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Power and Perception: The Special Tribunal for Lebanon

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INTRODUCTION

On March 1, 2009, the long-anticipated Special Tribunal for Lebanon (“Tribunal,” also known as “STL”) finally opened its doors. The Tribunal, established to try the killers of former Lebanese Prime

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Minister Rafiq Hariri, has been hailed as a triumph against impunity and “a decisive milestone” in the quest for justice.¹ Nonetheless, the Tribunal has been fraught with complications since the outset and faces significant challenges as it forges ahead. The use of the U.N. Security Council’s Chapter VII powers to implement the Tribunal, coupled with an exceedingly narrow mandate relying solely on domestic law, has led to criticisms that the Tribunal is partial at best and illegal at worst.² Moreover, with a contentious history of United Nations (U.N.) involvement, including an extensive and controversial investigation into the assassination of Mr. Hariri, the Tribunal risks *appearing* biased. The appearance of partiality in turn jeopardizes the support and acknowledgment of the very people the Tribunal is intended to serve.³

As the Tribunal moves forward, it must convince the Lebanese that it is a fair and independent judicial body concerned with upholding justice and ending impunity. To do this, the Tribunal must: (1) overcome the controversial history leading up to its opening by putting forth indictments that sound in truth and solid evidence; (2) dispel perceptions that it is the product of political manipulations rather than a true desire to see justice done; and (3) find a way to embrace the Lebanese people in a way that allows them to participate fully in the transition to justice and peace.

This Article seeks to explore the creation of the Tribunal, the political climate in which it arose, and the various obstacles facing the Tribunal, in the context of international transitional justice.⁴ Part I

1. *Start of Lebanon Tribunal ‘Decisive Milestone’ in Pursuit of Justice – Ban*, UN News Centre, Mar. 1, 2009, <http://www.un.org/apps/news/story.asp?NewsID=30052&Cr=Lebanon%20&Cr1=tribunal>.

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

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

4. The 2004 United Nations Secretary-General’s *Report on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* defines transitional justice as:

[T]he full range of processes and mechanisms associated with a

explores the background of the Tribunal's creation, including the early U.N. investigation into the assassination of Mr. Hariri and the ultimate decision of the U.N. Security Council to impose the Tribunal upon a deeply divided Lebanese populous. Given this background, Part II examines the legality and legitimacy of the Tribunal. First, Part II.A analyzes the various legal novelties of the Tribunal charter in comparison to other international tribunals and the potential legal obstacles the Tribunal will face in carrying out its mandate. Part II.B then explores the difficulties facing the Tribunal in establishing legitimacy among the Lebanese population for whom it was ostensibly created. This latter exploration stems from the growing recognition among international justice scholars and activists that establishing lasting peace and security through transitional justice mechanisms requires national involvement and understanding.⁵ Thus, this Article posits, if the Tribunal is to take its place among the growing legacy of international tribunals or have any lasting effect on Lebanese peace and stability, it must recognize its handicaps and proceed with vigilance.

I. BACKGROUND OF THE TRIBUNAL: A CIRCUITOUS ROUTE

A. Assassination

The brutal February 14, 2005 assassination of former Lebanese Prime Minister Rafiq Hariri, which also resulted in the deaths of twenty-

society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.

The Secretary-General, *Report on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *U.N. Rule of Law and Transitional Justice*]. Similarly, the International Center for Transitional Justice defines international transitional justice as "a response to systematic or widespread violations of human rights . . . [that] seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy." See Int'l Ctr. for Transit'l Justice, *What is Transitional Justice?*, <http://www.ictj.org/en/tj/>. As such, transitional justice is "justice adapted to societies transforming themselves after a period of pervasive human rights abuse." *Id.*

5. See Crane, *supra* note 3; see also *U.N. Rule of Law and Transitional Justice*, *supra* note 4, at 1 ("We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations.").

two people, shook Lebanon to its core. Assassination attempts and arbitrary bombings were not infrequent in Lebanon,⁶ yet no one as prestigious and prominent as Hariri had been targeted, let alone killed, since the Lebanese Civil War.⁷ The world took notice; officials from Western countries decried the murder and pledged solidarity with the Lebanese people.⁸ Indeed, it is rumored that then French President Jacques Chirac, Hariri's close personal friend, announced his intention to set up an international tribunal to punish the killers as early as the day of the funeral, which he attended.⁹

6. Aside from the fifteen-year civil war that ravaged Lebanon from 1975-1990, in which car bombs and assassinations were frequent occurrences, the early 2000s witnessed a number of seemingly politically motivated assassinations of former politicians and military men. For example, former Christian Lebanese Forces commander and parliamentarian Elie Hobeika was killed in January 2002; Palestinian activist Mohammad Jihad Jibril was killed by a car bomb in May 2002; a Hezbollah member Ali Hussein Salah was killed in August 2003; and Hezbollah member Ghaleb Awali was killed in July 2004. See Amy Zalman, *Timeline: Assassination History of Lebanon Since 2000*, ABOUT.COM, <http://terrorism.about.com/od/originshistory/tp/Lebanon-Assassination-Timeline.htm> (last visited Apr. 10, 2010). On October 1, 2004, a car bomb almost killed Cabinet minister Marwan Hamadeh in what is now considered the onset of the string of assassinations surrounding Hariri's death. See *Lebanese Minister Marwan Hamade Wounded in Beirut Blast*, DAILY STAR ONLINE, Oct. 1, 2004, http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=8912.

7. Revered or despised, Hariri was a central part of Lebanon's recent rehabilitation and recovery from its fifteen-year civil war. Through his joint-stock company, Solidere, he single-handedly redeveloped the once-booming downtown area, giving himself both regulatory authority and eminent domain powers under an agreement with the government made while he was still Prime Minister in 1994. See Richard W. Carlson, *Mr. Hariri Goes to Washington*, WKLY. STANDARD, May 12, 2003, available at 2003 WL 13314883. As both a businessman and politician, he was well known among world leaders. He maintained notoriously close ties with both Paris and Washington. See *id.* at 3-4; see also Patrick Seale, *Chirac, Hariri, and the International Court*, MIDDLE E. ONLINE, Apr. 30, 2007, <http://www.middle-east-online.com/english/Default.pl?id=20537>.

8. See, e.g., *World Denounces Beirut Bomb Blast*, MERCURY (Australia), Feb. 16, 2005, at 12 ("Leaders from the White House to the Gaza Strip have denounced the Beirut bomb blast that killed former Lebanese prime minister Rafik Hariri."); see also Robert Bridge, *Lebanon Mourns After Beirut Bomb*, MOSCOW NEWS (Russia), Feb. 16, 2005, at 6; *Death of Hariri: Abdullah, Najib Convey Condolences*, NEW STRAIT TIMES (Malaysia), Feb. 16, 2005, at 2; Editorial, *Hariri's Assassination*, NATION (Pakistan), Feb. 15, 2005 (LEXIS).

9. See Seale, *supra* note 7, at 1.

Hariri's murder was immediately condemned by those inside and outside Lebanon as an act of aggression by Syria,¹⁰ whose government had increasingly butted heads with Hariri and his allies over the country's continued military presence in Lebanon.¹¹ As early as February 15, the White House insinuated that Syria had orchestrated the attack, saying that the bombing appeared to have been "an attempt to stifle . . . efforts to build an independent, sovereign Lebanon free of foreign domination."¹² That very day, the United States withdrew its Ambassador from Syria.¹³ France immediately called for an international inquiry into the attack.¹⁴ Within Lebanon, the rift between pro-Syrian and anti-Syrian factions, which had been growing over the last two years, widened. Members of the anti-Syrian opposition in Lebanon publicly blamed Syria for the bombing and appealed to Western powers to compel the withdrawal of Syrian troops.¹⁵ Simultaneously, pro-Syrian groups, largely centered around Hezbollah, the Lebanese Shiite militia, rallied around Syria in opposition to what they deemed to be Western interference into internal affairs.¹⁶

10. See Brian Knowlton, *Bomb Blast Kills Ex-Leader of Lebanon: Finger Pointing Begins as Nations Ask, 'Who?'*, INT'L HERALD TRIB., Feb. 15, 2005, at 1 ("Word of the assassination provoked a burst of finger-pointing directed at Syria . . .").

11. The assassination of Hariri took place amidst a background of growing tension between pro- and anti-Syrian forces in Lebanon. The tension came to a head in late 2004 when Syria pressured the Lebanese Parliament to extend the mandate of then Lebanese President Emile Lahoud, considered a Syrian "stooge," by another three years. After failed negotiations with the Syrians to stop the amendment from passing, Hariri, then Prime Minister, eventually voted in favor of the amendment. The next week he resigned from his post. He was killed six months later. See, e.g., Weedah Hamzah, *Events in Lebanon Surrounding the Killing of Rafik Hariri*, TOPNEWS.IN, Feb. 27, 2009, <http://www.topnews.in/events-lebanon-surrounding-killing-rafik-hariri-2132107>.

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

13. Press Release, U.S. State Department, U.S. Recalls Ambassador to Syria (Feb. 15, 2005), available at <http://2001-2009.state.gov/r/pa/prs/ps/2005/42305.htm>.

14. See Knowlton, *supra* note 10.

15. See Neil MacFarquhar, *Behind Lebanon's Upheaval, 2 Men's Fateful Clash*, N.Y. TIMES, Mar. 20, 2005, § 1, at 1.

16. On April 26, 2005, Lebanese and international pressures led Syria to withdraw its troops. See Hassan M. Fattah, *Last Syria Force Leaves Lebanon*, N.Y. TIMES, Apr. 27, 2005, at A1.

The United Nations became involved in the investigation almost immediately, largely at the insistence of the United States and France, who urged the Security Council to take measures “to punish those responsible for this terrorist attack.”¹⁷ The day following the assassination, the Security Council linked it to the “fight against terrorism” and called on the Lebanese government to “bring to justice the perpetrators, organizers and sponsors of this heinous terrorist act.”¹⁸ On February 25, following discussions with the Lebanese government, the U.N. Secretary-General dispatched Peter FitzGerald, an international investigator, to head a fact-finding mission in Beirut and submit a report.¹⁹ Stopping just short of pointing the finger at Damascus, the report included anonymous testimonies that Syrian President Bashar Al-Assad had threatened Hariri just months before the assassination²⁰ and determined that Syria bore the primary responsibility for “the political tension that preceded the assassination.”²¹ Moreover, the report concluded that the Lebanese investigation process “suffer[ed] from serious flaws and ha[d] neither the capacity nor the commitment to reach a satisfactory and credible conclusion.”²² Due to this inadequacy, it recommended the creation of an international investigation commission and the removal of certain leaders of the Lebanese security services whom it viewed as an impediment to any successful investigation.²³

B. The International Independent Investigation Commission: From Mehlis to Brammertz

The Security Council adopted Resolution 1595 on April 7, 2005, calling for the establishment of the International Independent

17. See Khairallah, *supra* note 2, at 590.

18. *Statement by the President of the Security Council*, U.N. Doc. S/PRST/2005/4 (Feb. 15, 2005), ¶ 5.

19. Nadim Ladki, *UN Team in Lebanon to Probe Hariri Death*, GLOBE & MAIL (Canada), at A14 (Feb. 26, 2005).

20. Peter FitzGerald, *Report on the Mission of Inquiry into the Circumstances, Causes and Consequences of the 14 February Beirut Bombing*, ¶¶ 9-10, delivered within a Letter from the Secretary-General to the Security Council, U.N. Doc. S/2005/203 (Mar. 24, 2005) [hereinafter FitzGerald Report 1]. Specifically, the report noted that a number of sources heard from Mr. Hariri that Assad had threatened to “break Lebanon over [his] head.” *Id.* ¶ 10.

21. *Id.* ¶ 61.

22. *Id.* at Executive Summary.

23. *Id.* ¶ 62.

Investigation Commission (UNIIC) to take over the investigation.²⁴ The UNIIC's mandate was written broadly as "assist[ing] the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers, and accomplices."²⁵ International investigator Detlev Mehlis was appointed Commissioner of the UNIIC and was given a three-month deadline (with an optional three-month extension at the discretion of the Secretary-General) to deliver a report on his findings.²⁶ The Lebanese government played no part in the formation of the Commission, other than drafting a letter to the Security Council expressing its approval of the investigation.²⁷ On June 13, 2005, the Lebanese government signed a Memorandum of Understanding with the Commission, agreeing that the government would assist but not interfere with the Commission's investigation.²⁸

The Mehlis Commission faced tremendous temporal and functional obstacles at its outset. Regarding the former, by the time the Commission started its investigation, four months had passed since the bombing, allowing perpetrators plenty of time to destroy evidence or collude with each other.²⁹ Time restraints were compounded by the need to organize files and evidence as well as research Lebanese criminal law and procedure.³⁰ A full-scale crime scene investigation was not conducted until the third month of the mandate, almost seven months after the bombing.³¹

In addition to its temporal constraints, the very function of the Commission placed upon it enormous burdens. The Mehlis Commission had to contend not only with the massive expectations of the international community but also that of the divergent Lebanese

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

25. S.C. Res. 1595, ¶ 1, U.N. Doc. S/RES/1595 (Apr. 7, 2005).

26. *UN investigator promises in-depth probe of fatal attack on former Lebanese premier*, UN.ORG, May 24, 2005, available at 2005 WLNR 82383222. Mehlis ultimately delivered two reports: the first in October 2005 and the second in December 2005. See *infra* notes 27, 59.

27. See Detlev Mehlis, UNIIC Commissioner, *Report of the International Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005)*, ¶ 3, delivered within a Letter from the Secretary-General to the Security Council, U.N. Doc. S/2005/662 (Oct. 20, 2005) [hereinafter Mehlis Report 1].

28. *Id.* ¶ 5.

29. *Id.* ¶ 88.

30. *Id.* ¶ 91.

31. *Id.* ¶ 93.

population, many of whom felt the FitzGerald Report had been cursory and incomplete.³² The FitzGerald Report's inclusion of and reliance on uncorroborated witness statements from anonymous sources³³ further alienated many Lebanese, who denounced it as "alien to reality" and "not based on documents or evidence."³⁴ Pro-Syrian groups argued that the report was "political" rather than "of a technical-criminal nature."³⁵ Simultaneously, there were concurrent pressures from the United States and France, who had worked hard to ostracize Assad and hinted about their hopes that an investigation would topple the Syrian regime, not least of all as a means of controlling infiltration of Syrian insurgents into Iraq.³⁶

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

33. See FitzGerald Report 1, *supra* note 20, ¶ 3 (noting that many persons interviewed had requested anonymity). Notably, the report gives no named sources, nor objective evidence for the anecdote about Assad threatening Hariri, aside from a conclusion that "the received testimonies corroborated each other verbatim." *Id.* ¶ 9.

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

35. Al-Ghoul, *supra* note 32.

36. See Nicholas Blanford, *Hariri Trial a Bellwether of Mideast Clout*, CHRISTIAN SCI. MONITOR, Apr. 19, 2007, at 6 ("Analysts say Washington is gambling on Syria being held responsible for Hariri's murder, believing that indictments against senior Syrian officials will effectively cripple the Damascus regime."); Seale, *supra* note 7 (noting that Syria's opponents in Lebanon, "backed by France and the United States" saw the tribunal "not simply as a means to avenge Hariri but also as a way to assert Lebanon's sovereignty by excluding Syrian influence altogether from Lebanese affairs"); Flynt Leverett, *Illusion and Reality*, AM. PROSPECT, Aug. 13, 2006, available at <http://www.propsect.org/cs/articles?articleid=11859> (stating that the Bush Administration had worked since 9/11 to uproot the Syrian regime through "diplomatic isolation and political pressure"); Esther Pan & Eben Kaplan, *Background: Syria: U.S. Policy Options*, COUNCIL ON FOREIGN REL., available at <http://www.cfr.org/publication/8551/syria.html> (updated Sept. 15, 2006) (noting that "some advocates of isolating Syria seem to be holding out hope that the ongoing UN investigation into the Hariri assassination will condemn and possibly bring down Assad's regime"); Eshan Ahari, *In Syria, Regime Change by Other Means*, ASIA TIMES, Sept. 16, 2005, available at http://www.atimes.com/atimes/Middle_East/G116Ak01.html (describing the Bush Administration as using the Hariri investigation to "oust" Assad); Farah Stockman & Thanassis Cambanis, *US Limits Contact with Syrian Leader*, BOSTON GLOBE, Nov. 8, 2005, at A8 (noting that the United States had "cut off nearly all contact with the Syrian government as the Bush administration steps up a campaign to weaken and isolate President Bashar Assad's government"); Joshua Hammer, *Getting Away with Murder?*, ATLANTIC, Dec. 2008, at 2, available at <http://www.theatlantic.com/doc/200812/hariri-assassination/2>; Nada Bakri, Majdoline Hatoum & Nafez Qawas, *Full International Backing for Lebanon, Isolation for Syria*, DAILY STAR, Sept. 20, 2005 ("The U.S. and

Against this backdrop, Mehlis's first report ("Mehlis Report"), issued October 21, 2005, set off a maelstrom within Lebanon and deepened the Lebanese political divide.³⁷ Detailing an intricate web of conspiracies reaching up to the highest rung of the Syrian regime, the report pointed the finger squarely at Syria, finding that there was probable cause to believe that the decision to assassinate Hariri "could not have been taken without the approval of top-ranked Syrian security official[s] . . ." ³⁸ While hailed as vindication by the pro-Hariri camp, the report was denounced by those already suspicious of U.N. motivations as incredible and lacking professionalism.³⁹

Indeed, despite its dramatic conclusions, the report quickly began to unravel. Like its predecessor, the Mehlis Report relied chiefly on the testimony of a handful of witnesses, many of whom turned out to be unreliable and some of whom later publicly recanted their testimony.⁴⁰ Physical evidence failed to corroborate the statements.⁴¹ Yet, at Mehlis's recommendation, the Lebanese government arrested three of Lebanon's high ranking former security generals and one former parliamentarian, all

France increased Syria's isolation as it demanded that it stop all meddling in Lebanon and Iraq . . ."); Editorial, *Accountability for Syria*, WASH. POST, Oct. 22, 2005, at A20 ("The United States has plenty of reasons of its own to bring pressure on Mr. Assad, including his support for foreign terrorists and Sunni insurgents in Iraq.").

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

38. Mehlis Report 1, *supra* note 27, at 43 (Conclusion).

39. ICG, *supra* note 37, at 7 (noting that "it is hard to find a Lebanese (or Arab) who does not entertain conclusive views about the German prosecutor's work—meticulous and unimpeachable evidence for some, politicised and hearsay evidence for others"). The divide also fell along sectarian lines: "more than 80 per cent of Sunnis and Christians trust Detlev Mehlis's investigation, but two-thirds of Shiites did not." *Id.* at 8.

40. Georg Mascolo, Holger Stark & Volker Windfuhr, *The Hariri Murder Investigation: Kofi Annan's Syria Problem*, DER SPIEGEL, Dec. 19, 2005, available at <http://www.spiegel.de/international/spiegel/0,1518,391437,00.html>. Der Spiegel reported that some of the witnesses were apparently paid for their testimony. See Robert Parry, *The Dangerously Incomplete Hariri Report*, CONSORTIUMNEWS.COM, Oct. 23, 2005, available at <http://www.consortiumnews.com/2005/102205.html> (reporting that the key witness called his brother in Paris shortly after testifying and declared "I've become a millionaire"). Another key witness recanted his accusations of Syria in an "outlandish" public statement, alleging he had been "kidnapped, tortured, and offered \$1.3 million in bribes by Lebanese officials" to blame Syria. See Michael Slackman, *Syria Attacks Evidence as U.N. Case Turns More Bizarre*, N.Y. TIMES, Dec. 7, 2005, at A3.

41. See Mascolo, *supra* note 40.

pro-Syrian, based solely on witness testimony.⁴² The men remained detained without formal charges as the investigation's main suspects for almost four years.⁴³

Mehlis's reliance on uncorroborated witness statements was further exacerbated by a seeming lack of understanding of Lebanese politics. This failing was best illustrated by his use of witness statements to corroborate President Assad's alleged threat to Hariri, something the report repeatedly emphasized as indicative of the Syrian president's involvement.⁴⁴ Relying on the testimony of six Lebanese witnesses,⁴⁵ the report expanded on the FitzGerald finding that President Assad threatened Hariri's life just months before the assassination.⁴⁶ While Mehlis acknowledged differing accounts between Syrian and Lebanese witnesses, he credited only the Lebanese reports—notwithstanding that not a single Lebanese witness had actually attended the meeting.⁴⁷ Rather, all witnesses recounted to Mehlis their discussions with Hariri after he attended the meeting, in which Hariri allegedly told them what had transpired.⁴⁸ Moreover, the testimonies all came from staunchly

42. See U.N. Human Rights Council [UNHRC], *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Opinions adopted by the Working Group on Arbitrary Detention*, 72 (¶ 7), 73-75 (¶¶ 10-22), 76 (¶ 26), U.N. Doc. A/HRC/10/21/Add.1 (Feb. 2, 2009) (Opinion 37/2007 (Lebanon)).

43. See *id.* at 75, ¶ 22. The U.N. Working Group on Arbitrary Detention determined in 2007 that the detention of the four men was arbitrary, noting that they had been kept in isolation “without light and ventilation” for more than a year and a half. *Id.* at 72-73, ¶¶ 7, 9, and 80, ¶ 47. The men remained in jail for nearly four years, until April 29, 2009, when the Tribunal ordered them released after a key witness recanted a statement alleging that the generals had a hand in planning the assassination. Raed Rafei, *Lebanon Frees Suspects in Hariri Case*, L.A. TIMES, Apr. 30, 2009, at A26.

44. Mehlis Report 1, *supra* note 27, at ¶¶ 25-31.

45. Including Saad Hariri, Hariri's son, and Walid Jumblatt, Marwan Hamadeh, Bassem al-Sabae, Ghazi al-Aridi, and Gibran Tuani, who had all allied with Hariri against Syria before the assassination, and “were some of the loudest anti-Syrian politicians in Lebanon.” Sami Moubayed, *The Ball is Now in Syria's Court*, ASIA TIMES, Oct. 25, 2005, available at http://www.atimes.com/atimes/Middle_East/GJ25Ak02.html. Their biases, though apparently unrecognized by Mehlis, would have been obvious to any Lebanese. *Id.*

46. *Id.* ¶ 26.

47. On the other hand, Mehlis summarily discredited alternative accounts provided by Syrian officials who attended the meeting as appearing rehearsed. Mehlis Report 1, *supra* note 27, at ¶ 34. Though they may very well have been, the double standard left critics questioning the reliability of the report as a whole. See Moubayed, *supra* note 45.

48. See Mehlis Report 1, *supra* note 27, at 6-8; see also Moubayed, *supra* note 45.

anti-Syrian Lebanese activists, including Hariri's own son, leading some critics to point to the testimonies as proof of the pro-Hariri camp's interference in the investigation.⁴⁹ At one point, Mehlis himself seemed to acknowledge this fear. In a comment that was later redacted from the October report, Mehlis noted that "the investigation had been influenced and manipulated at times by politicians in Lebanon."⁵⁰

In addition to issues of credibility, the report suffered from apparent violations of basic principles of criminal investigation.⁵¹ Although the investigation was not complete, the report released the names of both witnesses and suspects. Aside from potentially violating the basic tenet of confidentiality,⁵² the decision to publish the names put both suspects and witnesses in danger.⁵³ Gibran Tueni, a prominent Lebanese journalist and outspoken critic of Syria, was later killed by a car bomb after being named in the report.⁵⁴

Despite the critical evidentiary gaps in the report and its preliminary nature,⁵⁵ the report had far-reaching consequences. Within two weeks of its release, the Security Council used the report to take further steps to force Syria to comply with the investigation.⁵⁶ Under Resolution 1636, the Security Council invoked its Chapter VII powers to require Syria to "fully and unconditionally" cooperate with the Mehlis investigation or face "further action."⁵⁷ This was the first time in the investigation

49. See, e.g., Moubayed, *supra* note 45.

50. See Parry, *supra* note 40. Mehlis reiterated this sentiment following his resignation from the Commission in December 2005, shortly after he released his second report. Although the second report largely reiterated the first and recommended greater sanctions against Syria to force its cooperation, he complained that "every step his team took was politicized—sometimes by the pro-Syrian politicians, sometimes by the Hariri camp—at times prompting Mehlis to wonder whether his investigation was doing the country more harm than good." See Mascolo, *supra* note 40.

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

52. See *id.* at 590-91 (noting that the naming of suspects and witnesses likely constituted a breach of confidentiality).

53. *Id.* at 591 (adding that Mehlis's successor, Serge Brammertz, in his report of June 10, 2006, deemed it "inappropriate to disclose specific information at this stage of the investigation" for security and confidentiality reasons).

54. *Id.*

55. See *id.* at 591.

56. S.C. Res. 1636, ¶ 11(b), U.N. Doc. S/Res/1636 (Oct. 31, 2005). They did so in response to Mehlis's complaints that Damascus was refusing to cooperate. See Mehlis Report 1, *supra* note 27, at ¶ 35.

57. S.C. Res. 1636, ¶ 11(b), U.N. Doc. S/Res/1636 (Oct. 31, 2005). Previous versions drafted by the United States including specific threats of economic sanctions

process that the U.N. had invoked Chapter VII powers, determining “that this terrorist act and its implications constitute a threat to international peace and security.”⁵⁸

Mehlis produced one other report, issued in December 2005, which largely reiterated the first.⁵⁹ Like the first report, the December report was accompanied by controversy. Indeed, just prior to the release of the second report, one of Mehlis’s key witnesses recanted his prior testimony implicating Syrian officials, claiming Lebanese authorities had coerced him.⁶⁰ While Mehlis defended his witnesses, accusing Syria of interfering in the investigation,⁶¹ analysts began to question Mehlis’s judgment.⁶²

At this stage, it is unclear whether or not the Mehlis reports have any legal value.⁶³ Mehlis was replaced as Commissioner in January 2006 by Serge Brammertz, a Belgian prosecutor who reportedly accused Mehlis of being “carried away by anti-Syrian sentiment” and having “raced ahead under international pressure to implicate Syria, without checking the admissibility of the sources.”⁶⁴ Over the next two years, Brammertz released seven reports, all far more general and “technical” than

were contested by Russia and China. ALFRED P. PRADOS, CRS ISSUE BRIEF FOR CONGRESS: LEBANON 6 (Mar. 16, 2006), available at <http://www.fas.org/sgp/crs/mideast/IB89118.pdf>.

58. S.C. Res. 1636, *supra* note 56, at 3; see Khairallah, *supra* note 2, at 591 (noting that Resolution 1636 determined “in retrospect” that the assassination constituted a threat to international peace and security, justifying Chapter VII application).

59. Detlev Mehliis, UNIIIC Commissioner, *Second Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 and 1636 (2005)*, delivered within a letter from the Secretary-General to the Security Council, U.N. Doc. S/2005/775 (Dec. 12, 2005) [hereinafter Mehliis Report 2].

60. *Id.* ¶ 30; see also Michael Slackman, *Syria Attacks Evidence as U.N. Case Turns More Bizarre*, N.Y. TIMES, Dec. 7, 2005, at A3.

61. See Mehliis Report 2, *supra* note 59, ¶¶ 9, 30.

62. See Slackman, *supra* note 60, at A3 (noting that a European official believed the key recanting witness “definitely has a credibility problem” and added: “You cannot trust this guy. How did Mehliis trust this guy?”); see also Hammer, *supra* note 36, at 2 (quoting a U.N. insider as characterizing another one of Mehliis’s key witness as a “nut case” who “couldn’t be trusted”).

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

64. See Hammer, *supra* note 36, at 2; see also Serge Brammertz, *Third Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005), and 1644 (2005)*, delivered within a letter from the Secretary-General to the Security Council, ¶¶ 6, 8, 13, U.N. Doc. S/2006/161 (Mar. 14, 2006).

Mehlis's, focusing on forensic evidence and crime scene analysis.⁶⁵ He downgraded "suspects" to "persons of interest" and refrained from providing details, cutting off the press entirely.⁶⁶ His discretion appealed to Syria, who agreed to talk with him under the condition of secrecy.⁶⁷

C. *Talk of the Tribunal*

As the U.N. investigation proceeded, violence continued to terrorize the Lebanese. Between February 2005, when the assassination occurred, and December 2005, targeted attacks against prominent leaders and spokespeople left at least five dead and several severely wounded.⁶⁸ The attacks almost exclusively targeted anti-Syrian proponents, including several journalists and politicians.⁶⁹ The assassination of anti-Syrian politician Gibran Tueni just hours after the second Mehlis report was released strengthened the convictions of many Lebanese that Syria was to blame for the attacks.⁷⁰

The violence rekindled talk of establishing an international tribunal, an idea that had been tabled pending the outcome of the U.N. investigation.⁷¹ On December 13, 2005, then Lebanese Prime Minister Siniora wrote to the Secretary-General requesting the establishment of a "tribunal of an international character" to try those responsible for the

65. *Id.*

66. *Id.*

67. *New Approach to Hariri Probe, Say Analysts*, IRIN, Feb. 27, 2006, <http://www.irinnews.org/Report.aspx?ReportId=26156>.

68. Specifically, journalist Samir Kassir was killed in a car bombing on March 2, 2005; on June 21, 2005, former Lebanese Communist Party leader Geroge Hawi was killed; Defense Minister Elias Murr was wounded and two other people were killed in a car bomb in July 2005; May Chidiac, a prominent journalist, was maimed by a car bomb on September 25, 2005; and Gibran Tueni was killed December 12. *See* Hamzah, *supra* note 11.

69. *See id.*

70. *See Anger in Beirut as Leading Critic of Syria Murdered*, IRISH TIMES, Dec. 13, 2005, at 11; *see also Robert Fisk on the Murders of Gibran Tueni, Rafik Hariri, and the Changing Tide in Lebanon*, DEMOCRACY NOW, Dec. 14, 2005, available at http://www.democracynow.org/2005/12/14/robert_fisk_on_the_murders_of.

71. *See* Hammer, *supra* note 36, at 3.

Hariri assassination.⁷² The Security Council acknowledged the letter two days later and asked the Secretary-General to assist the Lebanese government in determining what it would need in order to establish such a tribunal.⁷³

Following rounds of discussions between the Lebanese government and the U.N., the Secretary-General issued a report on March 21, 2006, recommending the establishment of a “mixed tribunal” through an agreement between Lebanon and the U.N.⁷⁴ One week later, the Security Council passed Resolution 1664 urging the Secretary-General to negotiate an agreement with the Lebanese government “aimed at establishing a tribunal of an international character.”⁷⁵ As per the understanding, the U.N. would draft a proposal to establish the Tribunal and then present it to the Lebanese cabinet for approval. The Lebanese cabinet would then pass it on to Parliament for final approval.⁷⁶ As such, the process resembled previous U.N. negotiations with Sierra Leone, East Timor, and Kosovo to establish treaty-based “hybrid” or “internationalized” tribunals.⁷⁷

72. Fuad Siniora, Annex to the Letter dated 13 December 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General, U.N. Doc. S/3005/783 (Dec. 13, 2005). Citing Tueni's assassination, Siniora also asked that the Commission's mandate be expanded to include a series of other assassination attempts and attacks that had plagued the country, both before and after Hariri's murder, and that were seemingly similarly motivated. *Id.*

73. See S.C. Res. 1644, U.N. Doc. S/Res/1644 (Dec. 15, 2005).

74. Secretary-General, *Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005)*, ¶ 5, delivered to the Security Council, U.N. Doc. S/2006/176 (Mar. 21, 2006). The Secretary-General emphasized that consultations with Lebanese authorities made clear that security concerns strongly suggested placing the tribunal outside of Lebanon, though the application of Lebanese substantive criminal law would play an important role in “ensuring that the tribunal would have a national dimension.” *Id.* at xx.

75. S.C. Res. 1664, ¶ 1, U.N. Doc. S/RES/1664 (Mar. 29, 2006).

76. Colum Lynch, *U.N. Proposes a Tribunal on Lebanon Assassination*, WASH. POST, Nov. 11, 2006, at A21.

77. See Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 245 (2003) (noting that hybrid tribunals, as opposed to international tribunals, are designed to “share judicial accountability jointly between the state in which it functions and the U.N.”); Khairallah, *supra* note 2, at 594; see also Parinaz Kermani Mendez, *The New Wave of Hybrid Tribunals: a Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?*, 20 CRIM. L.F. 53, 63 (2009), available at <http://www.springerlink.com/content/45845rv448p5484t/fulltext.pdf> (“The hybrid approach appreciates the need for nations to take justice into their own hands while acknowledging their limited capacity to do so.”).

The process faced obstacles from the outset. The U.N. presented a draft statute of the Tribunal to the Lebanese government on November 10, 2006, at a time of heightened political tension in Lebanon. Already splintered by disagreement over parliamentary issues, such as Hezbollah's demands for a greater share of political power in the cabinet, the government became polarized over the Tribunal. On November 11, Hezbollah resigned from the cabinet, citing the failure of the power-sharing negotiations and the unexpected announcement by the pro-Hariri camp that a vote on the U.N. draft resolution would be held two days later.⁷⁸ Yet, despite Hezbollah's contention that the absence of Shiite representation extinguished the government's constitutional legitimacy,⁷⁹ the government moved forward with negotiations. Without the six Hezbollah members, the cabinet approved the U.N. draft for the Tribunal on November 12, 2006, by a two-thirds majority.⁸⁰

The government still needed Parliament approval, however, a feat that became increasingly difficult to achieve. Over the next few months, the situation in Lebanon continued to deteriorate. Hezbollah led protests against the government throughout December, bringing the government to a political deadlock.⁸¹ Creation of the Tribunal became the central issue in what was being called "Lebanon's worst political turmoil in decades."⁸² Each side accused the other of using the Tribunal to achieve

78. See Amal Saad Ghoraib, *In Their Own Words: Hizbollah's Strategy in the Current Confrontation*, CARNEGIE ENDOWMENT POL'Y OUTLOOK, Jan. 2007, at 4, available at http://www.carnegieendowment.org/files/saadghorayeb_hizbollah_final.pdf. Hezbollah argued that the sudden vote prevented any "serious discussion" on the draft because it gave the Shiite cabinet members no more than a few days to have it "translated, reviewed by legal persons, and discussed by us." *Id.*

79. See Ghoraib, *supra* note 78, at 3.

80. Géraud De Geouffre de La Pradelle, Antoine Korkmaz & Rafaëlle Maison, *Lebanon: A Court Without Law, UN Manipulates International Justice*, LE MONDE DIPLOMATIQUE, Apr. 2007, available at <http://mondediplo.com/2007/04/02lebanon>; see also *Cabinet Crisis Threatens Lebanon Tribunal*, CNN.COM, Nov. 12, 2006, available at <http://www.cnn.com/2006/WORLD/meast/11/12/lebanon.cabinet/index.html> (noting that Siniora justified the vote despite Hezbollah's resignation because the cabinet still had 19 members, "enough for the two-thirds majority required for the cabinet to act").

81. See Rym Ghazal, *Siniora, Berri, Trade Blows Over Bid to Slip Hariri Court Treaty Past Parliament*, DAILY STAR (Lebanon), Feb. 5, 2006, reprinted as *Lebanese PM, Speaker exchange accusations over Letter on Tribunal*, BBC, Feb. 5, 2007.

82. Peter Heinlein, *U.N. Chief Sends Top Lawyer to Lebanon to Break Hariri Tribunal Impasse*, VOA NEWS, reprinted in U.S. FED. NEWS, Apr. 14, 2007, available at 2007 WLNR 7337928.

political goals.⁸³ The pro-Hariri camp argued that Hezbollah and its allies had resigned in order to prevent the Tribunal from forming; Hezbollah, in turn, alleged that the pro-Hariri camp was using the Tribunal as a political tool to threaten “Washington’s enemies” in Syria and Lebanon.⁸⁴ Throughout January 2007, sporadic bursts of violence related to the deadlock threatened to plunge the country into civil war.⁸⁵

Amidst the crisis, the pro-Syrian Shiite Speaker of the House, allied with Hezbollah, refused to convene Parliament until the stalemate was resolved.⁸⁶ Likewise, the Lebanese president, a long-time Syrian ally, refused to sign off on the draft.⁸⁷ With no resolution in sight, in February 2007, Siniora asked the U.N. to use its Chapter VII powers to circumvent the Lebanese Parliament and unilaterally impose the Tribunal, sparking outrage among the pro-Syrian factions.⁸⁸ On May 30, 2007, the Security Council did just that: Resolution 1757 gave the government until June 10, 2007, to ratify the Agreement, at which point the Agreement would enter into force unilaterally.⁸⁹ Not surprisingly, the Parliament did not ratify, making the Special Tribunal for Lebanon the first treaty-based tribunal in the history of the U.N. to be enforced by resolution under Chapter VII.⁹⁰

II. THE TRIBUNAL: ISSUES OF LEGALITY AND LEGITIMACY

A. *Legality of the Tribunal: Innovations and Obstacles*

Much like the history of the Tribunal’s creation, the writing of the Statute of the Special Tribunal for Lebanon was contentious, often

83. Khaled Yacoub Oweis, *Syria Tells UN’s Ban Lebanese Must Agree on Court*, REUTERS, Apr. 24, 2007; *see also* Ghoraib, *supra* note 78, at 3-5.

84. *See* Blanford, *supra* note 36.

85. *Former Lebanese President Says U.N. Tribunal Non-Negotiable*, VOICE OF AM., Feb. 8, 2007.

86. *See* Rym Ghazal, *U.N. Signs Deal on Hariri Court, Raising Pressure for Ratification*, DAILY STAR, Feb. 7, 2007.

87. *See* Michael Jansen, *Huge Popular Gathering in Beirut Calls on Siniora to Resign*, IRISH TIMES, Dec. 11, 2006, at 10; *see also* Bruce Zagaris, *Lebanon Approves U.N. Plan for International Criminal Court for Hariri Assassination*, INT’L ENFORCEMENT L. REP., Jan. 5, 2007 (reporting that Lahoud called cabinet approval for the U.N. vote “unconstitutional due to the ministerial resignations”).

88. *See* Ghazal, *U.N. Signs Deal*, *supra* note 86.

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

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

characterized by a split Security Council and several abstentions on paramount issues.⁹¹ The disputes were both logistical and political. While it was widely known that the United States, France, and Britain had an interest in seeing Syria held accountable,⁹² Russia was reportedly working to narrow the Tribunal's mandate as much as possible in order to protect Syria.⁹³ Moreover, the nature of the Tribunal—established to deal primarily with one incident (Hariri's murder) rather than a widespread or systematic attack on humanity—led to disputes on how to characterize the crime under international law.⁹⁴ The result is a unique statute containing several legal innovations, some more questionable than others. These various legal novelties have led some critics to worry whether the “creature that the many parents of the [Tribunal] in the Council have engendered may prove to be a cripple from its birth.”⁹⁵

The following Section will discuss some of these innovations and the obstacles they present to the Tribunal's ability to hand down decisions grounded in accepted legal standards.

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

92. See *supra* note 36 and accompanying text.

93. Raghida Dergham, *Talk of Deals between Washington, Damascus and Tehran, Dar al-Hayat*, Nov. 3, 2006, available at http://www.raghidadergham.com/archive/4rdpast11_03_06.html.

94. See Jurdi, *supra* note 91, at 1127-28; see also NADIM SHEHADI & ELIZABETH WILMSHURST, CHATHAM HOUSE, *THE SPECIAL TRIBUNAL FOR LEBANON: THE UN ON TRIAL?* 7 (2007), available at http://www.chathamhouse.org.uk/files/9408_bp0707lebanon.pdf. Ultimately, a proposal to define the attack as a “crime against humanity” was dropped, apparently at the behest of China and Russia, who did not believe the term was appropriate. See SHEHADI & WILMSHURST, at 7. Instead, the Council settled on conferring jurisdiction solely over crimes defined under Lebanese national law, making the Tribunal the first internationalized court not to have jurisdiction over any international crime. See Antonios Tzanakopoulos, *Special Tribunal for Lebanon: The First Orders by the Pre-Trial Judge*, 13 ASIL INSIGHTS [2] (2009), <http://www.asil.org/files/insight090807pdf.pdf>.

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

1. *Narrow Mandate*

At the outset, the Tribunal is characterized by a uniquely narrow mandate. Under Article 1, the Statute confers jurisdiction over persons responsible for the February 14, 2005 attack that killed Hariri and twenty-two others.⁹⁶ As per Siniora's request,⁹⁷ it further provides the option of including "other attacks that occurred between 1 October 2004 and 12 December 2005, or any later date," providing the Tribunal finds a sufficient connection between those attacks and Hariri's.⁹⁸ Sufficient connection is defined as criminal intent (motive), purpose behind the attacks, nature of the victims targeted, pattern of attacks (*modus operandi*), and perpetrators.⁹⁹ "Any later date" is qualified by two restrictions: that the Lebanese government and U.N. agree on such a date, and that the Security Council then consents to it.¹⁰⁰

Thus, unlike previous international courts established to try massive violations of international humanitarian law, the primary mandate of the Tribunal relates to a single attack, with the possibility of trying others. Although recent reports from the UNIIIC indicate that significant commonalities exist between the fourteen attacks under its mandate—notably those between October 1, 2004 and December 12, 2005—and the Hariri case, the reports give no indication as to whether they will meet the threshold to be tried.¹⁰¹ Because no indictments have been issued, it is impossible to know whether the Tribunal will try any cases other than the Hariri case. Moreover, because Article 11 of the statute allows the prosecutor to jointly try related cases, it is likely that the Tribunal will "deal with a very limited number of cases,"¹⁰² perhaps as few as one.¹⁰³

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

97. *See supra* note 72.

98. STL Statute, *supra* note 96, at art. 1.

99. *Id.*

100. *Id.*

101. *See Jurdi, supra* note 91, at 1127, n.9; *see also* Cécile Aptel, *Some Innovations in Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1107, 1110, n.10 (2007).

102. *See Aptel, supra* note 101, at 1110.

103. *Id.*

2. Exclusive Reliance on Lebanese Domestic Criminal Law

The uniquely narrow mandate has led to what is by far the most obvious departure from traditional international or hybrid courts: the Tribunal's exclusive reliance on Lebanese domestic criminal law as the source for its subject-matter jurisdiction.¹⁰⁴ Article 2 defines the Tribunal's applicable criminal law broadly as "[t]he 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."¹⁰⁵ Referring to the attack against Hariri as a "terrorist crime," the Statute conspicuously avoids reference to crimes against humanity or any other violations of international humanitarian law, both of which have previously constituted the substantive framework for both international and hybrid tribunals.¹⁰⁶ Indeed, while domestic law has played an important role in hybrid tribunals, this role has been limited, either secondary to or at least complementary of international law concerning the massive human rights violations that justified the creation of the tribunals in the first place.¹⁰⁷

In part, the omission of international humanitarian law can be traced to the unique nature of the mandate, referring to the attack as a "terrorist crime."¹⁰⁸ As of yet, there is no omnibus international definition of terrorism;¹⁰⁹ as it does not fulfill the requirements for a war crime or a crime against humanity, terrorism does not yet qualify as a "true discrete crime under international law."¹¹⁰ Had the Statute more forcefully included the "other attacks" that plagued Lebanon throughout 2004-2005 and beyond, the justification for characterizing the crimes as crimes against humanity—defined in international law generally as: "acts of murder, persecution, extermination or other inhumane acts when committed as part of a widespread or systematic attack directed against

104. STL Statute, *supra* note 96, at art. 2(a).

105. *Id.*

106. *See* Jurdi, *supra* note 91, at 1126.

107. *Id.*

108. STL Statute, *supra* note 96, at Introduction.

109. Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L. J. 119, 190 at n.384 (2008).

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

any civilian population, with knowledge of the attack”¹¹¹—might have been stronger.¹¹² Indeed, the Security Council considered including crimes against humanity within the Tribunal’s jurisdiction, but ultimately chose not to due to “insufficient support” for the inclusion.¹¹³

The reliance on Lebanese law raises some potentially significant legal hurdles. For one, rather than resort to an extensive body of established international jurisprudence, the Tribunal must depend solely on Lebanese jurisprudence, described by one scholar as, at best, “scattered and lacking consistency.”¹¹⁴ Under Lebanese law, terrorist acts are defined under Article 314 of the Lebanese Penal Code as “all acts designed to create a state of alarm which are committed by means such as explosive devices, inflammable materials, poisonous or incendiary products or infectious or microbial agents likely to create a public hazard.”¹¹⁵ While relatively comprehensive,¹¹⁶ Lebanese jurisprudence is riddled with unusual holdings, some of which, if followed, could prove problematic if the Tribunal is to try cases other than the Hariri attack. For example, in at least one case, the Lebanese Council of Justice found that the fatal shooting of a political figure in a public square in broad daylight did not qualify as a “terrorist act” because the act had been committed with a gun, a weapon that did not meet the requisite likelihood of creating a “public hazard.”¹¹⁷ This

111. See Jurdi, *supra* note 91, at 1127. For the full definition of “crimes against humanity,” see Statute of the International Criminal Court, art. 7(1), July 17, 1998, 37 I.L.M. 1002 [hereinafter Rome Statute].

112. See Jurdi, *supra* note 91, at 1127 (arguing that, given the nature, number, and scope of the attacks, coupled with the UNHCR’s findings suggesting the acts were perpetrated by the same people, apparently targeting a single group (the anti-Syrian coalition) and apparently constituting part of a systematic attack, there would be reasonable grounds to believe that “both the material and mental elements of a crime against humanity could be discerned”).

113. See *id.* at 1128. There is some reason to believe that the decision was, in part, political. Russia refused the inclusion of crimes against humanity as well as any reference to international instruments for the definition of terrorism, specifically the Arab Convention for the Suppression of Terrorism (the “Arab Convention”) to which Lebanon is a party. *Id.* at n.12, n.18. See also Milanovi, *supra* note 110, at n.2.

114. See Jurdi, *supra* note 91, at 1128.

115. *Id.* at 1129.

116. *Id.* at 1136.

117. *Id.* at 1131, n.30 (referring to Judgment 1/1975, Council of Justice, 23 June 1975 [In Arabic], cited in Samir Aalieh, *Ijtihad Al-Majlis Al-Aadli fi Al-Jarayem Aala Amn Al-Dawla 1949-1977* [Jurisprudence of the Council of Justice on Crimes against the Security of the State 1949-1977] (Beirut: University Collection for Studies, Publications and Distribution, 1987), 58 [Arabic]).

ruling would have the potential of excluding attacks committed by gunfire, such as the one on MP Pierre Gemayel, who was shot down on November 21, 2006, should his case be included.¹¹⁸

Perhaps a more troublesome aspect of the decision to apply Lebanese law relates to the Security Council's surprising decision to include international forms of criminal responsibility, raising significant legality issues.¹¹⁹ Under Article 3, individual criminal responsibility accrues not only for commission and complicity, but also for "common purpose" liability and "superior" responsibility,¹²⁰ forms of liability that are "almost uniquely international in character."¹²¹ Indeed, rather than emanating from Lebanese law, both provisions appear to be based on the Rome Statute and, as per international standards, seem to be much broader than the typical domestic laws for accomplice liability.¹²²

Applying international theories of criminal responsibility to purely domestic crimes could potentially mean that individuals would be held accountable for crimes not punishable under Lebanese law.¹²³ This possibility has led at least one critic to assert that Article 3 is perhaps the Statute's "most grave legal defect," effectively amounting to *nullum crimen sine lege*.¹²⁴ The problem becomes more pronounced when compared to the Statute for the Special Court for Sierra Leone (SCSL), which conferred jurisdiction over both international and domestic crimes.¹²⁵ However, the SCSL Statute was careful to specify that international forms of individual criminal responsibility were not to apply to domestic laws: "[i]ndividual criminal responsibility for the crimes referred to in article 5 [*i.e.* crimes against Sierra Leonean law] shall be determined in accordance with the respective laws of Sierra

118. *Lebanese Christian Leader Killed*, BBC NEWS, Nov. 21, 2006, available at <http://news.bbc.co.uk/2/hi/6169606.stm>.

119. See Milanovi, *supra* note 110, at 1142.

120. See STL Statute, *supra* note 96, at art. 3(1)(b) and 3(2); see also Milanovi, *supra* note 110, at 1139-40.

121. Milanovi, *supra* note 110, at 1139.

122. *Id.* at 1143-45.

123. *Id.* at 1142.

124. *Id.* (noting that the principle of *nullum crime sin lege* is "a fundamental principle of both international human rights law and criminal law and is now firmly based in customary international law"). The Rome Statute defines *nullum crime sin lege*: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." Rome Statute, *supra* note 111, at art. 22.

125. See Milanovi, *supra* note 110, at 1145.

Leone,' while international forms of responsibility are reserved solely for international crimes."¹²⁶ Unless the Lebanese Criminal Code provides for substantially similar definitions of liability—and it does not appear that it does¹²⁷—the Tribunal will have to proceed very carefully to avoid violating the principle of legality, perhaps by conducting a “parallel” review of Lebanese law to ensure the outcome would be the same.¹²⁸

3. *Practical Obstacles to Fulfilling Mandate*

In addition to the various legal problems posed by its mandate, the Tribunal will likely face significant practical obstacles in carrying it out. One glaring omission from the Statute is a clause requiring the cooperation of third-party states. This is especially noticeable as some version of such a requirement, at least with regards to Syria, was included in all of the earlier resolutions concerning the UNIIC.¹²⁹ Under the STL Statute, Syria's obligations to cooperate with the Tribunal are non-existent.¹³⁰ While this particular omission is not singular to the Lebanon Tribunal—the SCLC similarly takes no measures to require third state cooperation¹³¹—it could greatly limit the Tribunal's ability to arrest or seize suspects or witnesses, or to obtain evidence.¹³² This is particularly troubling given Syria's past reluctance to assist the Tribunal.¹³³ One way around this would be for the Tribunal to form its own agreements with third states or, alternatively, to appeal to the Security Council to compel cooperation through its Chapter VII powers, a solution that has had mixed results in the past.¹³⁴ Either way, this issue is one the Tribunal will have to address moving forward.

126. *Id.* at 1143.

127. *Id.*

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

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

130. *Id.* at 1162.

131. *Id.* at 1156-57.

132. *See* Aptel, *supra* note 101, at 1114.

133. *See, e.g.,* Swart, *supra* note 129, at n.41 and accompanying text. Swart also goes on to explain that absent any agreements to the contrary, Syria is not under any international obligations to cooperate, especially if it decides to prosecute Syrian nationals rather than extradite them, a prerogative it is guaranteed under international law concerning international cooperation in criminal matters. *See id.* at 1162-63.

134. *Id.* at 1159-60; *see also* Aptel, *supra* note 101, at n.30 and n.31 (“The experience of the [International Criminal Tribunal of Yugoslavia], the [International Criminal

Perhaps because of its failure to force third party cooperation, the STL Statute includes yet another innovation in Article 22: the ability to try individuals *in absentia*.¹³⁵ Traditionally, the U.N. has provided stringent limitations on trials *in absentia*.¹³⁶ The clause was reportedly debated at length and ultimately included at the insistence of the Lebanese.¹³⁷ While provisions for trials *in absentia* are not unheard of in mixed tribunals, the breadth of Article 22 differentiates it from the others; unlike the Statute for the Special Court for Sierra Leone, for example, which allows for *in absentia* trials only after the accused has already appeared once in court and then refuses to appear or absconds,¹³⁸ Article 22 allows for trials to take place from beginning to end without an accused ever appearing in court.¹³⁹ This comes dangerously close to violating notions of a fair trial as envisioned by fundamental international human rights instruments.¹⁴⁰ Notably, the wide reach of the provision is tempered by limiting factors that suggest the power will only be used in “exceptional circumstances,”¹⁴¹ and provides for the right to a

Tribunal for Rwanda] and the [Special Court for Sierra Leone] has shown that this procedure may not always be reliable, for it is subject to the usual political maneuverings in the Security Council. Nevertheless, concerning crimes of terrorism, it is noteworthy that the Security Council has adopted specific resolutions requesting certain States to extradite persons suspected of having conducted terrorist activities (see for example SC Res. 1267 (1999) and 1333 (2000) addressed to Afghanistan.”)

135. STL Statute, *supra* note 96, at art. 22. Here it appears the Secretary-General endorsed the provision because Lebanese law allows it and because the provision “would ensure that those responsible for the Hariri assassination would be held accountable, even if they were to refuse to surrender to the [Tribunal].” Aptel, *supra* note 101, at 1121.

136. This is because trials *in absentia* would not be consistent with Article 14 of the International Covenant on Civil and Political Rights, which guarantees the right to be tried in one’s presence. See Aptel, *supra* note 101, at 1121; see also Paola Gaeta, *To Be (Present) or Not to Be (Present): Trials in Absentia before the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1165, 1167 (2007) (noting that both the ICC and the two ad hoc international tribunals established by the Security Council (ICTY and ICTR) do not allow for *in absentia* trials).

137. See Aptel, *supra* note 101, at 1121.

138. See Gaeta, *supra* note 136, at 1167 (“Rule 60 of the Rules of Procedure allows for trials *in absentia* when, after having made his initial appearance, the accused refuses to appear at his own trial, or is at large and does not appear in court.”).

139. STL Statute, *supra* note 96, at art. 22(a). The sole condition is that where the accused could not be reached for notification of the indictment, notice was given through publication in the media. *Id.* at art. 22(2)(a).

140. See Gaeta, *supra* note 136, at 1169.

141. Aptel, *supra* note 101, at 1122. Specifically, Article 22 will only apply if the accused has: expressly and in writing waived his or her right to be present; not been

retrial if the accused was convicted but did not designate a defense attorney of her choosing.¹⁴² Nonetheless, Article 22 could prove problematic should the Tribunal seek cooperation from countries who categorically disapprove of *in absentia* trials, and will likely require the Tribunal to negotiate agreements with such countries.¹⁴³

Even if the Tribunal succeeds in trying perpetrators *in absentia*, it may be precluded from trying individuals who can claim personal or functional immunity. This is because, unlike any other international or hybrid courts,¹⁴⁴ the Tribunal lacks language eliminating immunities for heads of state or officials, a provision which customary international law would have covered had the Statute relied on crimes against humanity rather than domestic law, both of which include an immunity exception.¹⁴⁵ Yet it is not clear that the immunity exception qualifies as

handed over to the Tribunal by the State authorities concerned; or 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.” STL Statute, *supra* note 96, at art. 22(1)(a)(b) and (c).

142. STL Statute, *supra* note 96, art. 22(3).

143. See Gaeta, *supra* note 136, at 1174.

144. See Aptel, *supra* note 101, at 1111 (noting that the removal of immunities for heads of state was included in all international tribunal charters following Nuremburg). See Charter of the International Military Tribunal of the Far East art. 6, Jan. 19, 1946, T.I.A.S. No. 1589; Statute of the International Criminal Tribunal for Yugoslavia art. 7(2), May 25, 1993, 32 I.L.M. 1192, *amended* July 7, 2009; Statute of the International Criminal Tribunal for Rwanda art. 6(2), Nov. 8, 1994, 33 I.L.M. 1602; Statute of the Special Court for Sierra Leone art. 6(2), Jan. 16, 2002, 2178 U.N.T.S. 138; Law on the Establishment of Extraordinary Chambers for the Courts of Cambodia art. 29, Aug. 10, 2001, available at <http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20amended%2027%20Oct%202004%20Eng.pdf>; Rome Statute, *supra* note 111, art. 27.

145. See Aptel, *supra* note 101, at 1111. This principle was first applied during the Nuremburg Trials and codified in Principle III of the Nuremburg Principles: “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.” *Id.* Article 27 of the Rome Statute also addresses this issue of immunity:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international

customary law outside of international human rights and humanitarian crimes.¹⁴⁶ To the contrary, customary law has historically protected heads of state and other officials from prosecution of acts that violate national law.¹⁴⁷ There is reason to believe that failure to include such a provision in the STL Statute was political;¹⁴⁸ whatever the reason, it leaves open the possibility that the perpetrators of the crime will escape prosecution. This is especially problematic if any of Mehlis's accusations concerning the involvement of highly ranked Lebanese and Syrian officials are found to have merit.

4. *Bypass of Lebanese Parliament by Chapter VII*

A final hurdle to the court's legality is the most obvious: the use of Chapter VII to bypass Parliament and enforce the Agreement. This approach differs dramatically from previous U.N. uses of Chapter VII to establish international courts. For example, in the case of both the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda, the establishment of the tribunals under Chapter VII arose in the context of egregious human rights violations. In both instances, the Security Council had passed numerous resolutions relating to the violations, suggesting that the establishment of the courts was merely one of many exercises of the Council's Chapter VII powers to maintain international peace and security.¹⁴⁹ By contrast, the U.N. has tended to establish hybrid or internationally assisted courts through treaty or national statute¹⁵⁰ in an effort to address crimes of international concern as well as assist the nation's transition to peace and rule of

law, shall not bar the Court from exercising its jurisdiction over such a person.

Rome Statute, *supra* note 111, at art. 27.

146. See Aptel, *supra* note 101, at 1111 (adding that derogations to the general rules on immunity of state officials are usually limited to international crimes "*stricto sensu*").

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

148. See Dergham, *supra* note 93 (suggesting that Russia sought to ensure immunity for Syria by refusing to consider crimes against humanity as a crime).

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

150. The tribunals for Sierra Leone and Cambodia were both created through bilateral agreements with the U.N. The Supreme Iraqi Criminal Tribunal was established by national statute.

law.¹⁵¹ In such cases, the nation has agreed to international intervention to aid in its own recovery.¹⁵² Here, neither model applies: Lebanon was neither dealing with massive human rights violations necessitating international intervention, nor, by virtue of the Parliament failing to ratify, did it agree to permit international intervention in its internal affairs.¹⁵³ In this sense, by enforcing the Resolution, the Council was not acting on behalf of Lebanon, but rather “sid[ing] politically with the Lebanese [g]overnment” at the expense of at least a portion of the population.¹⁵⁴ Indeed, the Lebanese president has repeatedly denounced the Tribunal as lacking any legal authority whatsoever.¹⁵⁵

151. See Amnesty International, International and Internationalized Criminal Tribunals, at 2 (2008), available at http://www.amnestyusa.org/international_justice/pdf/InternationalTribunalsfactsheet.pdf.

152. For example, the establishment of the Sierra Leone tribunal was “consensual, and its legal status, applicable law, composition and organizational structure were negotiated and agreed upon between the parties.” Khairallah, *supra* note 2, at 591 (referencing Daphna Shrager, *The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions*, in INTERNATIONALIZED CRIMINAL COURTS & TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 16 (Cesare P.R. Romano *et al.*, eds. 2004)).

153. Arguably, in enacting Resolution 1757, the Security Council not only violated Lebanese sovereignty, but violated international treaty law by using its power as a lever to force a binding decision. See Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1091, 1091, 1104-05 (2007).

154. *Id.* at 1098.

155. See, e.g., Ghazal, *U.N. Signs Deal*, *supra* note 86. There is another way to look at the Security Council’s use of Chapter VII to establish the Tribunal. At the point of establishment, the Security Council had already issued several resolutions related to the assassination both with regards to Lebanon and Syria. See S.C. Res. 1559, U.N. Doc. S/RES/1559 (Sept. 2, 2004) (calling upon Syria to withdraw its troops from Lebanon); S.C. Res. 1595, *supra* note 24 (establishing the UNIIC); S.C. Res. 1636, *supra* note 56 (requiring Syria to cooperate and threatening “further action”); S.C. Res. 1644, *supra* note 73 (extending the mandate of the UNIIC); S.C. Res. 1664, U.N. Doc. S/RES/1664 (Mar. 29, 2006) (requesting the Secretary-General to negotiate an agreement with the Government of Lebanon to establish an international criminal court); S.C. Res. 1686, U.N. Doc. S/RES/1686 (June 15, 2006) (extending the mandate of the UNIIC); S.C. Res. 1748, U.N. Doc. S/RES/1748 (Mar. 27, 2007) (extending the mandate of the UNIIC by one year); S.C. Res. 1757, *supra* note 89 (establishing the Tribunal). Lebanese politics had been paralyzed for months, with sporadic violence threatening to spread. See Sam Ghattas, *Memo Seeks UN Action in Hariri Case*, ASSOCIATED PRESS, Apr. 4, 2007. The chances for bringing the perpetrators to justice were waning. In this context, the Security Council was merely exercising its rightful powers under Chapter VII to establish an international court in order to maintain international peace and security. Under its Chapter VII powers, the Council was not obliged to limit the tribunal’s jurisdiction to international law as it had done in the past for the International Criminal Tribunal for

Thus, as a “*sui generis* international tribunal on various levels,”¹⁵⁶ the Tribunal faces an uncertain future of questionable legality. Even if the Tribunal manages to bring more than one case, the use of the “scattered” Lebanese criminal code to define the Tribunal’s jurisdiction renders any outcome unpredictable at best, and illegal at worst. By attaching international principles of joint liability and superior responsibility to domestic laws, the mandate further risks violating principles of legality. Finally, it is unclear whether the Tribunal will be able to gain access to witnesses, suspects, or evidence, given its lack of a provision compelling third state cooperation. In the event that it tries people *in absentia*, as per Article 22, it risks violating a fundamental principle of international criminal law that requires a defendant to be present—at least for part of the time—to face the charges against him. Though certainly not insurmountable, the various innovations of the Statute mean the Tribunal will have to proceed vigilantly and with acute awareness of its limitations in order to come forth with sound legal opinions.

B. Legitimacy: The Appearance of Justice

Even if the Tribunal overcomes its many legal hurdles, it must still contend with establishing legitimacy, if the Tribunal is to create any long-lasting justice for the Lebanese.¹⁵⁷ Since the establishment of the first international court in Yugoslavia, the U.N. and other international actors have increasingly emphasized the importance of outreach to the local community as a means of ensuring that “justice is perceived to be done both internationally as well as locally and regionally.”¹⁵⁸ In part, this emphasis is logistical: international and hybrid tribunals are resourced and financed by the international communities or local communities they serve, and thus perceptions of legitimacy within those communities go a long way toward preserving support for the tribunals.¹⁵⁹ Perhaps more importantly, however, the perception of

Yugoslavia (ICTY) or International Criminal Tribunal for Rwanda (ICTR), but free to enact what it deemed appropriate and best suited for the situation. See Fassbender, *supra* note 153, at 1101. The Security Council’s consultation with the Lebanese government on many of the substantive issues could constitute further proof of the Tribunal’s legitimacy. *Id.*

156. See Jurdi, *supra* note 91, at 1125.

157. See Crane, *supra* note 3, at 1686, 1687.

158. *Id.* at 1686.

159. See Statement by Nina Bang-Jensen in *War Crimes Tribunals: The Record and*

legitimacy is also profoundly entwined with the notion of permanent justice and rule of law.¹⁶⁰ Specifically, if the tribunals are to succeed in what they set out to do—replace a “culture of impunity” with a “culture of accountability”—they must achieve popular credibility.¹⁶¹

As interventionist organs of justice, all international jurisdictions have had to contend with some degree of antipathy and skepticism from locals who doubt the international community’s motives or qualifications for achieving justice.¹⁶² The Special Court for Sierra Leone, for example, struggled with African leaders’ attempts to manipulate “popular thinking” by condemning the court as “white man’s justice.”¹⁶³ Milosevic often downplayed the legitimacy of the ICTY by referring to it as a creation of NATO.¹⁶⁴ Sudan has objected to the International Criminal Court and its investigations into crimes in Darfur as “Western imperialism.”¹⁶⁵ Lebanon brings its own cynicism to the table: a long history of violence treated with utter impunity has left the population weary and skeptical of international powers and even the rule of law.¹⁶⁶ In addition, the country has long been deeply divided, often along sectarian lines, with each group appealing to a different foreign power and accusing the other of violating Lebanon’s sovereignty.¹⁶⁷

The long and complicated involvement of the U.N. in the Lebanese investigation, and its appearance of having taken sides with the government at the expense of the population, have merely fed fears of politicization¹⁶⁸ and alienated those who otherwise approved of

the Prospects: Tribunal Justice: The Challenges, The Record, And The Prospects, 13 AM. U. INT’L L. REV. 1541, 1562-63 (1998).

160. See Crane, *supra* note 3, at 1686; see also Donna E. Arzt, *Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 226, 227 (Jan. 2006).

161. See Arzt, *supra* note 160, at 227.

162. See Marieke Wierda et al., *Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1065, 1075 (2007); see also Crane, *supra* note 3, at 1686-88.

163. See Crane, *supra* note 3, at 1686.

164. See Wierda et al., *supra* note 162, at 1075 (referencing E. Suljagic, *Justice Squandered? The Trial of Slobodan Milosevic*, in PROSECUTING HEADS OF STATE 211, 211-13 (E. Lutz & C. Reiger eds., 2009)).

165. See Wierda et al., *supra* note 162, at 1075.

166. *Id.* at 1066-72.

167. *Id.* at 1067; see Blanford, *supra* note 36, at 6.

168. See Wierda et al., *supra* note 162, at 1065-67.

international intervention.¹⁶⁹ The perceived sloppiness of the Mehlis reports and their potentially unfounded accusations against Syria exacerbated fears that the West manipulated the investigation for its own ends.¹⁷⁰ By April 2007, Lebanese on both sides began to feel as though the Tribunal had become an excuse for world powers to play out their strategies. Reporter Nicholas Blanford noted that “the tribunal has morphed from an instrument of international justice to try the killers of former Prime Minister Rafik Hariri into the nexus of a regional struggle over Lebanon’s future played out in the Mideast and the corridors of the UN headquarters in New York.”¹⁷¹ The use of Chapter VII merely clinched the notion that foreign powers, rather than the Lebanese, controlled the Tribunal.¹⁷² Indeed, there will always be individuals who believe the use of Chapter VII was an abuse of power that renders the Tribunal illegitimate.¹⁷³

Fears of politicization are compounded by the perception that the Tribunal, with its exceedingly narrow mandate, is an exercise in selective justice.¹⁷⁴ Since 1975, Lebanon has suffered through two major wars resulting in mass destruction and gross violations of human rights. The civil war in 1975-1990, which resulted in hundreds of thousands killed and wounded, close to a million forcibly displaced, and tens of thousands missing, ended in a general amnesty,¹⁷⁵ brokered in an agreement

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

170. *Id.* at 594. Among these fears was the suspicion that the United States was trying to coerce Syria into cooperating with its efforts in the war with Iraq. *Id.* These fears were not unfounded: the United States often tied together its requests for Syria to withdraw from Lebanon with its concerns that Syria was not doing enough to stem the flow of insurgents from its borders into Iraq. See Bakri, *supra* note 36; see also Robin Wright, *US, France to Introduce U.N. Resolutions Against Syria*, WASH. POST, Oct. 19, 2005, at A16; Blanford, *supra* note 36, at 2 (“Analysts say Washington is gambling on Syria being held responsible for Hariri’s murder, believing that indictments against senior Syrian officials will effectively cripple the Damascus regime.”).

171. See Blanford, *supra* note 36, at 1.

172. See Wierda et al., *supra* note 162, at 1066-67 (quoting Hezbollah spokesman Mohammad Hussein Fadlallah as asking: “How can this tribunal achieve legal results and establish judicial rights when it is rejected by a large segment of the Lebanese population and by Syria? How can its resolutions be implemented without creating tension?”).

173. See Khairallah, *supra* note 2, at 594-96.

174. See Wierda et al., *supra* note 162, at 1072-73.

175. *Id.* at 1067-68.

supported by the United States.¹⁷⁶ In 2006, the Lebanon-Israel War claimed forty civilians in Israel and more than a thousand in Lebanon, resulted in massive displacement, and caused rampant destruction of civilian sites on both sides.¹⁷⁷ Although both of these wars consisted of egregious violations of international humanitarian law, some potentially qualifying as war crimes or genocide, the Lebanese are painfully aware that the U.N. has never taken any action to bring these crimes to justice.¹⁷⁸ Nor can it be said that the decision to prosecute Hariri's killers reflected a sudden will on the part of the international community to "expand jurisdiction of the international criminal justice system, thus establishing a precedent for similar situations."¹⁷⁹ In 2007, Pakistani appeals to establish an international tribunal or even a commission to investigate the assassination of former Pakistani Prime Minister Benazir Bhutto went absolutely unheeded.¹⁸⁰ Against this background, the selection of one man's death as the impetus for international concern seems hollow and overtly political.

Given this context, the Tribunal faces significant—though not insurmountable—hurdles to establishing its legitimacy with the Lebanese. Indeed, the U.N. has already taken steps to ameliorate the perceptions of impartiality, starting with the replacement of Mehlis with Brammertz as Commissioner of the UNIIC—which, because of Brammertz's reliance on forensic evidence rather than witness statements, went some way in depoliticizing the investigation.¹⁸¹ The Lebanese have also seemed to embrace Daniel Bellemare, who replaced Brammertz in January 2008 and is now the Chief Prosecutor for the Tribunal.¹⁸² Bellemare took great steps in endowing the Tribunal with a sense of impartiality when, on April 29, 2009, he recommended that the four pro-Syrian Lebanese generals be released for lack of evidence.¹⁸³

176. *Id.* at 1072; Hassan Krayem, *The Lebanese Civil War and the Taif Agreement*, AM. U. OF BEIRUT, available at <http://ddc.aub.edu.lb/projects/pspa/conflict-resolution.html> (last visited Apr. 13, 2010).

177. De Geouffre de La Pradelle, *supra* note 80.

178. *Id.*

179. See Khairallah, *supra* note 2, at 594.

180. *Id.*

181. See Wierda et al., *supra* note 162, at 1075-76.

182. See Hammer, *supra* note 36.

183. See Aaron Gray-Block & Nadim Ladki, *Lebanon Tribunal Orders Release of Generals*, REUTERS (UK), Apr. 29, 2009, available at <http://uk.reuters.com/article/idUKTRE53S5BF20090429>.

The decision sparked fireworks and celebration throughout the pro-Syrian parts of Lebanon, while the pro-Hariri camp acknowledged the soundness of the decision.¹⁸⁴ Analysts believe the decision, by relying on evidence as its basis, has made great strides toward preserving the Tribunal's credibility.¹⁸⁵

Recent announcements by the STL concerning imminent indictments and the development of a witness protection program have likewise garnered approval from the Lebanese.¹⁸⁶ Indeed, acting STL registrar Herman von Hebel indicated that all Lebanese parties, including Hezbollah, were cooperating with the Tribunal investigations.¹⁸⁷ Finally, the STL has made recent attempts to keep the Lebanese apprised of its progress. In March 2010, STL President Antonio Cassesse released the first annual report of the tribunal's work, offering a glimpse into its process and progress over the year since it opened its doors.¹⁸⁸ Acknowledging the various legal and practical obstacles facing the STL, the report reiterated that its aim was to "dispense justice *free from any political or ideological fetter and based on the full respect for the rights of both the defendants and the victims.*"¹⁸⁹ Significantly, the report describes attempts to initiate outreach activities, including "recruitment of outreach staff and opening an office in Beirut, launching a multi-lingual website and organizing" media, non-governmental, and diplomatic events.¹⁹⁰

CONCLUSION

Like all courts of international jurisdiction before it, the Tribunal is faced with a number of hurdles that threaten its ability to adjudicate fairly and impartially, while also being perceived as such. As discussed

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

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

186. *Hariri Tribunal Ready to Hand Down Indictments*, XINHUA NEWS AGENCY, Apr. 16, 2010, available at <http://www.mathaba.net/news/?x=623292>.

187. *Id.*

188. SPECIAL TRIBUNAL FOR LEBANON, ANNUAL REPORT (2009-2010), available at http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/Annual_report_March_2010_EN.pdf.

189. *Id.* at 8.

190. *Id.* at 40, ¶¶ 136; 41-42, ¶¶ 140-48.

in Part I, the U.N.'s long and questionable involvement in the investigation of Hariri's death deepened divisions in Lebanese society rather than alleviated them. Security Council politics, prevalent since the onset of the investigation, have created an STL Statute that is unique and potentially problematic, requiring at the least some intensive vigilance on the part of Tribunal officials to ensure that justice is done. In addition, Part II emphasized the difficulties the STL will face with regards to its perceived legitimacy, particularly in convincing the Lebanese that its decisions emanate from a concern for justice rather than political interests. Indeed, politicization remains the primary concern for many of the Tribunal's biggest Lebanese skeptics.¹⁹¹

The STL has already repaired some of the early damage to its reputation as an impartial adjudicator. Prosecutor Bellemare's cautious and deliberate approach in preparing for indictments seems to have earned respect, even from erstwhile STL critics like Hezbollah. Likewise, the recent release of the STL's first annual report indicates both a desire to maintain continuous communication with the Lebanese public as well as intentions to expand outreach activities.

However, if the Tribunal is to succeed in its noble goal of "dispensing justice free of any political and ideological fetter,"¹⁹² these commendable beginnings must be carried out to their full extent. First, the Tribunal should continue to communicate with the differing Lebanese political parties to encourage support of the Tribunal. Importantly, Tribunal officials should continue to engage critics, including Hezbollah and Syria, so as to garner their full cooperation and assistance. Because Hezbollah and Syrian authorities largely shape the opinions of their supporters, such inclusion can only help improve general support and respect for the Tribunal. Practically, garnering voluntary cooperation from Syria might help resolve some of the legal issues identified in Part II regarding third party cooperation. Likewise, gaining the trust and respect of domestic Tribunal critics might go some way to ensuring the availability of witnesses and forthcoming testimony. Indeed, the recent reports indicating that Hezbollah has been cooperative in encouraging some of its members to talk to the Tribunal as witnesses suggest that Hezbollah is willing to work with the Tribunal as a voluntary partner.

Second, indictments, when eventually issued, should sound in clear and objective evidence, as the outcome of careful investigation

191. See Wierda et al., *supra* note 162, at 1075-76.

192. STL ANNUAL REPORT, *supra* note 188.

rather than questionable testimony. The recent decision to withdraw unfounded indictments was a good first step. In addition, the Tribunal's recently established witness protection program should help encourage forthcoming witnesses as well as assuage fears of reprisal. Going forward, the Tribunal should continue to investigate with deliberation and strive to abide by internationally recognized standards of evidence. In doing so, the Tribunal will stave off criticism while establishing well-founded law. Likewise, the investigative team should be forthright about its findings while respecting standard measures of confidentiality regarding witnesses and suspects.

Finally, any outreach activities the Tribunal undertakes should be expansive and inclusive, reaching all parts of the Lebanese community. While the STL's activities to date, including media and diplomatic outreach, are necessary starting points, the Tribunal should ensure that the Lebanese are involved in the dissemination of information as well as on the receiving end of it. To this end, it should engage local non-governmental organizations throughout the country to organize town hall meetings and public education campaigns, and to otherwise disseminate information on the process and progress of the Tribunal. Local media should be kept apprised of developments in a timely manner. The facility with which clashing groups in Lebanon may accuse the Tribunal of bias or politicization reiterates the need for forging connections with local constituencies. Involving the community in every step of the process will build a feeling of domestic ownership over the Tribunal and help counteract earlier perceptions of bias or international interference in domestic affairs.¹⁹³ Ultimately, the success of the Tribunal will depend largely on its ability to include the Lebanese in establishing a lasting rule of law in Lebanon.

193. See Mendez, *supra* note 77, at 77-80 (discussing the failures of the hybrid panels set up in Kosovo to conduct outreach, and the successes of the Special Court in Sierra Leone).

