

THE HARIRI TRIBUNAL

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Le 14 février 2005, l'ancien premier ministre libanais Rafik Hariri fut assassiné lors d'un attentat à la camionnette piégée à Beyrouth. Le 30 mai 2007, le Conseil de sécurité des Nations Unies adoptait, par 10 voix sur 15, une résolution créant un tribunal international pour juger les présumés assassins de M. Hariri. Le texte prévoyait l'entrée en vigueur, le 10 juin 2007, de la Convention signée entre les Nations Unies et le Liban en 2006, créant ce "Tribunal spécial" qui "commencera à fonctionner à une date que le Secrétaire général arrêtera en consultation avec le Gouvernement libanais". Cet article dresse un premier bilan des principales dispositions de cette Convention.

On 30 May 2007, the Security Council adopted Resolution 1757 authorising the creation of the Special Tribunal for Lebanon (STL Tribunal) to bring to justice the alleged perpetrators of the assassination of former Prime Minister Rafiq Hariri. Mr Hariri and 22 other individuals were killed by a suicide truck bomber in Beirut on 14 February 2005. Resolution 1757 provides that the Agreement signed in 2006 between the United Nations and the Lebanese Republic on the establishment of the STL Tribunal would enter into force on 10 June 2007, and "commence functioning on a date to be determined by the Secretary-General in consultation with the Government of Lebanon." This paper provides a brief analysis of this Agreement.

I INTRODUCTION

On 30 May 2007, the Security Council, acting under Chapter VII of the United Nations (UN) Charter,¹ adopted Resolution 1757² authorising the creation of the Special Tribunal for Lebanon (STL Tribunal).³ Annexed to Security Council Resolution 1757 was the Agreement between the UN and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (the STL

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1 Charter of the United Nations (UN Charter) (26 June 1945) 1 UNTS xvi.

2 UNSC Resolution 1757 (30 May 2007) S/RES/1757/2007.

3 Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, annexed to UNSC Resolution 1757, above n 2 [STL Agreement]. The STL Agreement contains an attachment, the Statute of the Special Tribunal for Lebanon [STL Statute], which forms an integral part of the STL Agreement (art 1(2)).

Agreement), creating a mixed international-domestic or hybrid tribunal to prosecute those responsible for the assassination of former Lebanese Prime Minister Rafiq Hariri and 22 other individuals killed by a suicide truck bomber in Beirut on 14 February 2005.⁴ This was one of many targeted killings of anti-Syrian political figures in Lebanon to have occurred in the past three years. The popularity of Mr Hariri and the growing anti-Syrian feeling among the Lebanese population galvanised support at the national and international level for such a tribunal.

The STL Tribunal shares many of the characteristics of other international and hybrid tribunals set up over the past decade.⁵ Similarly to the International Criminal Tribunals for Yugoslavia and Rwanda, it is created by a binding resolution of the UN Security Council forcing the cooperation of other member states with the STL Tribunal. Furthermore, as in the case of the Special Court for Sierra Leone, the STL Agreement endorses a system of two-tiered chambers with international participation and monitoring outside the regular judicial system of Lebanon. The STL Tribunal will have primacy over domestic Lebanese courts regarding those suspected of being involved with the killing of Mr Hariri.⁶ Contrary to the hybrid tribunals in Kosovo, East Timor, Bosnia-Herzegovina and Sierra Leone, the STL Tribunal will be located outside the country where the crime took place, possibly to prevent undue influence from neighbouring states. This raises logistical issues regarding witnesses' participation. It is also likely to lessen the interest of the Lebanese population in keeping up with developments. More importantly, as opposed to all other hybrid tribunals that have jurisdiction in respect of international crimes, the STL Tribunal will simply have competence over a series of alleged terrorist acts under domestic legislation.

Western nations have welcomed the decision to establish a special tribunal to deal with the assassination of former Prime Minister Hariri and, potentially, other political killings as an important signal from the international community that politically motivated attacks and killings in

4 "Rafic Hariri tué dans un attentat" (14 February 2005) <<http://www.rfi.fr>> (last accessed 1 June 2007). Evidence thus far suggests that a young, male suicide bomber, probably non-Lebanese, detonated up to 1800 kilograms of explosives inside a van in order to assassinate Mr Hariri: see Serge Brammertz, International Independent Investigation Commission [IIC] Commissioner "Fourth report of the International Independent Investigation Commission established pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005)" (Beirut, 10 June 2006) para 23, annexed to UNSC "Letter dated 10 June 2006 from the Secretary-General addressed to the President of the Security Council" (10 June 2006) S/2006/375.

5 For an overview of hybrid tribunals, see K Ambos and M Othman (eds) *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (Max Planck Institute, Freiburg, 2002); Laura A Dickinson "The Promise of Hybrid Courts" (2003) 97 AJIL 295; Cesare P R Romano, André Nollkaemper and Jenn K Kleffner (eds) *Internationalized Criminal Courts. Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP, Oxford, 2004); Alberto Costi "Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-conflict Situations" (2006) 22 NZULR 213.

6 STL Agreement, above n 3, art 8(1).

Lebanon must not go unpunished.⁷ China and Russia warned that the move could have serious political repercussions because the Security Council was exceeding its authority and interfering in Lebanese internal affairs.⁸ In Lebanon, the decision has highlighted the division between the government of Prime Minister Fouad Siniora who requested the establishment of the STL Tribunal, on the one hand, and, on the other, the country's Parliament's Speaker, Mr Nabih Berri, who has refused to convene Parliament to approve the plan.⁹ The Head of State, Mr Emile Lahoud, perceived to be pro-Syrian, has publicly indicated he opposes such a tribunal.¹⁰ Syria, which is widely believed to have had a hand in the assassination of Mr Hariri, has made it clear it would not cooperate with the STL Tribunal.¹¹

International support has been active, as evidenced by the fact that Security Council Resolution 1757 was adopted by a vote of ten in favour to none against.¹² At the domestic level, it has been impossible for political parties to agree to adopt the STL Agreement. The latter only entered into force on 10 June 2007, in accordance with the terms of Security Council Resolution 1757,¹³ ten days proving insufficient for all Lebanese factions to reach an agreement for the ratification of the STL Agreement. Only time will tell whether the STL Tribunal will operate successfully.

This paper analyses the main provisions of the STL Agreement and Statute and, where relevant, compares them with similar provisions found in other international and hybrid tribunals. After a brief review of the events and negotiations leading to the adoption of the STL Agreement and associated Statute, the paper examines the structure, the jurisdiction and the procedural aspects of

7 See, for instance, the statements of the French and Slovak representatives, Mr Jean-Marc de la Sablière and Mr Dušan Matulay: UNSC "Security Council Authorizes Establishment of Special Tribunal to Try Suspects in Assassination of Rafiq Hariri" (30 May 2007) SC/9029 ["Security Council Authorizes Establishment of Special Tribunal"].

8 See the statements of the Chinese, and Russian representatives, Mr Wang Guangya and Mr Vitaly I Churkin: "Security Council Authorizes Establishment of Special Tribunal", above n 7.

9 "Hezbollah condemns Hariri court" (31 May 2007) <<http://www.bbc.co.uk>> (last accessed 14 June 2007).

10 "Letter dated 15 May 2007 from the President of Lebanon addressed to the Secretary-General", annexed to UNSC "Letter dated 16 May 2007 from the Secretary-General to the President of the Security Council" (17 May 2007) S/2007/286 ["Letter dated 15 May 2007 from the President of Lebanon addressed to the Secretary-General"].

11 See Sam F Ghattas "Syria, Hezbollah denounce plan for Lebanon tribunal" (1 June 2007) *The Boston Globe* <<http://www.boston.com>> (last accessed 14 June 2007).

12 China, Russia, Qatar, Indonesia and South Africa abstained. See "Security Council Authorizes Establishment of Special Tribunal", above n 7.

13 UNSC Resolution 1757, above n 2, para 1(a): "[t]he provisions of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19 (1) of the annexed document before that date."

the STL Tribunal, before evaluating the provisions dealing with the rights of the accused and participation of victims and witnesses in the process. The paper concludes with a brief assessment of the legitimacy of the STL Tribunal and ventures to anticipate its impact and legacy.

II NEGOTIATION OF THE AGREEMENT SETTING UP THE STL TRIBUNAL

On 14 February 2005, Rafiq Hariri was killed when powerful explosives were detonated as his motorcade drove near the St George Hotel in Beirut. Among the dead were several of his bodyguards and the former Minister of the Economy, Basel Fleihan. A powerful businessman and a popular politician, Mr Hariri served twice as Prime Minister of Lebanon, from 1992 to 1998 and again from 2000 until 2004, when he resigned in the midst of a political crisis surrounding the renewal of the mandate of President Emile Lahoud, considered by many to be a political ally of the Syrian President. Bizarrely, it is the same Syrian government that helped Mr Hariri gain power and with whom he worked closely that was soon accused of being behind his assassination.

The events that have unfolded since Mr Hariri's assassination have led to the departure of all Syrian forces from the territory of Lebanon and elicited a strong response on the part of the international community. Soon thereafter, the then UN Secretary-General, Mr Kofi Annan, dispatched a fact-finding mission to Beirut to enquire into the causes, the circumstances and the consequences of Mr Hariri's assassination.¹⁴ The resulting report criticised Syria's undue influence in the affairs of Lebanon and its primary responsibility in the climate of political tension that preceded the assassination. The report also branded the Lebanese authorities as incompetent, both as regards their incapacity to protect their citizens and their failure to conduct the investigation into the assassination according to international standards. In conclusion, the report cast doubt on the ability of any international body to carry out a successful enquiry until extensive reforms are made to the leadership of the Lebanese security forces.¹⁵

Acting on the recommendations of the fact-finding mission, the Security Council adopted Resolution 1595 on 7 April 2005. This Resolution set up the International Independent Investigation Commission (IIIC) to be based in Lebanon "to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices."¹⁶ Security Council Resolution 1595 also requested the Lebanese authorities to

14 Peter FitzGerald, Head of the United Nations Fact-finding Mission in Lebanon "Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri" (New York, 24 March 2005) [Report of the Fact-finding Mission to Lebanon], annexed to UNSC "Letter dated 24 March 2005 from the Secretary-General to the President of the Security Council" (24 March 2005) S/2005/203. The fact-finding mission to Lebanon was set up following a request by the Security Council: UNSC "Statement by the President of the Security Council" (15 February 2005) S/PRST/2005/4.

15 Report of the Fact-finding Mission to Lebanon, above n 14, paras 60-64.

16 UNSC Resolution 1595 (7 April 2005) S/RES/1595/2005.

facilitate the work of the IIIC and all UN member states to "cooperate fully" and in particular to provide the IIIC "with any relevant information they may possess" pertaining to what was now labelled a terrorist act. The first IIIC report implicated Syrian and Lebanese officials and in particular the brother-in-law of the Syrian President as well as Syria's military intelligence chief.¹⁷ In response to these allegations, the Security Council adopted Resolution 1636 on 31 October 2005. This Resolution imposed an obligation on all member states to refuse entry into their territory to individuals suspected by the IIIC or the government of Lebanon of having been implicated in the assassination plot and to freeze the funds and assets of suspected individuals held on their territories. Security Council Resolution 1636 explicitly requested Syria to cooperate fully and unconditionally with the IIIC, to refrain from interfering in the domestic affairs of Lebanon and to detain "those Syrian officials or individuals whom the Commission considers as suspected of involvement in the planning, sponsoring, organizing or perpetrating of this terrorist act, and make them fully available to the Commission."¹⁸

The Security Council also expressed its willingness to "consider any additional request for assistance from the Lebanese Government to ensure that all those responsible for this crime are held accountable."¹⁹ The Lebanese government accepted this assistance offer from the Security Council and requested the creation of an international tribunal to try all those responsible for the "terrorist bombings" of 14 February 2005.²⁰ In a second report submitted on 10 December 2005, the IIIC upheld the conclusions of its first report.²¹ This led the Security Council to adopt Resolution 1644 on 15 December 2005, extending the mandate of the IIIC and requesting Syria's government to commit to cooperate fully with the IIIC.²² More importantly, the Security Council instructed the Secretary-General to help the Lebanese government "identify the nature and scope of the international assistance needed" to set up an international tribunal. As requested by the Lebanese government, the Security Council authorised the IIIC:²³

17 Detlev Mehlis, IIIC Commissioner "Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005)" (Beirut, 19 October 2005) para 124 [IIIC First Report], annexed to UNSC "Letter dated 20 October 2005 from the Secretary-General addressed to the President of the Security Council" (20 October 2005) S/2005/662.

18 UNSC Resolution 1636 (31 October 2005) S/RES/1636/2005, para 11(a).

19 UNSC Resolution 1636, above n 18, para 14.

20 UNSC "Letter dated 13 December 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General" (13 December 2005) S/2005/783.

21 Detlev Mehlis, IIIC Commissioner "Second report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 and 1636 (2005)" (Beirut, 10 December 2005) para 88.

22 UNSC Resolution 1644 (15 December 2005) S/RES/1644/2005.

23 UNSC Resolution 1644, above n 22, para 7.

[T]o extend its technical assistance as appropriate to the Lebanese authorities with regard to their investigations on the terrorist attacks perpetrated in Lebanon since 1 October 2004, and [requested] the Secretary-General in consultations with the Commission and the Lebanese Government to present recommendations to expand the mandate of the Commission to include investigations of those other attacks.

This paragraph was inserted to satisfy Lebanese politicians who wanted to extend the IIIC's duration and charter to include assassinations of other prominent anti-Syrian Lebanese, such as Gebran Tueni, a vocal supporter of the withdrawal of Syrian troops from Lebanon, who was assassinated on 12 December 2005.²⁴ The idea that the assassination of Mr Hariri was part of a wider terrorist campaign aimed at terrorising the Lebanese population was addressed by the Head of the IIIC, Serge Brammertz. In his report of 15 March 2006 to the Security Council, he noted that "[a]t this stage ... it is too early to conclude or even make an assumption that any of the 14 other cases are linked either with each other or with the Hariri case", but he went on to say that the IIIC remained actively engaged in evaluating any links between the 14 cases and Mr Hariri's assassination.²⁵

Security Council Resolution 1664 adopted on 29 March 2006 remained silent on the crimes to be covered, but requested the UN Secretary-General to negotiate an agreement with the government of Lebanon aimed at establishing "a tribunal of an international character based on the highest international standards of criminal justice."²⁶ Negotiations and consultations between January and September 2006 led to the conclusion of an agreement between the UN and the pro-western government of current Lebanese Prime Minister Fouad Siniora, which was officially signed by the government of Lebanon and the UN on 23 January and 6 February 2007 respectively. The refusal of the Speaker of Parliament Nabih Berri to convene the legislature to ratify the STL Agreement as required under Lebanese law forced the government to ask the Security Council to adopt the Agreement and Statute as a matter of urgency.²⁷

24 Gebran Tueni was a Lebanese politician and journalist, and former editor and publisher of *An-Nahar*, a daily Beirut newspaper. Others to have been killed include journalist Samir Kassir and ex-Communist leader George Hawi (June 2005), Industry Minister Pierre Gemayel (November 2006) and, on 14 June 2007, Walid Eido, a member of Parliament. See "Lebanese MP dies in Beirut blast" (14 June 2007) <<http://www.bbc.co.uk>> (last accessed 15 June 2007).

25 Serge Brammertz, IIIC Commissioner "Third report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005), and 1644 (2005)" (Beirut, 15 March 2006) S/2006/161, para 79 [IIIC Third Report].

26 UNSC Resolution 1664 (29 March 2006) S/RES/1664/2006, para 1.

27 "Letter dated 14 May 2007 from the Prime Minister of Lebanon to the Secretary-General" (14 May 2007), annexed to UNSC "Letter dated 15 May 2007 from the Secretary-General to the President of the Security Council" (16 May 2007) S/2007/281.

As you will recall, in my aforementioned letter I explained the impasse that had been created by the refusal of the Speaker of parliament to convene a session of parliament to formally ratify the statutes of the Tribunal and the bilateral agreement with the United Nations. As you will have also seen from the communication from members of parliament, a parliamentary majority has expressed its support for the Tribunal and readiness to formally ratify it in parliament if only a session could be convened. Unfortunately, this situation has continued since my last letter, as also reported to you by Nicolas Michel after his visit to Beirut last month.

We view Mr. Michel's most recent visit as a natural and welcome step on your part to enable the Secretariat to assess, at first hand, the prospects of formal domestic ratification of the Tribunal and the views of various parties regarding the Tribunal and its statutes. Mr. Michel's report to you and to the Security Council will have confirmed that (a) for all practical purposes the domestic route to ratification had reached a dead end, with no prospect for a meeting of parliament to complete formal ratification; and that (b) despite their stated support for the establishment of a Tribunal, the opposition has declined to discuss with Mr. Michel any reservations they may have on any of the agreed statutes.

In the light of the above, the Lebanese Government believes that the time has come for the Security Council to help make the Special Tribunal for Lebanon a reality. We therefore ask you, as a matter of urgency, to put before the Security Council our request that the Special Tribunal be put into effect. A binding decision regarding the Tribunal on the part of the Security Council will be fully consistent with the importance the United Nations has attached to this matter from the outset, when the investigation commission was established. Further delays in setting up the Tribunal would be most detrimental to Lebanon's stability, to the cause of justice, to the credibility of the United Nations itself and to peace and security in the region.

For his part, Lebanon's President, Emile Lahoud, warned that establishing the STL Tribunal would infringe Lebanese sovereignty and could trigger fresh violence.²⁸ Nonetheless, the Security Council decided on 30 May 2007 that the STL Agreement appended to Security Council Resolution 1757 would enter into force on 10 June 2007, unless Lebanon notified the Security Council of its ratification by the Lebanese Parliament before that date. This clause was inserted in order to give Lebanese political parties ten days to reach an agreement for its adoption in accordance with constitutional requirements before it entered into force. Absent ratification by Lebanon, the STL Tribunal became a reality on 11 June 2007.²⁹

28 "Letter dated 15 May 2007 from the President of Lebanon addressed to the Secretary-General", above n 10.

29 "Secretary-General Launches Measures to Establish Special Tribunal For Lebanon, in Accordance with Security Council Resolution 1757 (2007)" (11 June 2007) SG/SM/11035, L/3117.

III ESTABLISHMENT OF THE STL TRIBUNAL

The two governing instruments of the STL Tribunal are the Agreement annexed to Security Council Resolution 1757 and the Statute attached to the Agreement. The STL Agreement governs the relations between the UN and Lebanon. Lebanon is *inter alia* under an obligation to cooperate with the STL Tribunal and to provide the necessary immunities to the Tribunal's judges, personnel and defence counsel. The STL Agreement also sets out the rules about the financing of the STL Tribunal, to be shared between Lebanon and the UN.³⁰ Furthermore, the STL Agreement provides an overview of the structure, composition and jurisdiction of the STL Tribunal and enumerates a number of principles of international criminal law commonly found in the statutes of other international and hybrid tribunals.

The STL Statute further details the basics of the operation and functioning of the STL Tribunal, although it will be up to the judges at a later stage to draft the Rules of Procedure and Evidence. The organisation of the STL Tribunal, the rights of the accused and victims and the conduct of the proceedings are described in detail. The STL Statute also contains provisions on the principles of law applicable by the STL Tribunal and its relationship with domestic Lebanese law. General principles of criminal law, such as individual criminal liability, double jeopardy (*non bis in idem*) and amnesty are also enumerated.

In combination, the STL Agreement and Statute aim to secure the best possible conditions to bring to justice the alleged perpetrators, organisers and sponsors of Mr Hariri's and others' assassinations. They provide an able and impartial judicial forum capable of applying existing legal provisions, with respect for the rules of international criminal justice and the rights of the accused. This proposition permeates all the provisions of the STL Agreement and Statute, from the decision to locate the STL Tribunal outside Lebanon to the numerous provisions aiming at preserving the impartiality and independence of the Tribunal and securing the rights of the accused, witnesses and victims. The following sections examine the provisions pertaining to the functioning of the STL Tribunal itself. The rights of the accused and the role of the victims and witnesses are examined in Part IV.

A Composition

The STL Tribunal will comprise four main organs: the Chambers, the Prosecutor, the Registry and the Defence Office.³¹

The Chambers will consist of a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber, with the possibility of setting up a second Trial Chamber, should the mandate of the STL Tribunal be

30 STL Agreement, above n 3, art 5.

31 STL Agreement, above n 3, art 2(1); STL Statute, above n 3, art 7.

expanded, upon request by the UN Secretary-General, to include other assassinations.³² According to the STL Agreement, "no fewer than eleven independent judges and no more than fourteen such judges" will serve as follows:³³

- (a) a single international judge shall serve as a Pre-Trial Judge;
- (b) three judges shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;
- (c) in the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (b) above;
- (d) five judges shall serve in the Appeals Chamber, of whom two shall be Lebanese judges and three shall be international judges; and
- (e) two alternate judges, of whom one shall be a Lebanese judge and one shall be an international judge.

The judges of the STL Tribunal will be appointed to serve for a three-year term and may be eligible for re-appointment for a further period to be determined by the UN Secretary-General in consultation with the Lebanese government. They "shall be persons of high moral character, impartiality and integrity, with extensive judicial experience ... [and] shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."³⁴

Lebanese judges will be appointed by the UN Secretary-General to serve in the Trial Chamber or the Appeals Chamber or as an alternate judge from a list submitted by the Lebanese government, upon the proposal of the Lebanese Supreme Council of the Judiciary.³⁵ International judges will be appointed by the UN Secretary-General to serve as Pre-Trial Judge, Trial Chamber Judges, Appeals Chamber Judges or alternate judge, upon nominations forwarded by states at the invitation of the UN Secretary-General as well as by competent persons.³⁶ The Lebanese government and the UN Secretary-General will consult on the appointment of judges and the UN Secretary-General will appoint judges, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council.³⁷

32 STL Agreement, above n 3, art 2(2).

33 STL Agreement, above n 3, art 2(3).

34 STL Statute, above n 3, art 9(1).

35 STL Agreement, above n 3, art 2(5)(a).

36 STL Agreement, above n 3, art 2(5)(b).

37 STL Agreement, above n 3, art 2(5)(c). The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General (art 2(5)(d)).

Similar conditions apply to the position of Prosecutor, who will be appointed for a renewable three-year mandate by the Secretary-General in consultation with the Lebanese government.³⁸ The Prosecutor must be an individual of "high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases."³⁹ Article 11(2) of the STL Statute emphasises the need for the Prosecutor to act independently and without seeking or receiving instructions from governments or other sources. The international Prosecutor will be assisted by a Lebanese Deputy Prosecutor and "by such other Lebanese and international staff as may be required to perform the functions assigned to him or her effectively and efficiently."⁴⁰

The Registry will ensure the effective and efficient functioning of the Chambers and the Office of the Prosecutor and administer the financial resources and staff of the STL Tribunal.⁴¹ Headed by a UN civil servant appointed by the UN Secretary-General, this organ will also oversee the Victims and Witnesses Unit.⁴²

Impartiality, independence, and competence of the judges, prosecutors and staff are fundamental elements of trials that comply with international standards of fairness and due process. This was clearly recognised by the report of the Secretary-General to the Security Council on 21 March 2006 pursuant to paragraph 6 of Security Council Resolution 1644.⁴³ The appearance of impartiality is as important as actual impartiality where a trial concerns a highly-politicised issue such as the assassination of former Prime Minister Hariri. Accordingly, the participation of international prosecutors and judges alongside Lebanese prosecutors and judges is essential. It is similarly imperative that international judicial personnel of the highest standards of professionalism and integrity be appointed. Individuals with direct experience in criminal trials, and preferably in trials before international criminal tribunals or hybrid tribunals, should be appointed.

Judges must be free to decide cases before them without interference or pressure from any government, international institutions, public opinion or the media. Political authorities must not undermine the perceived impartiality of the STL Tribunal by prejudging the assessment of the facts by the competent judicial authority – especially since extensive media coverage of the Tribunal's operations is expected.

38 STL Agreement, above n 3, art 3; STL Statute, above n 3, art 11(1).

39 STL Statute, above n 3, art 11(3).

40 STL Statute, above n 3, art 11(4).

41 STL Agreement, above n 3, art 4(1).

42 STL Statute, above n 3, art 12(4).

43 "Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005)" (21 March 2006) S/2006/176, para 10.

The Prosecutor's ability to mount a focused prosecution strategy will be crucial to ensure the effectiveness of the trials. The appointment of Lebanese prosecutors to work alongside international colleagues should enable the former to gain further knowledge and expertise in prosecuting serious crimes of terrorism.

B Jurisdiction and Applicable Law

Article 1 of the STL Statute reads as follows:

The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (*modus operandi*) and the perpetrators.

This provision reflects the conclusions of the IIC that the attack of 14 February 2005 formed part of a wider policy or plan to attack civilians in relation to their political activities. The assassination of yet another anti-Syrian public figure on 14 June 2007⁴⁴ might move even further in time the temporal jurisdiction of the STL Tribunal.

Article 1 must be read in conjunction with Article 3 of the STL Statute and with the Secretary-General's report of 21 March 2006. The latter stated that:⁴⁵

The Security Council has provided broad direction regarding personal jurisdiction in its resolutions related to the Commission. In its resolution 1595 (2005), the Council reiterated its call on the Lebanese Government to bring to justice the *perpetrators, organizers and sponsors of the crime*. This wording was echoed by the Lebanese authorities in our consultations, in which they expressed a preference for the tribunal to have personal jurisdiction over all those responsible for the death of Mr. Hariri and 22 others.

Article 3 of the STL Statute relates to individual criminal responsibility, which can arise if the individual has "committed, participated as accomplice, organized or directed others to commit" a crime or "contributed in any other way to its commission".⁴⁶

44 See "Lebanese MP dies in Beirut blast", above n 24.

45 "Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005)", above n 43, para 7 (italics added).

46 STL Statute, above n 3, art 3(1)(a) and (b).

The only question left open is the extent to which officials of other states may be brought before the STL Tribunal. In the statutes of other international or hybrid tribunals, provision has been made regarding immunity of state officials from prosecution. In the absence of any provision on the subject in the STL Statute, it is arguable, based on the judgment of the International Court of Justice in the *Case Concerning the Arrest Warrant of 11 April 2000*, that such individuals could not be prosecuted before the STL Tribunal unless immunity is waived first.⁴⁷

Turning now to the applicable law, in his 21 March 2006 report to the Security Council, the Secretary-General noted that "consultations with the Lebanese authorities made it clear that applying Lebanese substantive criminal law would play an important role in ensuring that the tribunal would have a national dimension."⁴⁸ The STL Statute enumerates as applicable a number of provisions of the Lebanese Criminal Code on "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."⁴⁹ Furthermore, Article 2(b) states that Articles 6 and 7 of the Lebanese Law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle" shall also be applicable, subject to the provisions of the STL Statute.

While Lebanese criminal law should be a key part of the substantive law applied by the STL Tribunal, non-governmental organisations such as Human Rights Watch have urged careful scrutiny of the applicable Lebanese laws to "ensure that they can be interpreted and applied in a manner which is consistent with international fair trial standards."⁵⁰ In particular, Human Rights Watch was concerned by the fact that the "Law dated 11 January 1958" was an extraordinary law introduced in 1958 as a temporary measure to suspend certain provisions of the Penal Code. Its main goals were "to (i) introduce harsher sentences (and notably the death penalty) with respect to certain crimes that may lead to civil war or sectarian violence in Lebanon and (ii) give the military courts (as opposed to the criminal courts) jurisdiction over such crimes."⁵¹ However, it is clear that Article 24 of the

47 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, paras 58-60.

48 "Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005)", above n 43, para 10. See also IIC Third Report, above n 25, para 49, where it was stated that the provisions of Lebanese criminal law which may be relevant to the jurisdiction of the Tribunal include Articles 270, 271, 314, 549 and 549/201 of the Penal Code and Articles 2, 4, 5 and 6 of the "Law dated 11 January 1958".

49 STL Statute, above n 3, art 2(a).

50 Sarah Leah Whitson, Executive Director Middle East and North Africa Division and Richard Dicker, Director International Justice "Establishing the Hariri Tribunal. Letter to Secretary-General Kofi Annan" (Human Rights Watch, 27 April 2006) [HRW Letter], available at <<http://www.hrw.org>> (last accessed 13 June 2007).

51 HRW Letter, above n 50.

STL Statute, which only provides for terms of imprisonment in accordance with the practice of all other international and hybrid tribunals, would prevent application of the death penalty.

Another critique regarding the law applicable by the STL Tribunal relates to the conclusions of the IIC that the attack of 14 February 2005 formed part of a wider policy or plan to attack civilians in relation to their political activities, possibly implying that such attacks might amount to crimes against humanity.⁵² It is, therefore, disappointing that no consideration seems to have been given to the possible inclusion of appropriate international crimes, as defined in the Rome Statute of the International Criminal Court (Rome Statute),⁵³ within the jurisdiction of the STL Tribunal. An amendment to that end is possible, as provided for in the STL Agreement.⁵⁴ Until this happens, the STL Tribunal remains a tribunal set up exclusively to prosecute one or more terrorist crimes.

C Procedures and Penalties

Provisions regarding the operation of the STL Tribunal remain sketchy. In a nutshell, according to Article 18(1) of the STL Statute, the decision of the Prosecutor to lay charges must be reviewed by the Pre-Trial Judge, who shall only confirm the indictment "if satisfied that a prima facie case has been established by the Prosecutor." The Pre-Trial Judge may also, at that stage, "at the request of the Prosecutor, issue such orders and warrants for the arrest or transfer of persons, and any other orders as may be required for the conduct of the investigation and for the preparation of a fair and expeditious trial."⁵⁵ The case will then be heard by the Trial Chamber, with decisions taken by a majority.⁵⁶ Appeals to the Appeals Chamber will be limited to questions of errors of law or errors of fact that have occasioned a miscarriage of justice.⁵⁷ The Appeals Chamber "may affirm, reverse or revise the decisions taken by the Trial Chamber."⁵⁸

Other relevant provisions of the Statute include Articles 19, 20 and 21. Article 19 relates to the weight to be given to the evidence collected by the Lebanese authorities and the IIC prior to the establishment of the STL Tribunal; Article 20 states that the conduct of the hearings ought to be in

52 IIC Third Report, above n 25, paras 70-79.

53 Rome Statute of the International Criminal Court (Rome Statute) (17 July 1998) 2187 UNTS 3; 37 ILM 999.

54 STL Agreement, above n 3, art 20.

55 STL Statute, above n 3, art 18(2).

56 STL Statute, above n 3, art 23. The judgments must be accompanied by a written reasoned opinion, to which any separate or dissenting opinions shall be appended.

57 STL Tribunal, above n 3, art 26(1).

58 STL Tribunal, above n 3, art 26(2). The STL Statute also provides for the possibility for the convicted defendant and the Prosecutor to submit before the Appeals Chamber an application for review of the judgment (art 27(1)). Should the application be deemed to be "meritorious", the Appeals Chamber may either "[r]econvene the Trial Chamber" or retain "jurisdiction over the matter" (art 27(2)).

the interest of justice and in the respect of the rights of the accused; Article 21(1) gives the power to the Chambers to "confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively." The STL Statute also draws on the Rome Statute to incorporate the principles of individual responsibility and command responsibility.⁵⁹ It will be important to see how the Rules of Procedure and Evidence shape up once adopted by the judges of the STL Tribunal after they take office. The only parameters provided by the STL Statute are that the judges shall be "guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial."⁶⁰ Unfortunately, it is far from clear which sources will be applicable and there is only a requirement to consult international standards "as appropriate". Another source of concern is the absence in the STL Statute of specific defences to crimes available before the STL Tribunal. It is hoped the Rules of Procedure and Evidence shed some light on the subject.

The STL Statute provides that penalties imposed on a person found guilty shall be limited to "imprisonment for life or for a specified number of years", having recourse to "international practice regarding prison sentences and to the practice of the national courts of Lebanon."⁶¹ As mentioned earlier, this follows the trend of all international tribunals against the death penalty, while accommodating in other respects the practice of Lebanese courts. The STL Statute further provides for compensation to victims for injury suffered as a result of a crime committed by an accused convicted before the STL Tribunal.⁶² The STL Tribunal may "identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal" and the Registry may "transmit to the competent authorities of the State concerned the judgement finding the accused guilty of a crime that has caused harm to a victim."⁶³ The STL Statute leaves it to the victims to bring a case in a national court or other competent body to obtain compensation. It would surely be easier for the victims if compensation could be paid out of a fund of the same nature as the Trust Fund set up under the Rome Statute.⁶⁴

Finally, the STL Agreement explicitly prohibits Lebanon from granting amnesty or honouring existing ones. The latter point ensures the STL Tribunal will not have to wrestle with the legality of

59 STL Statute above n 3, art 3 (reflecting Rome Statute, above n 53, arts 25 and 28).

60 STL Statute, above n 3, art 28(2).

61 STL Statute, above n 3, art 24(1). The Statute also mentions that the Tribunal must "take into account such factors as the gravity of the offence and the individual circumstances of the convicted person" (Art 24(2), reflecting Rome Statute, above n 53, art 78(1)).

62 STL Statute, above n 3, art 25.

63 STL Statute, above n 3, art 25(1) and (2).

64 Rome Statute, above n 53, art 79.

amnesties, as some other hybrid tribunals have had to do,⁶⁵ and it does reflect the well-settled position of the UN.⁶⁶ However, insertion in the STL Statute of the possibility that the convicted individual might ask for pardon or commutation of sentence in accordance with the law of the state where the prison sentence is served, raises some concern. This will hardly be put to rest by the limitation that this could only occur "if the President of the Tribunal, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law."⁶⁷

IV THE PARTICIPANTS IN THE TRIALS

Given the politically charged nature of the assassinations of Mr Hariri and others since 1 October 2004,⁶⁸ the trials are likely to elicit powerful emotions. The STL Agreement and Statute take every precaution to shield the STL Tribunal from external interference and preserve its independence and integrity. In that respect, both instruments aim to provide respect for the rights of the accused to a fair trial and the participation of witnesses and victims with protection from intimidation and other kinds of pressure based on the highest international standards.

A The Rights of the Accused

The provisions on the rights of the accused in the STL Agreement and Statute guarantee the latter a treatment in line with international human rights principles, including those norms articulated in the International Covenant on Civil and Political Rights⁶⁹ and the European Convention on Human Rights.⁷⁰ The rights of a suspect under investigation include the rights to remain silent, to request free assistance of an interpreter and to be questioned in presence of counsel.⁷¹ Article 16 provides an enumeration of the rights of the accused before the STL Tribunal, including the right to be presumed innocent until proven guilty beyond reasonable doubt, a myriad of minimum guarantees related to the conduct of proceedings and the right to make "statements in court at any stage of the proceedings, provided such statements are relevant to the case at issue."⁷²

65 See Costi, above n 5, 235.

66 The Special Court for Sierra Leone has held that national amnesties granted to perpetrators of crimes against humanity are not recognisable before international courts: Decision No SCSL-04-15-PT-060-II (13 March 2004) para 88, available at <<http://www.sc-sl.org>> (last accessed 15 June 2007).

67 STL Statute, above n 3, art 30.

68 A list of attacks perpetrated between 1 October 2004 and 12 December 2005 is included in IIC Third Report, above n 25, para 55.

69 International Covenant on Civil and Political Rights (ICCPR) (16 December 1966) 999 UNTS 171, art 14.

70 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 223, art 6.

71 STL Statute, above n 3, art 15.

72 STL Statute, above n 3, art 16(5).

A fundamental component of a fair trial is "equality of arms" (*égalité des armes*). Equality of arms refers to the principle that "both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party."⁷³ The accused must, therefore, be afforded a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis the Prosecutor. The entitlement to disclosure of relevant evidence is not, however, an absolute right. For instance, the need to protect witnesses might have to be weighted against the rights of the accused.⁷⁴ In view of the potentially significant international support to be received by the Prosecutor's office, it is imperative that clear prescriptions be incorporated into the Rules of Procedure and Evidence. It will also be important to scrutinize adherence to the principle of equality of arms during the proceedings of the STL Tribunal.

It is as yet unclear how many accused will be brought before the STL Tribunal. The creation of the Defence Office as one of the four organs of the STL Tribunal is an important addition, not least since the seat of the Tribunal will be located outside Lebanon.⁷⁵ The role of the Defence Office is to:⁷⁶

[P]rotect the rights of the defence, provide support and assistance to defence counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice, and appearing before the Pre-Trial Judge or a Chamber in respect of specific issues.

Recent international practice has shown the important role that such an office plays in protecting the rights of the accused. At the Special Court for Sierra Leone, for instance, the Head of the Defence Office advocates with the court administration and before the judges on issues relevant to defence representation and fair trials.⁷⁷

The Defence Office will also maintain a list of qualified counsel who can be assigned to the accused, in the event that the latter cannot afford counsel, and provide resources to counsel

73 *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, para 60 (ECHR).

74 The Rome Statute provides that in some cases evidence may be presented by electronic means or withheld with only a summary provided to the accused: Rome Statute, above n 53, art 68(2) and (5).

75 STL Agreement, above n 3, art 8(1).

76 STL Statute, above n 3, art 13(2).

77 See Rules of Procedure and Evidence of the Special Court for Sierra Leone (16 January 2002), art 45, available at <<http://www.sc-sl.org>> (last accessed 13 June 2007). The Defence Office further helps to ensure that defence counsel have adequate support to prepare and present cases (art 45(B)(iii)). A similar body was also established at the War Crimes Chamber in Bosnia in the form of the Criminal Defence Support Section (generally known by its Bosnian acronym OKO (*Odsjek krivicne odbrane*)), which provides legal assistance to accused in war crimes cases. See Human Rights Watch *Looking for Justice. The War Crimes Chamber in Bosnia and Herzegovina* (Vol 18 No 1(D), February 2006) 22-28.

appointed to the accused.⁷⁸ The future Rules of Procedure and Evidence must also ensure that the right of the accused to counsel of their choosing is sufficiently protected, including where an accused seeks to retain non-Lebanese counsel.

Human rights activists have welcomed the decision of the Lebanese government to accept that any accused convicted of a crime under the STL Statute will be entitled to a right of appeal and that the death penalty will not be imposed by the STL Tribunal. According to Human Rights Watch, under Lebanese law, "decisions passed by the Justice Council – which would potentially have jurisdiction over crimes of this kind – are not subject to appeal."⁷⁹ Furthermore, the death penalty is permissible under Lebanese law for certain offences, a practice opposed by international and hybrid tribunals. Human Rights Watch hopes that the willingness of the Lebanese government "to put aside the death penalty in this context might encourage them to reconsider its application in Lebanon generally."⁸⁰ This enthusiasm is, however, dampened by the inclusion of a provision enabling the STL Tribunal to conduct trials in absentia (that is, in the absence of the accused) when the latter:⁸¹

- (a) Has expressly and in writing waived his or her right to be present;
- (b) Has not been handed over to the Tribunal by the State authorities concerned;
- (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.

The concept of criminal trial in absentia is accepted in a number of legal systems around the world, but rejected in most Anglo-Saxon jurisdictions, except when the accused has absconded or is disrupting the proceedings. The Statute of the International Tribunal for the Former Yugoslavia and the Rome Statute expressly state that the proceedings cannot begin unless the accused is present.⁸² Article 22(4) of the STL Statute does, however, provide that in "the case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement." This is in line with the jurisprudence of the European Court of Human Rights.⁸³

78 STL Statute, above n 3, art 13(1).

79 HRW Letter, above n 50.

80 HRW Letter, above n 50.

81 STL Statute, above n 3, art 22(1).

82 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (25 May 1993), annexed to UNSC Resolution 827 (25 May 1993) S/RES/827/1993, art 21; Rome Statute, above n 53, art 63.

83 *Krombach v France* [2001] ECHR 88.

B Witness and Victim Protection

In his third IIC report to the Security Council, Serge Brammertz stated that "[t]he ability of the Commission and the Lebanese authorities to keep and attract further potential insider witnesses will depend on the ability to protect them."⁸⁴ Effective protection and support for witnesses at risk due to testimony provided during trials are an essential aspect of the STL Tribunal's operations, as are participation of the victims and the protection of their rights. The STL Statute acknowledges these important values by setting up the Victims and Witnesses Unit within the Registry. The Unit will aim to:⁸⁵

[P]rovide, in consultation with the Office of the Prosecutor, measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, and such other appropriate assistance for witnesses who appear before the Special Tribunal and others who are at risk on account of testimony given by such witnesses.

The experience of other international and hybrid tribunals strongly suggests that the creation of the Unit, if adequately resourced, will be an essential component of the successful functioning of the STL Tribunal.⁸⁶

The importance of arrangements for long-term protection and support, including after the STL Tribunal completes trials and operations, is also stressed by a reading of some of the provisions of the STL Agreement.⁸⁷ It will be necessary for the Rules of Procedure and Evidence to make it clear that the Victims and Witnesses Unit should also provide for the national or international relocation of witnesses where appropriate, protection of the witnesses and their family members before, during and after STL Tribunal appearances and protection of witnesses' personal information, and secure transportation to and from the Tribunal. Certain witnesses have on occasion conditioned their cooperation with the IIC investigation upon the premise that their information not be divulged to the Lebanese authorities.⁸⁸ It will be important for the administration of such a witness protection programme to have considerable international involvement and cooperation.

Finally, the STL Statute recognises contemporary trends involving the participation of the victims in the trials. The bombing that took the life of Mr Hariri also killed 22 other individuals and

84 IIC Third Report, above n 25, para 47.

85 STL Statute, above n 3, art 12(4).

86 For instance, a Victims and Witnesses Unit was set up under the Rome Statute, above n 53, art 43(6). See also Statute of the Special Court for Sierra Leone (16 January 2002), annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002), art 16(4), available at <<http://www.sc-sl.org>> (last accessed 12 June 2007).

87 STL Agreement, above n 3, art 21(3); STL Statute, above n 3, art 16(2).

88 IIC Third Report, above n 25, para 47.

injured 135 people. The STL Statute recognises to the victims of the attack, where their personal interests have been affected, the necessary procedural rights in relation to the proceedings: first, the right to present views at appropriate stages of the proceedings "in a manner that is not prejudicial to or inconsistent with the rights of the accused";⁸⁹ second, the right to bring a compensation case before national or international bodies⁹⁰ (although, as alluded to earlier in this paper, this might prove more onerous for the victims than if a fund would have been set up to compensate them for any prejudice suffered by them). This position reflects Lebanese law, which recognises "a role for victims in the criminal process in the form of a right to participate in the proceedings as *partie civile*, with the purpose of obtaining, in the context of the criminal trial, reparations and restitution."⁹¹ This inclusive role for victims also finds support in the Rome Statute, which recognises the rights of victims to present their views through a legal representative⁹² and provides the International Criminal Court with the right to directly award reparation.⁹³

All in all, the measures discussed in this part of the paper are very much in line with the practice of existing international and hybrid tribunals. The drafting of the Rules of Procedure and Evidence applicable in the STL Tribunal, while "giving due consideration to the specific circumstances of the matter at hand", will hopefully build on this practice.⁹⁴

V LEGITIMACY, IMPACT AND LEGACY OF THE STL TRIBUNAL

The creation of the STL Tribunal responds to three important objectives of the international community: combating impunity; promoting reconciliation in Lebanon and in the Middle East; and, acting efficiently and effectively in order to maintain international peace and security.⁹⁵

The rapidity with which the Security Council has moved on this dossier, its members' unanimous conviction of a need to establish the truth, and the endorsement of the STL Agreement through a binding resolution go some way towards legitimising the STL Tribunal. The STL Agreement imposes a legal obligation on all UN member states, including Syria, to cooperate with the STL Tribunal and forges a partnership between the UN and the government of Lebanon aimed at

89 STL Statute, above n 3, art 17.

90 STL Statute, above n 3, art 25.

91 HRW Letter, above n 50.

92 Rome Statute, above n 53, art 68(3).

93 Rome Statute, above n 53, art 75.

94 "Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005)", above n 43, para 8.

95 The French permanent representative to the Security Council, Mr Jean-Marc de la Sablière, insisted on the importance of such an initiative in combating impunity and maintaining peace and in showing that the Council has "assumed its responsibility to help Lebanon": "Security Council Authorizes Establishment of Special Tribunal", above n 7.

securing criminal justice and respect for the rule of law. The explicit support by ten members of the Security Council, including three permanent members, and the abstention by China and Russia and three other states, mainly on formal grounds, demonstrate a consensus in the international community which will enhance the viability of the STL Tribunal. In the end, though, only the effective prosecution of those responsible for Mr Hariri's assassination and other related attacks, with the guarantees of a fair trial, will ensure that the STL Tribunal will fight impunity and promote accountability in Lebanon and in the Middle East.

The legitimacy of the establishment of the STL Tribunal is possibly weakened by concerns as to the legal basis upon which it has been created, the nature and role of the Tribunal as a hybrid tribunal, and its credibility amongst the Lebanese people and the international community in an atmosphere of insecurity and political uncertainty.⁹⁶

The UN Charter entrusts the Security Council with the primary responsibility for the maintenance of international peace and security.⁹⁷ The powers of the Security Council arise from Chapter VII of the UN Charter, which enables the Council to make binding recommendations with which states must comply.⁹⁸ The Security Council may exercise its considerable enforcement powers where it determines there exists a breach of, or threat to, international peace and security.⁹⁹ The mandate of the Security Council is broad, including threats arising from aggression, refusals to act against terrorism and overthrow of democratic governments.¹⁰⁰ There is no review of the Security Council's actions in the current UN framework. The sole limitation faced by the Security Council is that, as one of the main organs of the UN, it must act in accordance with the UN Charter and the general principles of international law. Article 2(7) of the UN Charter explicitly provides that nothing in the Charter authorises the intervention of the UN in matters "essentially within the domestic jurisdiction of a state", but does not prejudice the use of enforcement measures under Chapter VII.¹⁰¹

96 Géraud De Geouffre de La Pradelle, Antoine Korkmaz and Rafaëlle Maison "Qui va inculper les assassins du premier ministre Rafic Hariri? Douteuse instrumentalisation de la justice internationale au Liban" (April 2007) *Le Monde diplomatique* <<http://www.monde-diplomatique.fr>> (last accessed 13 June 2007).

97 UN Charter, above n 1, art 24.

98 UN Charter, above n 1, arts 25 and 103.

99 UN Charter, above n 1, art 39.

100 See Christine Gray "The Use of Force under Chapter VII UN Charter" in Malcolm D Evans *International Law* (OUP, Oxford, 2003) 589, 607.

101 UN Charter, above n 1, art 2(7). It should also be noted that a resolution under Chapter VII must be adopted with the "affirmative vote of nine members including the concurring votes of the permanent members" (art 27(3)).

The five abstaining states in the Security Council raised doubt whether the adoption of a binding resolution was the proper basis for the creation of the STL Tribunal. The Russian representative was of the view that:¹⁰²

[A] basis for adopting the resolution under Chapter VII did not exist. That measure had been invoked in the establishment of the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, which both dealt with international crimes against humanity and genocide, which was not the case for Lebanon. The Council's action today, before negotiations had been concluded in Lebanon, could be seen as interfering in Lebanese affairs.

The decision to invoke the powers under Chapter VII to create the STL Tribunal might be considered as taken hastily or as hiding an ulterior motive.¹⁰³ After all, the STL Tribunal is being set up to deal with a crime governed by existing laws in a sovereign country. The need to internationalise the process is nonetheless understandable. The binding obligation on all states to cooperate with the STL Tribunal will ease its work and lessen the risk that those involved in the trials (judges, prosecutors, defence counsels, staff, witnesses and victims) will be subjected to undue influence and other kinds of pressure. The conclusions of the IIC reports arising from preliminary investigations suggest the involvement of foreign agents, creating conditions for further unrest in the region. Whether this amounts to a breach of the UN Charter or a threat to international peace and security is open to debate.

Turning to the "hybrid" nature of the STL Tribunal, the recent trend to set up such tribunals stems from a desire to circumvent the limitations of purely international or domestic trials in addressing international crimes in post-conflict situations. Such limitations are usually caused by a lack of legitimacy, the absence of public support or limited domestic capacity both in terms of institutional infrastructure and of substantive legal norms. The hybrid model provides solutions to some of these issues by ensuring that foreign and national judges sit alongside "to try cases prosecuted and defended by teams of local lawyers working with those from other countries ... [and] apply domestic law that has been reformed to accord with international standards."¹⁰⁴ The hybrid model has developed where neither an international tribunal nor a domestic court was a politically viable option and has been aimed at improving the capacity-building of the national justice sector by including international norms and personnel, conferring legitimacy, resources, experience and technical knowledge upon them.¹⁰⁵ Finally, the location within the borders of the state is seen as a way of involving the local population in the process. One of the reasons for

102 "Security Council Authorizes Establishment of Special Tribunal", above n 7.

103 De Geouffre de La Pradelle, Korkmaz and Maison, above n 96.

104 Dickinson, above n 5, 295.

105 Dickinson, above n 5, 295.

preferring hybrid tribunals was the fact that purely international tribunals were perceived as being too removed from local populations.¹⁰⁶

The STL Tribunal will operate under circumstances that are similar in many respects to those under which other hybrid tribunals operate, but it will only apply domestic laws to terrorism offences. Unless such offences may be labelled as international crimes, it might be difficult to put the STL Tribunal in the same category as the other hybrid tribunals.¹⁰⁷ Another difference is that the seat of the STL is to be located outside Lebanon, although the possibility exists for it to meet away from its seat when necessary.¹⁰⁸ Security concerns may have dictated this. However, precisely because of the political sensitivity of the trials and the potential for misunderstanding and misrepresentation of the role and functioning of the STL Tribunal, it is important to strive to make the trials accessible and comprehensible to the Lebanese population and wider audiences in the Middle East by developing outreach and communication initiatives to promote transparency and comprehension and to make the work of the STL Tribunal relevant to the people of Lebanon.¹⁰⁹

In the long term, the STL Tribunal has the potential to have a significant impact on the Lebanese judicial system. Even if in contrast to other hybrid tribunals created in recent years, the principal objective of the STL is not to serve as a national justice reform project, the successful cooperation between the Lebanese investigators and the IIC thus far might be a positive sign of things to come.¹¹⁰ It is important that serious consideration be given to designing mechanisms by which skills, experience and expert knowledge brought to the Tribunal by a variety of international personnel can be shared with Lebanese legal and judicial professionals.

The legacy of the STL Tribunal is difficult to predict at this stage. So far, the reaction in Lebanon has divided the country between those who support the international position of the current government and those who oppose this initiative as interference into the domestic affairs of the state. At the international level, the creation of the STL Tribunal has highlighted the precarious situation of Lebanon as a country still haunted by conflict. It has also further isolated Syria, a

106 Costi, above n 5, 224-225.

107 De Geouffre de La Pradelle, Korkmaz and Maison, above n 96.

108 STL Agreement, above n 3, art 8(2).

109 One of the best examples is the extensive outreach programme undertaken by the Special Court for Sierra Leone to explain and clarify its activities to the population of Sierra Leone. See Special Court for Sierra Leone *Fourth Annual Report of the President of the Special Court for Sierra Leone* (Special Court for Sierra Leone, Freetown, 2007) 53-54.

110 Detlev Mehlis, the first IIC Commissioner, noted in his first report dated 19 October 2005 (IIC First Report, above n 17, para 206) that the "Lebanese judicial and security authorities ... have proved during the investigation that with international assistance and support, they can move ahead and at times take the lead in an effective and professional manner."

neighbouring state widely presumed to have played a role in the assassination of Mr Hariri and other Lebanese public figures.

The STL Tribunal will only have a successful outcome if the conditions for impartial, fair and transparent proceedings are present. This is crucial for many reasons. First, scandals surrounding recent UN operations and recurrent accusations of a "double standards" policy pursued by the Security Council have raised questions about the UN's legitimacy and questioned the ethos of the organisation, its agenda and its agents. Secondly, the perception in some circles that the creation of the STL Tribunal was politically driven can only be discarded by a process that will put to rest claims of "victors' justice" – an expression arising from, and still afflicting the reputation of the Nuremberg trials. Thirdly, the STL Tribunal might outlive the Lebanese government that helped create it. It is only by earning the respect of the entire Lebanese political body and the general population that it will receive the backing it needs from the domestic authorities. It is through its operation that the STL Tribunal will have to earn a reputation for impartiality, fairness and transparency if it is to win over those who cast doubt on its legitimacy.

