar Revolution”, an episode containing peaceful demonstrations in Beirut that started after Hariri’s funeral and culminated with the complete withdrawal of the Syrian troops. Due to his death the majority of the governing coalition was reduced to two Members of Parliament.

<sup>91</sup>) This attack was subsequently included into the mandate of the IIIC; see Letter to the Secretary-General of 14 December 2007, UN Doc. S/2007/736.

as well as influential journalists, most of them known for their explicit opposition to Syrian influence in Lebanon, as well as many members of the general public. While the sheer number of affected victims is considerably smaller in comparison to other situations which have given rise to prosecution by international tribunals, it is apparent that the attacks were strategically planned to destabilize a whole country. In fact, among the various possible motives for each attack, the IIIC is looking closely at the hypothesis that Rafik Hariri's likely success in the May 2005 elections was the main reason behind his assassination.<sup>92</sup> Thus, it is safe to say that attacks on the very state structure of Lebanon would be subject to scrutiny by the Tribunal.

### B. *The Terrorist Attacks as de facto International Crimes*

The applicable subject-matter law will be Lebanese criminal law only, especially with regard to crimes of terrorism;<sup>93</sup> its domestic laws on rules and procedures, as well as principles of international criminal procedure, shall guide the judges of the Tribunal when adopting their own.<sup>94</sup> Hence, the Security Council and the Lebanese government both agreed that the attack on Hariri constituted a local crime committed in violation of Lebanese law.<sup>95</sup> This too is a deviation from past practices in various ways. First, the traditional international criminal tribunals (the ICC, the ICTY and the ICTR) only have jurisdiction over international crimes, such as genocide, war crimes and crimes against humanity. In contrast, hybrid tribunals usually provide for a mixture of international and national crimes as potential

<sup>92</sup> See the 6th report of the IIIC (supra n. 10), para. 59; for possible motives concerning the other attacks, see paras. 64–67.

<sup>93</sup> Art. 2 STL-Statute refers to “(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on ‘Increasing the penalties for sedition, civil war and interfaith struggle.’”

<sup>94</sup> Art. 28 STL-Statute.

<sup>95</sup> Comp. also I. M. Saliba, “International Tribunals, National Crimes and the Hariri Assassination: A Novel Development in International Criminal Law”, *The Law Library of Congress* (6 June 2007), available at: <http://www.loc.gov/law/help/hariri/hariri.pdf> (downloaded on 28 October 2007).

bases for indictments.<sup>96</sup> The Tribunal will be the first international tribunal without any of the so-called core crimes against international law included in its jurisdiction. The critics of the Tribunal therefore argue that its creation was unwarranted, as no international crime was in question.<sup>97</sup>

But two aspects speak against this assumption. First, the mere possibility of prosecuting crimes under national law before international tribunals is nothing new, as the jurisdictions of other hybrid tribunals indicate; second, a qualification of the acts in question as international crimes seems actually plausible. During the negotiations on the STL-Statute, a qualification as crimes against humanity was rejected because there was no unanimity among the members of the Security Council, despite suggestions of the Secretary-General to that effect.<sup>98</sup> The latter had pointed out that the attacks in question could meet the definition of a crime against humanity, although there were differences in scope and number of the victims when compared to other situations which are subject to the jurisdiction of international criminal jurisdiction.<sup>99</sup> To start with, acts of terrorism can under certain circumstances amount to crimes against humanity or war crimes.<sup>100</sup> A qualification as a crime against humanity can for example be considered

<sup>96</sup> Comp. e.g. Art. 5 of the Statute of the SCSL; however, there this has remained a theoretical possibility only.

<sup>97</sup> See G. de Geouffre de La Pradelle / A. Korkmaz / R. Maison (supra n. 78), p. 18; see also n. 36 above and accompanying text.

<sup>98</sup> SG-Report (supra n. 29), paras. 23–25; see also St. Kay, “International Terrorism, A Special Tribunal for Lebanon – Syria, Lebanon and the Assassination of former Premier Hariri”, <http://www.9bedfordrow.co.uk/news/commentary/HaririAssassinationArticleF.doc> (accessed on 14 January 2008), at p. 14, who assumes that one of the problems of a qualification of the acts as crimes against humanity would have been that the alleged connected attacks would fail to qualify as the characterised offence if they were found by the judges not to have been so connected.

<sup>99</sup> SG-Report (supra n. 29), para. 24.

<sup>100</sup> A. Cassese (supra n. 46), at pp. 948, 949; B. Saul (supra n. 45), at p. 27, and p. 300 et seq.; R. J. Goldstone / J. Simpson, “Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism”, *Harvard Human Rights Journal* 16 (2003), p. 13, at p. 15; P. A. Mazandaran, “An International Legal Response to an International Problem: Prosecuting International Terrorists”, *International Criminal Law Review* 6 (2006), p. 503, at p. 527 et seq.; indeed, the statutes of the ICTR (Art. 4(d)), and the SCSL (Art. 3(d)) list “acts of terrorism” as Violations of Art. 3 Common to the Geneva Conventions and of Additional Protocol II, without however defining this further, while the ICTY in the Galic-case (ICTY-98-29-T, judgment of 5 December 2003) accepted “the crime of terror” as a de facto war crime under AP I; see generally S. Jodoin, “Terrorism as a War Crime”, *International Criminal Law Review* 7 (2007), p. 77.

for the attacks in New York and Washington of 11 September 2001. In the instant case the constitutive elements seem to be in place, such as murder and serious injuries etc. as *actus rei*. Furthermore, modern international customary law does not require a nexus to an on-going armed conflict; instead, political motives may suffice.<sup>101</sup> However, while indeed the various bombings appear to have been connected, it seems to be arguable whether these have been “committed as part of a widespread or systematic attack against any civilian population”. While the attacks of “9/11” were considered to be crimes against humanity since they formed part of a widespread attack against the population of the United States,<sup>102</sup> the situation in the present case appears to be different. On the one hand the attacks committed in Lebanon since October 2004 could – in the words of the Secretary General – reveal a “methodical plan” of attacks against a civilian population, albeit not in its entirety.<sup>103</sup> On the other hand, history and past practise seem to indicate that the scale of the attacks in question is an important criterion.<sup>104</sup> And it could be questioned whether there is sufficient connection between the seemingly isolated events carried out over the course of two years. Therefore, with a view to, first, the relatively small number of approximately 60 deaths and 500 injured persons in total and, second, to the intent behind the deeds which is presumably the political destabilisa-

<sup>101</sup> R. Cryer et al. (supra n. 28), p. 191; see generally e.g. V.-J. Proulx, “Rethinking the Jurisdiction of the International Criminal Court on the Post September 11th Era”, *American University International Law Review* 19 (2004), p. 1009.

<sup>102</sup> Comp. R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (New York 2004), at p. 262 et seq.; A. Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, *European Journal of International Law* 12 (2001), pp. 993, 994 et seq.; V.-J. Proulx (supra n. 101), pp. 1075 et seq.; J. D. Fry, “Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction”, *UCLA Journal of International Law & Foreign Affairs* 7 (2002), p. 169, at p. 190; L. N. Sadat, “Terrorism and the Rule of Law”, *Washington University Global Studies Law Review* 3 (2004), p. 135, at p. 149; for an opposing view see M. Ch. Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, Vol. I (Ardsley, NY 2005), at p. 151 et seq.; M. Mavany, “Terrorismus als Verbrechen gegen die Menschlichkeit”, *Zeitschrift für Internationale Strafrechtsdogmatik* 2007, p. 324, at p. 331, who argues that acts of non state-organizations do not fall under the definition of crimes against humanity; see also A. P. Rubin, “Legal Response to Terror: An International Criminal Court?”, *Harvard International Law Journal* 42 (2002), p. 65, at p. 69, who takes the view that an international criminal court can in general not be a response to terrorism.

<sup>103</sup> SG-Report (supra n. 29), para. 24.

<sup>104</sup> See St. Marks (supra n. 47), at p. 86; R. Cryer et al. (supra n. 28), pp. 194–195.

tion of the State and not a widespread attack against the civilian population as such, the rejection of a qualification as a crime against humanity in the present case appears to be acceptable.<sup>105</sup>

Nevertheless, this does not oppose a qualification of these acts as international crimes. The fact that acts of terrorism were not included in the Rome Statute of the ICC does not mean that they are excluded from the list of international crimes in general.<sup>106</sup> Indeed, the absence of a clear definition of terrorism in international law could lead to the conclusion that terrorism can still not be seen as a discrete international crime.<sup>107</sup> But attacks such as in the instant case which are aimed at the destabilization of a whole country, with wider repercussions for the surrounding region and possible support from other countries, can well be seen to be “most serious crimes of concern to the international community as a whole”.<sup>108</sup> This was in fact acknowledged as such in an annex to the Rome Statute and recommended for discussion at the 2009 ICC review conference.<sup>109</sup> Although overlap may occur, there may also be policy considerations to treat terrorism as a category distinct from crimes against humanity or war crimes, as the ultimate aim of such an act most often is the coercion of a State or a population,<sup>110</sup> and the killing of innocent persons is only a means to that

---

<sup>105</sup> Also arguing that an inclusion of crimes against humanity would have been possible and indeed favourable, N. N. Jurdi, “The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon”, *Journal of International Criminal Justice* 5 (2007), p. 1125, at p. 1127 et seq.

<sup>106</sup> See A. Cassese, *International Law*, at p. 129 and supra n. 98, p. 994, who argues that at least trans-national, state-sponsored or state-condoned terrorism amounts to an international crime; comp. also Ch. Much, “The International Criminal Court (ICC) and Terrorism as an International Crime”, *Michigan State Journal of International Law* 14 (2006), p. 121, at p. 125; Y. Dinstein (supra n. 48), at p. 72 et seq.; for an opposing view see M. Milanovic (supra n. 87); K. H. Kaikobad, “Peace and Security, Acts of Terrorism and Other Serious Crimes: A Theory on Distinction and Overlap”, *International Criminal Law Review* 7 (2007), p. 187, at p. 213.

<sup>107</sup> Comp. B. Saul (supra n. 45), at p. 191 et seq. and 270.

<sup>108</sup> ICC-Statute, Preamble, para. 4; Comp. also the Preamble to the International Convention for the Suppression of Terrorist Bombing (Annex to UNGA Res. 52/164 of 9 January 1998), where acts of terrorism are considered as “a matter of grave concern to the international community as a whole”.

<sup>109</sup> A. Zimmermann, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden 1999), Art. 5, paras. 3–4; comp. also P. J. Wertheim, “Should ‘Grave Crimes of International Terrorism’ be included in the Jurisdiction of the International Criminal Court?”, *Policy and Society* 22 No. 2 (2003), p. 1, who recommends the inclusion of terrorism within the jurisdiction of the ICC.

<sup>110</sup> Comp. Art. 2(b) of the International Convention for the Suppression of the Financing of Terrorism (1999), GA Res. 54/109 of 9 December 1999, 9 ILM 270 (2000), which generally

end. The proposal to prosecute terrorist acts under the existing core crimes largely stems from the absence of a special jurisdiction in this regard, namely under the Rome Statute. Hence this necessity decreases once an international court specifically addresses the issue. This may be comparable to the discussion concerning universal jurisdiction by national courts for international crimes, which primarily originated from the absence of international enforcement mechanisms; now that more and more international criminal courts and tribunals have been established, the call for regimes of universal jurisdiction may become less pressing.<sup>111</sup>

While it may be argued that crimes of international concern really call for the application of international law, it was probably beyond the scope of the negotiations on this Tribunal to find a solution for the general problem of defining terrorism conclusively. Actually, one possible result of the present endeavour could precisely be a general definition of terrorism construed and applied by an international court.<sup>112</sup> While it may be acceptable that the acts in question do not fall into the existing core crimes, including crimes against humanity, it would be unwarranted to qualify them as purely national crimes. The Rome Statute is only exhaustive with regard to its own jurisdiction. And the existing international treaties condemning terrorism,<sup>113</sup> as well as other sources of law,<sup>114</sup> indicate that such a prosecu-

---

defines a terrorist act as “any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing an act”.

<sup>111</sup> See R. Cryer et al. (supra n. 28), p. 46 with reference to the Eichmann-Case.

<sup>112</sup> Comp. A. Cassese (supra n. 106), pp. 120–130, who argues that a substantive definition of “terrorism” already exists on the international level, but that its enforcement by national or international courts is lacking; for a similar approach see Y. Dinstein (supra n. 48), at p. 72 et seq.; for an opposing view see Kaikobad (supra n. 106), at p. 192.

<sup>113</sup> For the status of the at present 30 (16 universal and 14 regional) international conventions pertaining to international terrorism see [http://www.un.org/law/terrorism/terrorism\\_tableupdateMarch2007.pdf](http://www.un.org/law/terrorism/terrorism_tableupdateMarch2007.pdf) (accessed on 26 November 2007); see also *International Instruments Related to the Prevention and Suppression of International Terrorism*, United Nations (ed.) (New York 2001).

<sup>114</sup> See e.g. UNGA Res. 49/60 of 9 December 1994, Declaration on Measures to Eliminate International Terrorism, UNGA Res. 55/158 of 12 December 2000 on Measures to Eliminate International Terrorism; see also the documents on a draft comprehensive convention on international terrorism negotiated in the Ad Hoc Committee established by UNGA Resolution 51/210 of 17 December 1996 (<http://www.un.org/law/terrorism/index.html>; accessed on 26 November 2007).

tion would not be *ex post facto*.<sup>115</sup> It must be admitted that in the present case the Security Council did not chose to pursue this avenue, but instead opted for a prosecution solely on the basis of national law. However, the decisive point is that in substance the acts to be prosecuted also have an international character.<sup>116</sup> That substantive national and international criminal laws are not mutually exclusive is already evidenced by the fact that the Rome Statute of the ICC needs to be transformed into national law in order to make it applicable in national courts if a Member State wants to claim the privilege of primary jurisdiction under the complementarity regime of Article 17 of the Rome Statute;<sup>117</sup> from a formalistic point of view, this would make even the “core crimes” crimes under national law.<sup>118</sup> It is also safe to assume that the judges of the Tribunal, in applying the Lebanese statutes, will look beyond Lebanese borders for additional guidance.

In sum, the doubts as to the warrant to create an international tribunal, which are based on the asserted absence of an international crime, are unfounded. First, the circumstance that the Tribunal shall apply Lebanese criminal law does not *per se* oppose to a qualification of the relevant acts as *de facto* international crimes. Second, it can be argued that the fact that Lebanese law, unlike international law, provides for a definition of terrorism,<sup>119</sup> made the inclusion of terrorism as an international crime in the

---

<sup>115</sup> For an opposing view, see M. Milanovic, “An Odd Couple – Domestic crimes and International Responsibility in the Special Tribunal for Lebanon”, *Journal of International Criminal Justice* 5 (2007), p. 1139.

<sup>116</sup> It may be noteworthy that the first modern attempt to define terrorism as an international crime was undertaken in the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism, in direct reaction to the assassination of King Alexander I of Yugoslavia by Croatian separatists in France; the need to recognise the crime of “regicide” as a threat to international peace was underlined by similar attacks in the previous years, including the assassination of Archduke Franz Ferdinand in Sarajevo in 1914 which sparked WWI; see B. Saul (*supra* n. 45), at p. 171 *et seq.*

<sup>117</sup> Comp. R. Heinsch (*supra* n. 42), at p. 267; L. N. Sadat, *The International Court and the Transformation of International Law: Justice for the New Millenium* (New York 2002), at p. 272 *et seq.*

<sup>118</sup> Comp. on this issue J. N. Magoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (New York 2003), at p. 249 *et seq.*

<sup>119</sup> Art. 314 of the Lebanese Penal Code defines terrorist acts as “acts designed to create a state of alarm which are committed by means which are likely to create a public hazard, such as explosive devices, inflammable materials, poisonous or incendiary products or infectious or microbial agents”.

STL-Statute, and therewith any difficult discussion about its definition, not an immediately pressing issue. Third, one decisive point is that the qualification of the acts in question as national or international crimes in effect does not have any impact on the legitimacy of the Tribunal. The Security Council decided to establish a tribunal of international character, acting under Chapter VII. Since the requirements for the application of Chapter VII are in place, it is within the Security Council's discretion to decide what measures to take, as the list of possible measures mentioned in Article 41 of the UN Charter is not exhaustive. Article 41 of the UN Charter empowers the Security Council to take the measure it deems to be useful.<sup>120</sup> Thus, the discussion of whether the alleged crimes could be qualified as international crimes has no impact on the possibility to create a tribunal of an international character.

### *C. Further Progressive Developments with Regard to International Criminal Law*

One remarkable point is that the death penalty is excluded from possible penalties, although it is accepted in Lebanon.<sup>121</sup> This is in line with the consistent practices of international criminal tribunals supported by the UN.<sup>122</sup> While the practices on the national level is still not uniform,<sup>123</sup> as the case of the Iraqi Special Tribunal demonstrates, it is noteworthy that Rwanda in July 2007 approved the abolition of the death penalty in its domestic law in order to allow for the referral of cases from the ICTR and other jurisdictions to its national courts.<sup>124</sup>

<sup>120</sup> See Tadic-Decision of the Appeals Chamber of the ICTY, *The Prosecutor v. Dusko Tadic*, IT-94-1-AR72 (supra n. 41), at para. 35; J. Frowein / N. Kirsch, Art. 41 MN 14, in: B. Simma (supra n. 39).

<sup>121</sup> Comp. Art. 24 STL-Statute and SG-Report (supra n. 29), para. 22; forced labour is similarly excluded.

<sup>122</sup> Comp. G.-J. A. Knoops, *Theory and Practise of International and Internationalized Criminal Proceedings* (The Hague 2005), p. 275.

<sup>123</sup> In late 2007, 133 countries had abolished the death penalty either in law or practise and of the 64 retentionist countries and territories, only 25 actually carried out executions in 2006; see Amnesty International, *Facts and Figures on the Death Penalty* (<http://web.amnesty.org/pages/deathpenalty-facts-eng>, accessed on 21 November 2007).

<sup>124</sup> See Amnesty International, News Service No. 143 of 27 July 2007, AI Index: AFR 47/010/2007.

Furthermore, the government may not grant amnesties for the crimes in question and any amnesties already granted shall be disregarded.<sup>125</sup> The non-applicability of amnesties is also the rule at the SCSL, at least as long as proceedings before international tribunals and crimes under international law are concerned.<sup>126</sup> The exclusion of amnesties is therefore a further indicator that the crimes in question are de facto treated as international crimes. However, it is not clear whether this rule would also apply to amnesties granted by States other than Lebanon. Language as well as object and purpose would support such a reading; the nature of a bilateral agreement would have pointed against it. In effect, Resolution 1757 (2007) may be seen as further authority that amnesties for serious crimes are now prohibited. This would be in line with the general trend in international law towards a refusal of amnesties,<sup>127</sup> as for example confirmed by the Trial Chamber of the ICTY, when it held that an amnesty granted for torture would not spare perpetrators from being held criminally responsible.<sup>128</sup> This trend is based on a general sense of “justice” that requires a person who committed a crime to be punished, since prosecution does not only give significance to the victim’s suffering and serves as a partial remedy, but also prevents private revenge and has a deterring effect.<sup>129</sup>

Lastly, the report of the Secretary-General stresses that at the Tribunal many elements of civil law are to be found; among these are a more active role of the judges and the possibility for trials in absentia of the accused.<sup>130</sup>

---

<sup>125</sup> Art. 6 STL-Statute.

<sup>126</sup> Comp. Art. 10 of the Statute of the SCSL; this rule was upheld with regard to amnesties granted before the establishment of the Court in the decisions on jurisdiction by the Appeals Chamber of the Special Court of 13 March 2004 (Kallon and Kamara, SCSL-04-15-PT-060) and of 25 May 2004 (Kondewa, SCSL-04-14-T-128-7363).

<sup>127</sup> See J. Dugard in: A. Cassese / P. Gaeta / J. Jones (eds.), *Rome Statute*, Vol. I (Oxford et al. 2002), pp. 693, 695 f., 698 et seq.; A. Cassese (supra n. 106), p. 315.

<sup>128</sup> *Prosecutor v. Furundzija*, Case IT-95-17/1-T (10 December 1998), para. 155.

<sup>129</sup> M. P. Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court”, *Cornell International Law Journal* 32 (1999), p. 507, at pp. 510, 513; compare also M. Ch. Bassiouni, “Searching For Peace and Achieving Justice: The Need for Accountability”, *Law & Contemporary Problems* 59 (1996), p. 9, at p. 13, who states that “if peace is not intended to be a brief interlude between conflicts, then in order to avoid future conflict, it must encompass what justice is intended to accomplish: prevent, deter, punish, and rehabilitate”.

<sup>130</sup> SG-Report (supra n. 29), para. 32. See on this point C. Aptel, “Some Innovations in the Statute of the Special Tribunal for Lebanon”, *Journal of International Criminal Justice* 5 (2007), p. 1107, at p. 1116 et seq.

The former is exemplified by the fact that the judges would be the first in questioning any witnesses; furthermore, they may call additional witnesses themselves.<sup>131</sup> While this is a general development in reaction to the practical difficulties of conducting an international trial under adverse conditions,<sup>132</sup> the second aspect is more problematic. Trials in absentia are not uniformly accepted even in civil law countries and raise concerns with regard to the principle of a fair trial, as laid down e.g. in Article 14 ICCPR.<sup>133</sup> Those civil law countries which accept this sort of trial only do so in exceptional circumstances and in conjunction with specific safeguards. In addressing these concerns, the mandatory appointment of defence counsel either by the accused or through an assignment by the Defence Office and the possibility of a re-trial are foreseen in the Statute of the Tribunal.<sup>134</sup> The general rule was included due to fears that other States, especially Syria, could refuse to hand over suspects. Still, trials in absentia could again seriously jeopardize the legitimacy of the proceedings as perceived by the general public and could be a detriment to the whole project of promoting justice in Lebanon.<sup>135</sup> With good cause, the drafters of the Rome Statute only allowed for trials without the presence of the accused if that person continuously disrupts the proceedings.<sup>136</sup> It can only be hoped that the Prosecutor will exercise restraint in the use of this option, as otherwise the proceedings could face allegations of “show trials”.

<sup>131</sup> Art. 20(2) STL-Statute.

<sup>132</sup> Comp. G.-J. A. Knoops (supra n. 122), p. 8: this shift was for example welcomed by Judge Bonomy (UK) of the ICTY in his presentation at the Conference “Building a Future on Peace and Justice” in Nuremberg (25–27 June 2007), see J. E. Wetzel, Conference Report on “Frieden und Gerechtigkeit – Bausteine der Zukunft”, *Journal of International Law of Peace and Armed Conflict* 20 (2007), p. 186, at p. 187.

<sup>133</sup> Comp. M. Nowak, *CCPR-Commentary*, 2nd ed. (Kehl et al. 2005), Art. 14, para. 63. Interestingly, the report of the UNSG only refers to recent case law of the regional European Court of Human Rights in Strasbourg in support of the regularity of such trials; SG-Report (supra n. 29), para. 33.

<sup>134</sup> Art. 22 STL-Statute.

<sup>135</sup> For a discussion of the compatibility of Art. 22 STL-Statute with the notion of a fair trial comp. P. Gaeta, “To Be (Present) or Not To Be (Present) – Trials in Absentia before the Special Tribunal for Lebanon”, *Journal of International Criminal Justice* 5 (2007), p. 1165, who concludes that Art. 22 STL-Statute is in compliance with international standards to ensure a fair trial in the case of a trial in absentia.

<sup>136</sup> Art. 63(2) ICC-Statute.

## VI. Operational Aspects

The official languages of the Tribunal will be Arabic, French and English.<sup>137</sup> It will have its seat outside Lebanon, with an investigative office in Beirut.<sup>138</sup> This was decided partly due to the security situation. It will be the first time that the main seat of a hybrid tribunal is not established “in theatre”, i.e. within the country where the crimes under investigation were committed. On the other hand, a “split” prosecutorial seat is already utilized at the ICTR,<sup>139</sup> and the SCSL has relocated one of its trials, namely the one against Charles Taylor, from Sierra Leone to the seat of the ICC at The Hague.<sup>140</sup> In order to facilitate access to the Tribunal for witnesses and the public, a location in the region was envisaged at first. One suggestion was Cyprus, to which the IIIC had already relocated during the armed conflict with Israel in the summer of 2006.<sup>141</sup> However, in July 2007 the Secretary-General formally proposed The Hague, and the Dutch Government positively responded one month later.<sup>142</sup> While it is certainly clear that the Dutch seat of government has much experience in hosting international tribunals, this will run contrary to one of the main structural principles of hybrid tribunals, namely to provide for as much local participation as possible in order to create a sense of “ownership” by the affected society.

The last point of contention during the negotiations in 2006 was the mechanism for financing the Tribunal. The report of the Secretary-General included various options on this issue, and the relevant part of the draft agreement had been left blank.<sup>143</sup> The preferred option of the Secretary-General involved some measure of assessed contributions from the UN budget. However the Security Council decided in favour of voluntary contributions from States, which are to provide 51% of the funding; the remaining 49% of the budget shall be financed by the government of

---

<sup>137)</sup> Art. 14 STL-Statute foresees the possibility of limiting proceedings to one or two working languages.

<sup>138)</sup> Art. 8 STL-Agreement.

<sup>139)</sup> SG-Report (supra n. 29), para. 42.

<sup>140)</sup> See supra n. 60.

<sup>141)</sup> Another proposal was Italy.

<sup>142)</sup> See “Lebanon: Ban Ki-moon welcomes Dutch agreement to host Hariri tribunal”, UN News Centre, 17 August 2007. The headquarters agreement was signed on 21 December 2007.

<sup>143)</sup> SG-Report (supra n. 29), paras. 44–51.

Lebanon.<sup>144</sup> The Tribunal will not come into existence until the Secretary-General has gathered enough funds for the first year of operation – approximately US\$ 30 million – and pledges for the second and third – approximately US\$ 45 and 40 million, respectively.<sup>145</sup> This leads to a problem that already the present tribunals are confronted with, namely the great difficulties to collect enough voluntary funding to remain operational. On the one hand, the reluctance of the Security Council to fund another international tribunal, in the light of the immense costs incurred by the ICTY and ICTR over the past years, may be a primary reason for the presently preferred option of establishing new ad hoc courts outside of the UN system.<sup>146</sup> On the other hand, in case voluntary contributions fall short, the argument that the budget should be supplemented by the UN now carries more weight since it was the Security Council that created the Tribunal directly.

The process of collecting enough initial funds as well as selecting the judges and other personnel will take at least a year. Therefore the Tribunal will not become operative before mid-2008 at the earliest. But the transition from the already existing IIC to the OTP of the Tribunal should make this process speedier than elsewhere. The Commissioner of the IIC Bellemare (Canada) is also the Prosecutor-Designate of the STL. By March 2008, Robin Vincent (United Kingdom), the former Registrar at the SCSL, had been appointed as the Registrar of the STL, the management committee had been established, premises in The Hague had been identified, and more than US\$ 60 million had been received in contributions and pledges. The Tribunal is to have an initial mandate for three years of operation, with a view to a possible prolongation.<sup>147</sup> The SCSL had at first also been intended to operate for a period of three years only, but will now most likely take at least eight years to conclude its work. The experiences of the latter shows that even with the greatest efforts of the staff and immense financial pressure by donors, a tribunal's operation usually lasts longer than originally planned. At the Lebanon-Tribunal, the conduct of operations will be assisted by a management committee.<sup>148</sup> A body of this

---

<sup>144</sup> Letter of 21 November 2006 (supra n. 17).

<sup>145</sup> See “Ban Ki-moon condemns latest murder of Lebanese Lawmaker” (supra n. 90).

<sup>146</sup> Comp. Y. Beigbeder (supra n. 61), pp. 141–143.

<sup>147</sup> Art. 21 STL-Agreement.

<sup>148</sup> Art. 6 STL-Agreement.

kind, in which the major donors and stakeholders are represented and which has budgetary oversight, was also first implemented at the SCSL.<sup>149</sup>

## VII. The Perspectives of the Special Tribunal for Lebanon

Politically, Lebanon seems to be a divided country. At present, backers of the western leaning government of Prime Minister Siniora on the one side and of President Lahoud and the Hezbollah-led opposition on the other, allegedly supported by Syria and Iran, are locked in a stand-off. The creation of the Tribunal has been one of the fundamental points of contention within Lebanese public debate since late 2006.<sup>150</sup> Both proponents and opponents to the Tribunal regard it as a major factor in enabling – or in contrast endangering – the continuation of the peace process and the eventual completion of Lebanese national sovereignty. The proposed Tribunal was strongly criticised as enforcing political divisions among the Lebanese population and as an “instrumentalization of international justice”.<sup>151</sup> Some even see the Tribunal as the focal point of a Franco-American conspiracy against Syria and as an attempt to ensure the continuing influence of Western States in Lebanon. More moderate critics point to inconsistencies concerning the lack of international judicial mechanisms for investigating potential war crimes during the war with Israel in 2006, or even during the Lebanese civil war in 1975 to 1989.<sup>152</sup> But the fact that the latter two proposals seem entirely unrealistic at present should not detract from the assessment that a tribunal aimed at the most recent problems could at least be one step towards reconciliation. For the first time, the circle of violence may be broken by a neutral allocation of accountability.

The future will show whether the fears that this international tribunal would spark new violence or even lead to a new civil war were legitimate.

---

<sup>149</sup> Comp. Art. 7 of the Statute of the SCSL.

<sup>150</sup> See e.g. the interview with the Lebanese Member of Parliament Ghassan Tuani, *Frankfurter Allgemeine Zeitung*, 7 December 2006, p. 7.

<sup>151</sup> See G. de Geouffre de La Pradelle / A. Korkmaz / R. Maison (supra n. 78), p. 18.

<sup>152</sup> For an overview of the wars and atrocities the Lebanese population had been confronted with over the last three decades see M. Wierda / H. Nassar / L. Maalouf, “Early Reflections on Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon”, *Journal of International Criminal Justice* 5 (2007), p. 1065, at p. 1067 et seq., who criticize the limited attention from the international community in the past.

The street fighting since December 2006, which left about a dozen dead; the renewed bombings; the fightings between a militant Palestinian group and the Lebanese military in the Nahr al-Bared refugee camp<sup>153</sup> with a total of approximately 380 casualties, from May 2007 to early September; and the killing of six UNIFIL-peacekeepers by a car bomb in June 2007 may have been signs of worse to come. The IIIC has called the security outlook “bleak”.<sup>154</sup> But most of these attacks seem to have been isolated events, staged by relatively small groups of persons, without a large backing in the Lebanese population. The next important step will be the election by the Lebanese Parliament of a successor to President Lahoud, whose term expired on 23 November 2007.<sup>155</sup>

From the viewpoint of international law, however, most of the objections specifically aimed at the Tribunal seem to be unfounded. Admittedly, there are aspects which may dampen its legitimacy, such as the fact that the Tribunal was eventually established by a resolution of the Security Council and not by the proposed agreement with a sovereign state; that its location may be far away from the country; that the Tribunal will apply national criminal law; and that trials in absentia are possible. But these challenges may be overcome if all persons involved show restraint in order to avoid an alienation between the Tribunal and further parts of the Lebanese population. More importantly, these aspects should not keep the general public from accepting the Tribunal as an instrument to assist their struggle of coming to terms with their past, even if its creation was sub-optimal. Legally, the Tribunal represents a real advancement in the further development of effective but fair instruments for international adjudication and demonstrates many lessons learned from other existing international criminal tribunals; among these are the provisions for efficient trial management; the simple majority of international judges; the statutory defence

---

<sup>153</sup> This camp close to Tripoli in northern Lebanon is the largest of 12 official sites for Palestine refugees in Lebanon, with over 30,000 inhabitants; altogether, according to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), in December 2006 approximately 410,000 refugees resided in Lebanon, partially since 1948; this is an estimated 10 per cent of the population of that State.

<sup>154</sup> See 8th Report of 12 July 2007 (*supra* n. 9), para. 104.

<sup>155</sup> A first round of voting was scheduled to take place on 25 September 2007, but due to a boycott by Hezbollah MPs the required two-thirds quorum was missed; see “Lebanon: Who’s for president?”, *The Economist*, Sep 27th 2007. As of early 2008 no successor had been selected.

office; the management committee; the enhanced role of victims; the use of evidence collected by the IIIC according to the highest standards; and the rejection of the death penalty.<sup>156</sup> Other criminal tribunals have shown that international judicial institutions can to some extent contribute to national peace and reconciliation. More generally, neutral third parties can assist in addressing deep-rooted conflicts which the State itself is unable to solve. There is reason to believe that the Special Tribunal for Lebanon, consisting of a diverse group of judges and other personnel, operating according to a clear set of rules, and observed by the world legal and political community, can also serve this function. Overall, more arguments point towards the conclusion that the Tribunal deserves a chance to prove itself.

From the vantage point of the development of international criminal law in general, the establishment of the Tribunal is another step in the ongoing effort to push back impunity and to use formalized international justice as a means to promote regional stability and peace. It could even be seen as a necessary precondition to that cause.<sup>157</sup> Although the Tribunal belongs to the so-called third generation of hybrid international tribunals, it adds some new components to this already diverse group. Moreover, as the short period of time needed for the negotiations indicates, the international criminal tribunals of the recent past now provide so much institutional experience that one can almost speak of the possibility of courts “off the shelf”. Lastly, the Tribunal highlights that even after the coming into force of the Rome Statute, a need for new international tribunals may arise, especially in cases where the ICC has no jurisdiction.<sup>158</sup> Some have predicted that ad hoc-tribunals will become irrelevant once the ICC is operative, or at least will only have importance for conflicts of the past.<sup>159</sup> However, the proposed Tribunal could be an indication that any international system of justice which lies ahead still has space for a diversified

---

<sup>156</sup> For a similarly positive critique of the procedural innovations in the Statute, see G. Higgins, “Fair and Expeditious Pre-Trial Proceedings”, *Journal of International Criminal Justice* 5 (2007), p. 394, at pp. 396 et seq., 400.

<sup>157</sup> Comp. Statement by UN Legal Counsel Michel before the UNSC on 20 November 2006, UN Doc. S/2006/893/Add. 1.

<sup>158</sup> Inter alia, Lebanon does not belong to the group of at present 106 Member States to the Rome Statute.

<sup>159</sup> Comp. for example Y. Beigbeder (*supra* n. 61), p. 143.

approach. In fact, hybrid international tribunals set up with the consent of the State in question could even be seen as fulfilling the principle of complementarity as enshrined in the Rome Statute.<sup>160</sup> All of these points indicate that the Special Tribunal for Lebanon will most likely not be the last international criminal tribunal to be realistically debated. Whether this leads to a greater manifestation, or instead fragmentation, in international criminal law remains to be seen. But international juridical options as answers to large-scale violent conflicts are here to stay.<sup>161</sup>

---

<sup>160</sup> Comp. Art. 17 ICC-Statute.

<sup>161</sup> An international investigation into the assassination of the former Pakistani premier Benazir Bhutto on 27 December 2007 along the lines of the IIIC has so far been rejected by Pakistan's President Pervez Musharraf; see his interview with *Le Figaro*, 12 January 2007 (Musharraf: "Le Pakistan mène la guerre au terrorisme"). But in January 2008 the "International Commission Against Impunity in Guatemala" (CICIG) started to work, which was created by the United Nations to investigate organized crime.