

**BEFORE THE TRIAL CHAMBER**  
**SPECIAL TRIBUNAL FOR LEBANON**

**Case No:** STL-11-01/PT/TC

**Before:** Judge Robert Roth, Presiding  
Judge Micheline Braidy  
Judge David Re  
Judge Janet Nosworthy, Alternate Judge  
Judge Walid Akoum, Alternate Judge

**Registrar:** Mr. Herman von Hebel

**Date:** 9 May 2012

**Filing Party:** Sabra Defence

**Original Language:** English

**Classification:** Public with Confidential Annexes

**THE PROSECUTOR**  
v.  
**SALIM JAMIL AYYASH**  
**MUSTAFA AMINE BADREDDINE**  
**HUSSEIN HASSAN ONEISSI**  
**ASSAD HASSAN SABRA**

---

**SABRA'S PRELIMINARY MOTION CHALLENGING THE JURISDICTION OF  
THE SPECIAL TRIBUNAL FOR LEBANON**

---

**Office of the Prosecutor:**  
Mr. Norman Farrell

**Defence Office:**  
Mr. François Roux

**Counsel for Salim Ayyash:**

Mr. Eugene O'Sullivan

Mr. Emile Aoun

**Counsel for Mustafa Badreddine:**

Mr. Antoine Korkmaz

Mr. John Jones

**Counsel for Hussein Oneissi:**

Mr. Vincent Courcelle-Labrousse

Mr. Yasser Hassan

**Counsel for Assad Sabra:**

Mr. David Young

Dr. Guénaél Mettraux



PUBLIC

## I. INTRODUCTION

1. The jurisdiction of the Special Tribunal for Lebanon suffers from a number of shortcomings which affect the fairness of proceedings and the legality and legitimacy of the Tribunal. Pursuant to Articles 1 *et seq* (in particular 16) of the Statute and Rules 77, 90(A)(i) and 126, the Defence hereby challenges the Tribunal's jurisdiction to proceed against Mr. Sabra on the basis of: (A) a violation of the Lebanese legal and constitutional order and, in turn, of the core principles of the United Nations Charter, including respect for State sovereignty and the rule of law; and (B) a violation and denial of important human rights safeguards which result from the displacement of Lebanese jurisdictions by an international *tribunal d'exception*.
2. The Defence has been significantly hampered in its preparation of the present motion. It has requested information regarding the creation of the Tribunal from relevant information-providers, notably member States of the Security Council at the time of Resolution 1757 and the Lebanese Government.<sup>1</sup> As of the date of this filing, none have provided any of the information sought. As a result, the Defence has been prevented, for instance, from reviewing the records of negotiations of the Agreement between the United Nations and the Lebanese Government on the establishment of a Special Tribunal ("STL Agreement") and attached Statute with a view to identifying information pertaining to, *inter alia*: (a) the basis for the Lebanese Government's authority to conduct these negotiations; (b) the basis for the Lebanese Government's authority to delegate the constitutional competence of Lebanese courts to another judicial body to apply Lebanese criminal law; (c) the basis for the Lebanese Government's authority to designate members of the Lebanese judiciary to act as Judges outside the Lebanese judiciary; (d) the UN's authority to circumvent the Lebanese Parliamentary process and consequences thereof upon the Tribunal's jurisdiction; (e) the consequences, if any, of the violations of Lebanon's constitutional order on the validity of Security Council Resolution 1757 and on the jurisdiction of the Tribunal; (f) the legal status of the STL Agreement and the position of Security Council members in relation to this matter; (h) whether and on what basis the

---

<sup>1</sup> See attached Confidential Annexes A-M, Correspondence between Counsel for Mr. Sabra and: Annex A, Lebanon; Annex B, The Russian Federation; Annex C, China; Annex D, Belgium; Annex E, France; Annex F, Indonesia; Annex G, Italy; Annex H, Peru, Annex I, Qatar; Annex J, Slovakia, Annex K, South Africa; Annex L, United Kingdom; Annex M, United States. A request to the UN is pending.

PUBLIC

Tribunal would be permitted (if at all) to apply international law; (i) whether and on what basis the UN would be permitted to authorise and mandate the STL to apply Lebanese criminal law without the approval of the competent (Lebanese) authorities to that effect; and (j) any issue pertaining to the selectivity of STL jurisdiction and/or any improper reason (if any) for the Tribunal's jurisdictional selectivity.

3. As a result of the non-disclosure of this information, the ability of the Defence to consider all possible challenges to the Tribunal's jurisdiction and to obtain relevant material was fundamentally undermined. The Defence submits that to ensure the fairness of these proceedings, the Trial Chamber should invite these States to provide the information sought to the Defence so that it can review all relevant records and identify therein any valid challenges to the Tribunal's jurisdiction.

## II. PRELIMINARY ISSUES

4. The present motion is unquestionably jurisdictional in nature<sup>2</sup> and should therefore be brought well before trial.<sup>3</sup>
5. Rule 90(E) limits the scope of motions brought under Rule 90(A) to those which "relate to the subject-matter, temporal or territorial jurisdiction of the Tribunal". However, it cannot be the case that the Defence is barred from bringing a motion challenging the jurisdiction of the Tribunal for reasons other than those enumerated in Rule 90(E).
6. First, *la compétence de la compétence* is a "major part of the incidental or inherent jurisdiction of any judicial or arbitral tribunal".<sup>4</sup> As a "well-entrenched principle of general international law",<sup>5</sup> this aspect of the exercise of the judicial function "does not need to be expressly provided for in the constitutive documents of" tribunals.<sup>6</sup> In other words, the Tribunal has that inherent jurisdiction.

---

<sup>2</sup> *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision"), para. 12.

<sup>3</sup> *Prosecutor v. Milutinović et al.*, Decision on Nebojša Pavković's Motion for a Dismissal of the Indictment Against Him, 21 February 2008 ("*Milutinović* Decision"), paras. 5, 15; *Prosecutor v. Kanyabashi*, Decision on the Defence Motion on Jurisdiction, 18 June 1997 ("*Kanyabashi* Jurisdiction Decision"), para. 3. See also *Tadić* Jurisdiction Decision, para. 6.

<sup>4</sup> *Tadić* Jurisdiction Decision, para. 18.

<sup>5</sup> *Ibid.*, para. 19.

<sup>6</sup> *Ibid.* para. 18.

PUBLIC

7. Second, Rule 90 is substantially similar to Rule 72 of the ICTY's Rules of Procedure and Evidence. This latter rule was adopted to limit the scope of jurisdictional challenges after the Appeals Chamber issued the *Tadić* Jurisdiction Decision, thus raising the possibility that the purpose of the provision was to avoid re-litigation of issues already settled by the ICTY.<sup>7</sup> This is evidently not the situation before the STL; the STL must have the power, and indeed has the obligation,<sup>8</sup> to determine the legality of its own establishment.
8. Third, the absence of a jurisdictional means to challenge aspects of the Tribunal's jurisdiction which affect the rights of the accused would constitute an impermissible denial of access to justice, which would itself violate his rights.
9. As such, the Defence contends that the motion can be entertained under Rule 90 or, in the alternative, under either Rules 77 or 126.

### III. SUBMISSIONS

10. International human rights instruments guarantee an individual the right to have a criminal charge against him determined by a tribunal established by law.<sup>9</sup> The phrase "established by law" comprises two fundamental notions. First, it governs the "legal basis for the very existence of a 'tribunal'".<sup>10</sup> That is, "its establishment must be in accordance with the rule of law"<sup>11</sup> in that it should be "set up by a competent organ in keeping with the relevant legal procedures".<sup>12</sup> The purpose of requiring a tribunal to be established by law is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the Executive.<sup>13</sup>
11. Second, the Tribunal "must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments."<sup>14</sup>

<sup>7</sup> See *Milutinović* Decision, paras. 5, 14-15.

<sup>8</sup> *Tadić* Jurisdiction Decision on, para. 18; *Prosecutor v. Milosević*, Decision on Preliminary Motions, 8 November 2001, para. 3.

<sup>9</sup> See Article 14, ICCPR; Article 6, ECHR; Article 8, ACHR.

<sup>10</sup> *Posokhov v. Russia*, Judgement, ECHR, 4 March 2003, para. 39; *Coëme and Others v. Belgium*, Judgement, ECHR, 22 June 2000 ("*Coëme*"), para. 107.

<sup>11</sup> *Tadić* Jurisdiction Decision, para. 45.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Coëme*, para. 98. See also Stephan Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, pp. 50-52.

<sup>14</sup> See *Tadić* Decision on Jurisdiction, para. 47

PUBLIC

12. The Defence contends that the STL was not established by law because it does not satisfy either criterion. As such, any exercise of its jurisdiction would be in violation of fundamental rights of the accused.

**A. The STL was not established in accordance with the relevant legal procedures**

13. On 30 May 2007, the Security Council adopted Resolution 1757, which, pursuant to Chapter VII of the UN Charter, brought the STL Agreement and Statute into force.<sup>15</sup> Both the Resolution and STL Agreement were concluded in violation of governing law. The very purpose of Resolution 1757 was to by-pass domestic treaty ratification processes and, in taking such a course, the Security Council acted *ultra vires* the UN Charter. As a result, neither the Resolution nor the STL Agreement can serve as a valid legal basis for the establishment of the Tribunal.

*i. The Lebanese Constitution was violated by the adoption of the STL Agreement*

14. The Lebanese Constitution dictates the legal processes for the adoption of laws and treaties in Lebanon. These provisions were ignored during the negotiations and eventual signature of the STL Agreement by the Lebanese Government.

15. First, the procedure for approval of international treaties was not respected. Article 52 of the Lebanese Constitution provides that the “President of the Republic negotiates international treaties in coordination with the Prime Minister” and that “treaties involving the finances of the state...are not considered ratified until they have been approved by the Chamber”. Yet, the Lebanese President did not negotiate the STL Agreement in coordination with the Prime Minister: he was not involved in the negotiations, comments he provided on the drafts were ignored, and he did not approve the STL Agreement.<sup>16</sup> Rather, because the STL Agreement could not be ratified according to domestic law, the Prime Minister forwarded the STL Agreement to the Council of Ministers without Presidential approval in violation of the Constitution,<sup>17</sup> and sought the assistance of the Security Council to by-pass the domestic legal order. In correspondence to the Secretary-General, the Prime Minister

---

<sup>15</sup> Security Council Resolution 1757, S/RES/1757, 30 May 2007 (“Resolution 1757”).

<sup>16</sup> Letter dated 14 November 2006 from the President of Lebanon to the Secretary-General (“Letter of 14 November 2006”), para. 2; Letter dated 5 February 2007 from President of Lebanon to the Secretary-General, p. 4, para. 1 (“Letter of 5 February 2007”). Authenticated copies of these letters are attached to the *Motion on Behalf of Salim Ayyash Challenging the Legality of the Special Tribunal for Lebanon* filed today and are incorporated by reference by the Defence of Mr. Sabra.

<sup>17</sup> *Ibid*, p. 4, para. 1.

PUBLIC

acknowledged that the speaker of Parliament refused to convene a session of Parliament to ratify the STL Agreement, but nonetheless asked the Security Council to put the STL “into effect.”<sup>18</sup> He had no legal or constitutional authority to do so nor did he ever make that claim.

16. The President repeatedly challenged the Prime Minister’s assertions before the Security Council.<sup>19</sup> The President noted that the Prime Minister and the Government were “devoid of legitimacy in terms of the National Pact and the Constitution” and that “[a]pproval of the Tribunal did not take place in Lebanon in accordance with the provisions of the Constitution, beginning with the negotiation phase”.<sup>20</sup> Nonetheless, the Security Council disregarded the Lebanese constitutional order and imposed the STL on Lebanon through Resolution 1757. As a consequence, Article 52 of the Lebanese Constitution was transgressed; the President’s role was not respected; and Parliament did not approve the STL Agreement.
17. Secondly, although the Prime Minister represented to the Security Council that “a parliamentary majority has expressed its support for the Tribunal”,<sup>21</sup> the approval of the STL Agreement by the Council of Ministers was in violation of the Lebanese Constitution.
18. On 13 November 2006, the Lebanese Council of Ministers held an extraordinary session<sup>22</sup> in which it approved the STL Agreement.<sup>23</sup> A challenge by the President to the decision of the Council of Ministers was forwarded to the Secretary-General.<sup>24</sup> On 25 November 2006, the Council of Ministers held another extraordinary meeting,<sup>25</sup> in which it issued a decree ratifying the STL Agreement and attached Statute, and

<sup>18</sup> Letter dated 14 May 2007 from the Prime Minister of Lebanon to the Secretary-General, Annex to the letter dated 15 May 2007 from the Secretary-General to the President of the Security Council, S/2007/281, 16 May 2007 (“Letter of 14 May 2007”).

<sup>19</sup> Letter dated 15 May 2007 from the President of Lebanon addressed to the Secretary-General, Annex to the Letter dated 16 May 2007 from the Secretary-General to the President of the Security Council, S/2007/286, 17 May 2007 (“Letter of 15 May 2007”); Letter of 14 November 2006; Letter of 5 February 2007.

<sup>20</sup> Letter of 15 May 2007.

<sup>21</sup> Letter of 14 May 2007.

<sup>22</sup> See

<http://old.naharnet.com/domino/tn/ArabicNewsDesk.nsf/story/028ABAC6B5B4CAD5C225722300584D5D?OpenDocument>.

<sup>23</sup> Report of the Secretary General on the Establishment of a Special Tribunal for Lebanon, S/2006/893, 15 November 2006 (“SG Report on Tribunal”), para. 54.

<sup>24</sup> *Ibid.*

<sup>25</sup> See <http://www.ankawa.com/forum/index.php?topic=66042.0;wap2>

<http://www.elaph.com/Web/AkhbarKhasa/2006/11/190511.htm?sectionarchive=AkhbarKhasa>.

published it in the Official Gazette. The decree was then forwarded to Parliament without the approval of the President.<sup>26</sup>

19. Article 53(12) of the Lebanese Constitution gives the President, not the Prime Minister, the power to call extraordinary sessions of the Council of Ministers; the Prime Minister has no such power.<sup>27</sup> As a result, the decisions taken at those meetings, notably the approval of the STL Agreement and its subsequent publication in the Lebanese Official Gazette, were unconstitutional.
20. Moreover, the composition of the Council of Ministers at its 13 and 25 November 2006 meetings was unconstitutional. Article 95(3)(a) of the Constitution stipulates that “[t]he confessional groups are to be represented in a just and equitable fashion in the formation of the Cabinet.” Further, paragraph (J) of the Preamble of the Constitution, which forms part of the Constitution and has constitutional status,<sup>28</sup> dictates that “[t]here shall be no constitutional legitimacy for any authority which contradicts the ‘pact of communal existence.’” Taken together, these provisions stipulate that no decision may be taken by any public authority in Lebanon without consultation with representatives of the various sects.
21. On 11 November 2006, all Shi’a and Orthodox members of the Council of Ministers had resigned,<sup>29</sup> with the result that sectarian groups were not represented as required by the Constitution. The decision taken to approve the STL Agreement and its subsequent publication in the Gazette and submission to Parliament were therefore illegal.
22. The STL was therefore not established by a competent organ in keeping with the relevant legal procedure, namely, the Lebanese Constitution. Moreover, the Security Council’s Resolution cannot cure the unlawfulness of this underlying act. First, the Appeals Chamber held that the STL Agreement, not the Resolution, serves as the

---

<sup>26</sup> Letter of 5 February 2007.

<sup>27</sup> Although the Prime Minister has the power to call an extraordinary meeting of Parliament, he only has the power to call regular sessions of the Council of Ministers. As the Constitution explicitly gives the power to call extraordinary sessions of the Council of Ministers to the President, it cannot be argued that this is an implied power of the Prime Minister. *See* Lebanese Constitution, Articles 64(5) and 64(6).

<sup>28</sup> *See Ayyash et al.*, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 (“*Ayyash* Interlocutory Decision on Applicable Law”), para. 121, fn. 232 (“it appears that the Preamble is considered an integral part of the Constitution and therefore holds the same legal status as other constitutional provisions”).

<sup>29</sup> Letter of 14 November 2006; Letter of 5 February 2007, pp. 3, 4.

“legal basis” of the Tribunal.<sup>30</sup> The Resolution was merely the vehicle pursuant to which the Agreement was intended to come into force. Therefore, the lawfulness of the Tribunal must be assessed against the STL Agreement, not the Resolution. The Security Council took no steps to verify the lawfulness of the STL Agreement and the views of some of its members suggested that the Security Council wilfully ignored indications that the Agreement was unlawful.<sup>31</sup> Second, a Security Council Resolution may not bring into force or legalise an act that is otherwise unlawful. There is no basis in the UN Charter allowing the Security Council to endow an illegal act with the force of law or allowing the Council to act unlawfully. Therefore, the illegality of the STL Agreement directly affects the power of the Security Council to adopt the Resolution and, therefore, the jurisdiction of the Tribunal.

ii. *The Security Council violated Lebanese sovereignty in contravention of the UN Charter*

23. The Security Council’s use of Chapter VII to impose the STL Agreement was a violation of Lebanese sovereignty and democratic process in a manner not permitted by the UN Charter. Although the creation of an international tribunal to try international crimes is within the Security Council’s Chapter VII powers,<sup>32</sup> Resolution 1757 was a much greater encroachment on State sovereignty than the creation of the ICTY or ICTR. In particular, the justifications relied on previously do not stand in the present context:<sup>33</sup> Lebanon did not consent to the removal of its domestic jurisdiction to an international forum, nor do the nature of the offences justify the encroachment upon sovereignty. As a result, Resolution 1757 cannot serve as a valid legal basis for the exercise of the Tribunal’s jurisdiction.

a. Lebanon did not consent to the STL Agreement

24. The Prime Minister reported to the Security Council that “a parliamentary majority has expressed its support for the Tribunal”.<sup>34</sup> This representation is, however, an insufficient basis to determine that Lebanon consented to be bound by the STL

<sup>30</sup> *Ayyash* Interlocutory Decision on the Applicable Law, para. 15, referring to SG Report on Tribunal, para. 6.

<sup>31</sup> See *infra*.

<sup>32</sup> *Tadić* Jurisdiction Decision, para. 36.

<sup>33</sup> *Tadić* Jurisdiction Decision, paras. 56-57. See also *Kanyabashi* Jurisdiction Decision, paras. 14-15, 19-28.

<sup>34</sup> Letter of 14 May 2007.

Agreement, not least because the President challenged those representations.<sup>35</sup> The fact that the Lebanese Government signed the STL Agreement on 23 January and 6 February 2007, respectively,<sup>36</sup> is equally without weight. The conditions for lawful entry into force of that Agreement were not met in this instance.

25. The terms of the STL Agreement are clear that it would not enter into force until the Government of Lebanon informed the UN that the “legal requirements” had been complied with.<sup>37</sup> This was clearly the UN’s understanding.<sup>38</sup> As such, , the customary rule that a state can express its consent to be bound by a treaty by the signature of its representative does not apply.<sup>39</sup> Rather, the terms of the treaty that consent to be bound would be expressed by ratification must be honoured.<sup>40</sup> Furthermore, “consent” in a sense that is legally relevant demands that the authority giving that consent is itself constitutionally empowered to give it. Consent given by an entity without Constitutional authority, or where conditions to providing consent have not been met, cannot bind the State in question.
26. In the present case, any “consent” given by the Lebanon Government would also be invalid because such consent was given in manifest violation of fundamentally important provisions of its domestic law.<sup>41</sup> These violations, discussed above, would have been manifest to the Security Council in light of repeated reports concerning them,<sup>42</sup> as well as State objections to the adoption of Resolution 1757.<sup>43</sup> The

<sup>35</sup> Letter of 15 May 2007; Letter of 14 November 2006; Letter of 5 February 2007.

<sup>36</sup> Resolution 1757.

<sup>37</sup> Article 19(1), STL Agreement.

<sup>38</sup> See, for instance, Statement by Mr. Nicolas Michel, Under-Secretary-General for Legal Affairs, the Legal Counsel, at the informal consultations held by the Security Council on 20 November 2006, Addendum to the SG Report on Tribunal, S 2006/893/Add.1 (“Michel Statement”), pp. 1-2 (“the Lebanese constitutional process for the conclusion of an agreement with the United Nations has not been completed. Major steps remain to be taken, in particular formal approval by the Government, which is the prerequisite for the signature of the treaty and its submission for parliamentary approval and, ultimately, its ratification. Only after this process has been completed will Lebanon have entered into an internationally binding commitment. Although the decision by the Government on Monday, 13 November 2006, to support the draft agreement and statute is of considerable political importance, it is not a formal step in the process of concluding the treaty.”).

<sup>39</sup> See Article 12, Vienna Convention on the Law of Treaties (“Vienna Convention”).

<sup>40</sup> See Article 14, Vienna Convention; Article 14, Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations (“Vienna Convention on International Organizations”). Although Lebanon has not ratified the latter Convention, its provisions are persuasive, particularly since the United Nations has signed it.

<sup>41</sup> See Articles 46(1) and 46(3), Vienna Convention on International Organizations.

<sup>42</sup> Letter of 15 May 2007; SG Report on Tribunal, para. 54; Michel Statement.

<sup>43</sup> See, for instance, Indonesia’s comments that the Resolution bypasses “constitutional procedure and national processes”; China stated that “Lebanon’s domestic laws provide the legal basis for the operation [of the STL]. It is therefore only reasonable that Lebanon should, in accordance with its constitutional procedures, complete the domestic legal process required for the entry into force of the

violations were also of a fundamentally important law – the Constitution. In particular, Article 52 of the Constitution evidently concerns a central aspect of state sovereignty – the right of the State to lawfully consent to be bound by treaty.

27. Thus, the situation before the Security Council in adopting Resolution 1757 was fundamentally different from when it created other *ad hoc* tribunals. In contrast to the creation of those Tribunals, no such consent existed here. Instead, the impossibility to secure the agreement of competent Lebanese authorities (Parliament lawfully called; the President) makes it clear that no lawful approval was or could have been given.

b. The nature of the offences do not justify the violation of Lebanese sovereignty and Security Council exceeded its powers by delegating Lebanese law

28. In relation to other *ad hoc* international tribunals, the nature of the crimes at issue has previously justified an encroachment upon sovereignty. For instance, the ICTY reasoned that the international crimes within its jurisdiction transcended “the interest of any one State” and that, in such circumstances, “the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world.”<sup>44</sup>

29. This reasoning does not justify the Security Council’s encroachment upon Lebanese sovereignty. First, the crimes within the STL’s jurisdiction are by definition – as domestic crimes<sup>45</sup> – not of a kind which transcend the interest of any one state. A State has exclusive jurisdiction over such crimes unless it lawfully agrees to delegate that competence to another body (as in the case of SCSL). Overriding a state’s exclusive right to try domestic crimes by its citizens on its territory in accordance with its own legal system is a far more serious encroachment on sovereignty than trying *international* crimes in an *international* forum. In such circumstances, the sovereign right of the State to exercise its own criminal jurisdiction should take precedence over any interest the international community has in seeing these crimes prosecuted.

---

agreement. That is explicitly provided for in the [STL Agreement].” Security Council 5685<sup>th</sup> Meeting, 30 May 2007, S/PV.5685 (“SC May 2007 Meeting”).

<sup>44</sup> *Tadić* Jurisdiction Decision, para. 59, *citing with approval Tadić*, Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, 10 August 1995, para. 42.

<sup>45</sup> Article 2, STL Statute.

30. Second, and in any event, the Security Council exceeded its powers by delegating the jurisdiction to exercise *domestic* law to an international body without consent. There is no basis in the Charter which empowers the Security Council to do so – the Security Council itself has no authority to apply Lebanese law or to delegate that competence to others. The UN Charter only refers to “international law” (not domestic law) as being within the realm of its competence.<sup>46</sup>
31. Where other international(ised) tribunals have been given the jurisdiction to try domestic crimes, those hybrid tribunals have been brought into existence on the basis of a treaty between the State concerned, ratified in accordance with domestic laws, and the UN.<sup>47</sup> In those cases, the lawful domestic process was respected and followed. In this respect, the STL is a *sui generis* tribunal – one which seeks to enforce national criminal law without the lawful consent of the state.
32. There was no (*evidential*) basis to suggest that Lebanese judicial authorities were incapable of prosecuting the acts now within the Tribunal’s jurisdiction. While there may have been a lawful basis to create the International Independent Investigation Commission (“IIIC”) to assist Lebanon with investigating the attack against Mr. Hariri,<sup>48</sup> this reasoning did not extend to the prosecutorial and judicial process and thus the creation of the STL itself. Nor did the Security Council make a determination to that effect. Therefore, there was no valid basis to displace the natural competence of Lebanese judicial and prosecutorial authorities in relation to these (alleged) domestic crimes.
33. Indeed, the Lebanese criminal justice system is fully functional, subject to the rule of law, with substantive and procedural capacity to try the crimes at issue. Indeed, Lebanon has in the past successfully tried similar crimes – a single assassination by explosive device. Further, the suspected perpetrators were not in power or involved in the Government, and thus it cannot therefore be said that the international community had a legitimate fear that the crimes at issue would not be properly prosecuted.<sup>49</sup> Lastly, the UN itself has demonstrated its trust in the ability of the Lebanese judiciary by appointing several of its members as Judges of this Tribunal. Thus, in such

---

<sup>46</sup> See Preamble, Articles 1(1), 13(1)(a), UN Charter.

<sup>47</sup> See *Prosecutor v Kallon et al.*, Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, paras. 59-62; *Prosecutor v Ieng Sary*, Decision on Ieng Sary’s Appeal Against the Closing Order, 11 April 2011, para. 213.

<sup>48</sup> See SC May 2007 Meeting.

<sup>49</sup> Cf *Tadić* Jurisdiction Decision, para. 58.

circumstances, vitiating Lebanon's right to exercise jurisdiction over these crimes was without legal basis or justification.

34. The Security Council's action also violates a fundamental aspect of international practice, which may have acquired customary status, whereby the judicial competence of a state to try crimes committed on its territory can only be lawfully displaced by an international criminal tribunal where it is unable or unwilling to do so itself.<sup>50</sup> Neither branch of that test has been established in the circumstances at present.
- c. Resolution 1757 was a serious violation of state sovereignty in breach of the UN Charter
35. Membership in the UN entails certain ever-increasing limitations upon the sovereignty of member states.<sup>51</sup> The UN Charter's prohibition upon intervention in a state's domestic matters does not "prejudice the application of enforcement measures under Chapter VII",<sup>52</sup> and the Security Council enjoys a wide margin of discretion under both Article 39 and 41 of the Charter.<sup>53</sup> However, sovereignty remains an important principle of international law and the UN Charter, which holds as a founding principle the sovereign equality of its members.<sup>54</sup> The Security Council's powers, although wide, are not unlimited.<sup>55</sup> In this instance, the Security Council seriously exceeded its *constitutional* limitations by imposing the STL Agreement on Lebanon.
36. First, the Security Council intervened in paradigmatically domestic affairs. The "question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."<sup>56</sup> The Defence submits that international practice has not developed to such an extent that basic governance issues – such as the constitutional organization of a State, and its ability to exercise criminal jurisdiction over its own citizens for

<sup>50</sup> See e.g. Articles 1, 17(1)(b), 19(2)(b), ICC Statute; *The Prosecutor v. Ruto, Kosgey and Sang*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, para 44; *The Prosecutor v. Gaddafi and Al-Senussi*, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 1 May 2012.

<sup>51</sup> *Kanyabashi* Jurisdiction Decision, para. 13.

<sup>52</sup> Article 2(7), UN Charter.

<sup>53</sup> *Tadić* Jurisdiction Decision, paras. 28, 31, 32.

<sup>54</sup> Article 2(1), UN Charter.

<sup>55</sup> *Tadić* Jurisdiction Decision para. 28.

<sup>56</sup> *Nationality Decrees in Tunis and Morocco* (Advisory Opinion), Permanent Court of International Justice, Series B, No. 4, 7 February 1923, p. 24.

crimes committed on its own territory – have been taken out of a State’s domestic jurisdiction. Although these issues may “very closely concern the interest of more than one State,” the State remains the sole judge over such matters.<sup>57</sup> Resolution 1757, by violating the Lebanese Constitution, altering the Lebanese judicial order, and preventing Lebanon from exercising its criminal jurisdiction over its citizens on its territory, is a gross violation of sovereignty.

37. Secondly, the Security Council interfered with the democratic processes of a member State. The pursuit of democracy is a fundamental value and goal of the UN and the Security Council in particular.<sup>58</sup> The Security Council’s actions were not consistent with respect for democratic governance, but in fact an affront to it: without the consent of Parliament, and therefore without an expression of citizens’ will, the Security Council intervened in the midst of a democratic dispute, favouring one side.<sup>59</sup> International practice has not developed to allow the Security Council an unfettered discretion under Chapter VII to trample on democratic decision-making within a State.
38. It is significant in this respect that, at the time of its adoption, several States voiced their opinion that Resolution 1757 represented an unprecedented violation of State sovereignty.<sup>60</sup> While the Resolution was ultimately adopted, such commentary

<sup>57</sup> *Ibid.*, pp. 23-24. See also Susan Lamb, “Legal Limits to United Nations Security Council Powers”, *The Reality of International Law: Essays in Honour of Ian Brownlie*, Guy S. Goodwin-Gill & Stefan Talman (eds.), Oxford, 1999, 361-388, p. 368 (“Although VII measures constitute an express exception to the operation of Article 2(7) [of the Charter], it is wrong to assume that the sphere of domestic jurisdiction of states and that of their component institutions disappears entirely once Chapter VII is invoked. A sphere of application of domestic jurisdiction for states persists”).

<sup>58</sup> See e.g., V. Lowe *et al.* (eds), *The United Nations Security Council and War*, at 576 (“The third function of the Security Council is to promote the diffusion of norms with regard to human rights, minority, democratic governance, the rule of law”).

<sup>59</sup> See, for instance, the comments of Indonesia at the Security Council meeting concerning Resolution 1757 (“the Council should not fail to take into consideration that there is no unified voice among Lebanese leaders. The domestic political situation in Lebanon has created difficulty for the international community to act further on that request.”), as well as South Africa (“The Security Council is mandated to act with impartiality and without bias. It cannot be seen to be taking sides in internal Lebanese politics.”). SC May 2007 Meeting. See also Gianluca Serra *Special Tribunal for Lebanon: A Commentary on its Major Legal Aspects*, *International Criminal Justice Review* 18 (September 2008), 344-355, p. 348; Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, *Journal of International Criminal Justice* 5 (2007), 1091-1105 (“Fassbender International Legality”), pp. 1093-1094.

<sup>60</sup> See, for instance, Indonesia (“If the draft resolution is adopted, it will bypass constitutional procedure and national processes. There are no legal grounds for the Security Council to take over an issue that is domestic in nature.”); South Africa (“We maintain that it is not appropriate for the Security Council to impose such a tribunal on Lebanon, especially under Chapter VII of the Charter of the United Nations. ... We also do not believe that the Council has the right to bypass the procedures required by the Lebanese Constitution for the entry into force of an agreement with the United Nations.”); China (“It is ... only reasonable that Lebanon should, in accordance with its constitutional

strongly suggests that the Security Council's actions were regarded as a violation of Article 2(7) of the Charter. Because of the refusal or failure of the relevant States to assist the Defence,<sup>61</sup> the Defence was unable to procure information regarding the legal basis for the Security Council's actions.

39. The core principles at the heart of the UN Charter demand respect for the right of States to organize and protect their own legal and judicial order, to govern themselves in accordance with the democratic process, and for citizens to benefit from the protection of their constitutional order. The UN Charter does not give the authority to the Security Council to override the democratic process or to violate the rule of law. Resolution 1757 contravened the Purposes and Principles of the Charter, regardless of the reliance on Chapter VII.<sup>62</sup> As a result, it cannot serve as a valid legal basis for the establishment of the Tribunal.

*iii. The Security Council acted ultra vires in imposing an un-ratified treaty on Lebanon*

40. In Resolution 1757, the Security Council imposed an un-ratified treaty – the STL Agreement – on Lebanon. This appears to be the first instance in which the Security Council has ordered the entrance into force of an agreement with a State that did not ratify it through its domestic constitutional processes. In so doing, it exceeded its powers under the UN Charter.
41. The entire structure and functioning of the STL testify to the fact that it is not a Chapter VII body: it did not become a subsidiary organ of the UN in the manner of the ICTY or the ICTR;<sup>63</sup> the Tribunal has no binding authority over UN State members pursuant to Chapter VII; and Tribunal staff are not formally UN staff.<sup>64</sup>

---

procedures, complete the domestic legal process required for the entry into force of the agreement.... China believes that by invoking Chapter VII of the Charter, the resolution will override Lebanon's legislative organs by arbitrarily deciding on the date of the entry into force of the draft statute.”); and the Russian Federation (“The arrangement chosen by the sponsors is dubious from the point of view of international law. ... The constituent documents for the Tribunal, imposed by a unilateral decision of a United Nations body — that is, a Security Council resolution — essentially represent an encroachment upon the sovereignty of Lebanon. While the Resolution was ultimately adopted, the commentary of these States strongly suggests that the Security Council's actions were in violation of Article 2(7) of the Charter.”). SC May 2007 Meeting.

<sup>61</sup> See *supra*.

<sup>62</sup> Article 24(2), UN Charter.

<sup>63</sup> SG Report on Tribunal, para. 6. This is confirmed by the fact that the Tribunal is funded in large part by Lebanon: Article 5, STL Agreement.

<sup>64</sup> See also Fassbender *International Legality*, p. 1093 (“What the Security Council in fact sought to accomplish with Resolution 1757 was to put the Agreement into effect, despite the absence of ratification by Lebanon.”).

Indeed, the STL Appeals Chamber has endorsed the view that the STL Agreement is the Tribunal's "legal basis".<sup>65</sup>

42. State commentary confirms that the Security Council was imposing a treaty on Lebanon, and that this was *ultra vires* its powers under the Charter. For instance, Indonesia stated that it considered that the Resolution "has changed the legal nature of article 19" of the STL Agreement; Russia stated that "[t]he treaty between the two entities — Lebanon and the United Nations — *by definition cannot enter into force on the basis of a decision by only one party*"; and Peru stated: "recognizing the particular circumstances of the case, we believe that the *agreement signed between Lebanon and the United Nations by means of a resolution*, in exercise of the powers of the Security Council as provided for in Chapter VII of the Charter of the United Nations, must not constitute a precedent beyond this particular case."<sup>66</sup>
43. The Security Council has no power under the UN Charter to impose an obligation in the form of an *entire* treaty on a State.<sup>67</sup> The essence of a treaty requires *consent by the parties* to be bound by its terms.<sup>68</sup> Moreover, the UN Charter provides that respect for self-determination is a fundamental principle of the UN,<sup>69</sup> which both guides and limits Security Council power. A State's ability to decide what treaty obligations should bind it forms part of that fundamental principle.
44. In this case, because the STL Agreement provides for a new, *ex post facto*, tribunal, it represents a displacement and replacement of the State's *judicial* competence. The Security Council did not have the authority to override Constitutional limitations agreed upon by Lebanese citizens (with the result, at the very least, that the due process level guaranteed to Lebanese citizens has been undermined, as discussed below) and to displace the legislative, executive, and judicial competence of Lebanon in the process. Such interference in sovereign, democratic-decision making is in

<sup>65</sup> *Ayyash* Interlocutory Decision on the Applicable Law, para. 15, *referring to* SG Report on Tribunal, para. 6.

<sup>66</sup> SC May 2007 Meeting (emphasis added).

<sup>67</sup> Fassbender *International Legality*, p. 1098, *see also* p. 1097 ("the power to substitute a Chapter VII decision for a ratification of an international treaty, with the effect of generating a treaty obligation on the part of the state in question in its relations with the UN, would be such an unprecedented competence."). There is no basis in the UN Charter or in state practice that would allow the UN to force into effect an entire treaty.

<sup>68</sup> *See* Fassbender *International Legality*, p. 1098; Preamble, Vienna Convention ("Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized").

<sup>69</sup> Article 1(2), UN Charter.

violation of the UN Charter's direction to respect self-determination, democracy, and sovereignty. The Security Council therefore acted *ultra vires* its powers in imposing the STL Agreement upon Lebanon in Resolution 1757.

iv. *Conclusion*

45. Whether established by agreement (the STL Agreement ratified by Resolution 1757), or by Security Council resolution (Resolution 1757 incorporating the STL Agreement),<sup>70</sup> the STL cannot be said to have been established by law. The Security Council's actions were *ultra vires* the UN Charter and international law. Both the STL Agreement and Resolution 1757 violated the rule of law, State sovereignty, and the democratic process, all of which form part of the core values guaranteed by the UN Charter and are thus binding on the Security Council. As a result, the STL's jurisdiction is vitiated and proceedings before such a tribunal would be in violation of an accused's fundamental right to be tried by a tribunal "established by law".

**B. *Jus de non evocando* and the displacement of Lebanese natural jurisdiction**

46. The principle of *jus de non evocando* provides that no one may be prevented from having his case heard by the courts that are competent under the law applicable to him at the time of the alleged offence.<sup>71</sup> This guarantee forms an integral part of the Lebanese constitutional order.<sup>72</sup> Pursuant to international human rights law, this principle is reinforced by the requirement that a valid pre-existing legal basis must provide for the existence of the "tribunal" that hears the case and for the composition of the bench.<sup>73</sup> It also demands that judicial competence over a matter may never depend on the discretion of the executive.<sup>74</sup>
47. By creating a new, *ex post facto*, jurisdictionally-selective tribunal empowered to deal with one incident (plus connected cases), the Security Council (acting as the "executive") effectively subjected those believed to be responsible for this incident to

<sup>70</sup> *Ayyash* Interlocutory Decision on the Applicable Law, para. 26.

<sup>71</sup> Such a prohibition is often explicitly provided for in jurisdictions of the civil-law tradition. *E.g.* Article 17, Dutch Constitution; Article 101, German Constitution; Article 25, Italian Constitution; Article 30, Swiss Constitution; Article 13, Belgian Constitution; Article 24, Spanish Constitution, Article 11, Surinamese Constitution, Article 23, Slovenian Constitution, Article 37, Turkish Constitution; Article 8, Greek Constitution; Article 83(2), Austrian Constitution, Article 49(4), Venezuelan Constitution.

<sup>72</sup> Article 20, Lebanese Constitution.

<sup>73</sup> *E.g. Buscarini v. San Marino* (dec.), 18 February 1999; *Posokhov v Russia*, Judgment of 4 March 2003, para. 37.

<sup>74</sup> *Zand v Austria*, 16 May 1977, Application 7360/76.

a different and, in several significant respects, inferior standard of due process. This constitutes a violation of the principle of *jus de non evocando* and related human rights guarantees.

48. An accused can only be validly removed from his “natural” domestic jurisdiction when his fundamental rights are not affected by the displacement of jurisdictional competence. In *Đukić*, for instance, it was noted that whilst it was within the Prosecution’s discretion to decide if and when to seek the deferral of a case to the competence of the international tribunal, it had to make that determination in such a way that would not prejudice the fundamental rights of the accused.<sup>75</sup>
49. Whether measured against the promised “highest fair trial standards”<sup>76</sup> or the lesser *Tadić* (“at least equally fair”) standard,<sup>77</sup> the displacement of competent Lebanese tribunals by the STL has resulted in a violation of *jus de non evocando* and in a grave and impermissible erosion of the level of due process protection for STL defendants.
  - i. *The STL effectively denies the accused access to certain categories of evidence to which they would otherwise have access to if tried in Lebanon*
50. There are several categories of *a priori* limitations that affect the ability of the Defence to access certain categories of information which might be relevant to its case and which it might otherwise have had access but for the displacement of lawful Lebanese jurisdictions by the STL.
51. First, *without a statutory basis*, the Rules put certain categories of information beyond the reach of the Defence:
  - a. Material in possession of the International Committee of the Red Cross;<sup>78</sup>
  - b. Material collected by the IIC;<sup>79</sup> and

<sup>75</sup> *Prosecutor v Đukić*, Decision on Preliminary Motions of the Accused, 26 April 1996, paras. 7-8. See also *In Re: The Republic of Macedonia*, IT-02-55-MISC.6, Decision on Prosecutor’s Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia, 4 October 2002.

<sup>76</sup> See, e.g., *In the matter of El Sayed*, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010, para. 52; STL Factsheet: “The Special Tribunal’s standards of justice, including principles of due process of law, will be based on the highest international standards of criminal justice as applied in other international tribunals.”; Security Council Resolution 1664, S/RES/1664 (2006), 29 March 2006; Resolution 1757; Preamble, STL Agreement; Article 28, STL Statute.

<sup>77</sup> The Defence does not accept that the principle as stated in the *Tadić* Jurisdiction Decision (paras. 61-62) reflects the state of international law on that point. Considering the STL’s commitment to operate “on the highest fair trial standards”, it should apply the internationally-recognised human rights standards as just stated. Furthermore, as discussed below, the creation of the STL would violate even the minimalist *Tadić* standard.

<sup>78</sup> Rule 164.

c. Material subject to Rule 117 and 118 confidentiality agreements.

No such *a priori* exclusionary rule applies in the Lebanese legal order.<sup>80</sup>

52. Secondly, under the terms of the STL Agreement, the only entity with a legal duty to cooperate with the Defence is Lebanon (and its organs).<sup>81</sup> The result is a limitation of the nature of evidence that the Defence can obtain. For instance, the Defence cannot rely on bi-lateral or multi-lateral cooperation agreements that are binding on Lebanon and which could have been relied upon to request information from other States had proceedings taken place in Lebanese courts.
53. Thirdly, thus far, the Defence has not received from the Lebanese authorities any of the information which it has sought from them.<sup>82</sup> In a domestic trial, Lebanese courts would have the ability to order Lebanese authorities to produce any such material. The ability of the STL to do so is as yet untested.
54. Fourthly, the STL's regime does not provide for a Prosecution obligation to conduct a full investigation *à décharge*. In contrast, the Lebanese legal order requires the competent investigative magistrate to do so.<sup>83</sup> As a result, evidence favourable to the accused would have been sought and obtained as part of a judicial investigation had proceedings taken place before a Lebanese court. This is not the case at the STL.
55. When combined, the absence of investigation *à décharge*, the absence of a legal duty to cooperate or actual cooperation with the Defence, and the unavailability of other sources of information to which a defendant might have had access had he been prosecuted in the Lebanese courts, means that information favourable to the accused or relevant to his case may evade STL Defence teams whilst it would have been available in domestic proceedings. This constitutes a major impediment to ensuring the fairness of STL proceedings.

---

<sup>79</sup> Rule 111.

<sup>80</sup> On the contrary, Article 76, para. 1, Lebanese Code of Criminal Procedure ("LCCP") provides: "When the defendant appears before him for the first time, the Investigating Judge shall inform him of the charges against him, summarizing the facts and informing him of the evidence in his possession or of the suspicions against him so that he can refute them and mount a defence. The Investigating Judge is not required to provide him with a legal characterization of the facts."

<sup>81</sup> Article 15, STL Agreement; Rule 15. *See also* Rules 20, 21.

<sup>82</sup> *Supra*, para. 2.

<sup>83</sup> *See generally* Article 60, para. 1, LCCP ("The Investigating Judge shall conduct the public prosecution *in rem*. He may question as a defendant anyone suspected of having committed the offence as a perpetrator, accomplice, accessory or instigator independently of the charges brought by the Public Prosecutor's Office."); Article 98, para. 1, LCCP. *See also* Art. 81(1) French Code of Criminal Procedure.

- ii. *The STL's evidentiary regime prejudices the accused relative to what he would have been entitled to in the Lebanese legal order*
56. The Rules provide for broad admission of evidence that would permit the STL to, for instance, admit incriminatory evidence that would not be admissible in a Lebanese court (thus prejudicing the position of the accused).<sup>84</sup> This, again, is a major prejudicial consequence of the displacement of the accused's natural jurisdiction as he could, theoretically, be convicted based on evidence that could not have been tendered in Lebanese courts.
57. The STL regulatory regime permits witnesses to testify anonymously.<sup>85</sup> If adopted at trial, this would prejudice the ability of the accused to confront the evidence against him.<sup>86</sup> Such practice is not permitted in Lebanese courts.<sup>87</sup> Whether or not the Prosecution intends to make use of that possibility could be readily established by an indication on the record. The Chamber should invite the Prosecution to indicate whether it intends to make use of that provision so that it may assess whether it might prejudice the Defence. It should then draw any inference from the Prosecution's failure to respond with a view to preserve the effectiveness of the defendant's rights.
58. The STL's evidentiary regime also hampers the Defence's ability to prepare for the case in several ways. For instance:
- a. It allows for redactions of the supporting material;<sup>88</sup> and
  - b. It allows for delayed disclosure of material.<sup>89</sup>
59. No similar impediments exist in the Lebanese legal order. The combined effect of these procedural deviations from the Lebanese legal order is that the Defence would be in a much better position to prepare for trial had proceedings taken place in Lebanese courts than will be the case before the STL.

---

<sup>84</sup> In particular, to be admissible before the STL, evidence does not need to have been obtained in conformity with Lebanese law (although this might constitute a factor in a decision to admit).

<sup>85</sup> Rule 93.

<sup>86</sup> On the right of the accused to confront the evidence presented against him, *see, e.g.,* ECHR, Article 6(3)(d); *Kostovski v. Netherlands*, 166 E.C.H.R. (20 November 1989), paras. 44-45; *Visser v. Netherlands*, (14 February 2002); Article 14(3)(e), ICCPR.

<sup>87</sup> The concept of "anonymous witness" does not exist in the Lebanese law. This is implied by two articles of the LCCP: Article 236 and Article 260, paras. 2, 3. *See also* Lebanese Cassation Court, Judgement No. 303, 8/12/1972, *Samir Aliya*, Vol 3/43.

<sup>88</sup> Rule 116(A).

<sup>89</sup> Rule 115.

- iii. *The Lebanese legal order offers much greater legal certainty than the STL statutory system*
60. Although the Statute does not mention the ability or authority of the STL to apply customary international law for the purpose of defining the scope of its jurisdiction, the STL has done so (as a means of interpretation).<sup>90</sup> This has resulted in a *diluted* re-definition of the crime of “terrorism” as applicable before the STL (but not, demonstrably, before domestic courts).<sup>91</sup> The STL’s interpretative approach thus exposes existing Lebanese criminal law to legal uncertainty (resulting from its reliance on customary law, its reliance on liberal rather than strict interpretation of criminal law, and its re-definition of existing crimes) which is plainly prejudicial to the accused. Defendants would not have been exposed to such risks in Lebanese criminal courts where criminal law is interpreted strictly and in compliance with existing Lebanese criminal law.
61. The risk of jurisprudential errors when applying Lebanese criminal law is further increased by the fact that, unlike Lebanese courts, the majority of STL Chambers (and counsel on both sides) are composed of Judges with no expertise in Lebanese criminal law.<sup>92</sup>
62. The Statute of the STL also provides for certain modes of liability (in particular, JCE and command responsibility) which did not form part of Lebanese criminal law at the time of the attack. Accordingly, the replacement of the accused’s natural jurisdiction by the STL could result in a guilty finding pursuant to theories of liability that are not applicable in their natural (Lebanese) jurisdiction. In other words, conduct that might not be criminal as a matter of Lebanese law could be criminal as a matter of STL law.

<sup>90</sup> *Ayyash* Interlocutory Decision on Applicable Law. The Defence reserves its right regarding the lawfulness of such a course.

<sup>91</sup> *Ayyash* Interlocutory Decision on Applicable Law, para. 145.

<sup>92</sup> Regarding the human rights requirement of “competence” see, generally: Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, doc.39, 1993, p. 249; Annual Report of the Inter-American Commission, 1996, OEA/Ser.L/V/II.95, doc.7, 1997, pp. 736-737. See also *Prosecutor v. Šešelj*, Décision Relative à la Requête pour Outrage de Vojislav Šešelj contre Carla Del Ponte, Hildegard Uertz-Retzlaff et Daniel Saxon et aux Demandes Subséquentes de l’Accusation, 22 December 2011, Opinion Individuelle du Président de la Chambre, le Juge Jean-Claude Antonetti, p. 23; *Prosecutor v. Milutinović*, Decision on Nebojša Pavković’s Motion for a Dismissal of the Indictment Against him on Grounds that the United Nations Security Council Illegally Established the International Criminal Tribunal for the Former Yugoslavia, 21 February 2008, para. 18. This state of affair is very different from the situation of, for instance, the Extraordinary Chambers of the Courts of Cambodia (“ECCC”). The ECCC relies, primarily, on international rather than domestic – Cambodian – law. Likewise, at the SCSL, no charges have been brought based on Sierra Leonian criminal law.

63. In light of the above, the protection of the accused against *ex post facto criminal law* is much more effective in Lebanese courts than is the case at the STL.

iv. *No right to amnesty or pardon*

64. A defendant convicted before the STL would not be eligible for a pardon (and/or amnesty) as any other Lebanese citizen might otherwise be entitled to.<sup>93</sup> The Lebanese Constitution grants the President the right to grant pardons, and general amnesties are permitted by law.<sup>94</sup> Amnesties have been frequently adopted in Lebanon,<sup>95</sup> significantly in 1991 as a condition for the cessation of the civil war, which included terrorist crimes.<sup>96</sup> Amnesties were granted in 2005 to the head of the Lebanese Forces for crimes including being an accomplice to the commission of terrorism,<sup>97</sup> and to fundamentalists who had yet to be convicted for crimes under Article 2 of the Law of 11 January 1958.<sup>98</sup>

65. The provision of amnesties for domestic crimes (such as those within the STL's mandate) is not prohibited in international law. Defendants in Lebanon could therefore benefit from an amnesty if any of them are convicted of any of the crimes they are charged with at the STL. The STL Statute thus puts the accused in a *worse* position than they would otherwise have been under Lebanese law. This raises issues of equality of treatment and equality before the law.<sup>99</sup> This prejudice to the accused results directly from the displacement and replacement of the competent Lebanese tribunals by the Special Tribunal.

v. *The STL is unable to effectively protect rights provided to the accused*

66. Whilst the Statute provides for a prohibition against *non bis in idem*,<sup>100</sup> it is incapable of enforcing that guarantee in an effective manner. First, Lebanese courts could readily re-qualify the underlying conduct and re-prosecute any of the accused (acquitted or convicted). Second, once the STL is closed, there is no mechanism

<sup>93</sup> Article 16, STL Agreement; Article 6, STL Statute.

<sup>94</sup> Article 53(9), Lebanese Constitution.

<sup>95</sup> See, for instance, amnesty laws adopted on 19 October 1949, 23 February 1954, 24 December 1958, 24 June 1965, 16 November 1965, 30 December 1968, 17 February 1969, 24 April 1969, 11 December 1970, 29 December 1997, and 24 May 2000.

<sup>96</sup> Amnesty law issued on 26 August 1991.

<sup>97</sup> Law No. 677, 19 July 2005.

<sup>98</sup> Law No. 678, 19 July 2005.

<sup>99</sup> Article 7, Lebanese Constitution.

<sup>100</sup> Article 5, Statute.

provided in the Statute that would enable a defendant to obtain effective protection against the possibility of *re*-prosecution. A fundamental right may not be regarded as guaranteed unless there is an effective mechanism capable of enforcing it.<sup>101</sup> In this case, no such mechanism exists.

67. The Statute does not provide for any guarantee regarding the detention of the accused, eligibility for parole or early release, nor for any other guarantees pertaining their possible detention.<sup>102</sup> There is therefore no statutory provision – or any rule – guaranteeing that an STL convict would benefit from international standards of protection. In contrast, all relevant rules and safeguards are in place in Lebanon.<sup>103</sup>
68. There is also a serious deficiency of accountability where a violation of a fundamental right is attributable to the STL itself or one of its organs: the Statute does not provide for any remedy (judicial or otherwise). In such a case, a defendant whose rights are violated by the Tribunal has no access to justice. In contrast, the Lebanese legal order provides many safeguards providing remedies in such cases.<sup>104</sup>

vi. *Selectivity and impartiality*

69. The hyper-selectivity of the Tribunal's jurisdiction also raises serious issues pertaining to the appearance of impartiality of the Tribunal.<sup>105</sup> In the history of

<sup>101</sup> See *Artico v Italy*, judgment, 13 May 1980, Series A no. 37, p. 16, § 33; *Colozza*, para. 28; *Artico*, para. 37.

<sup>102</sup> This would include, *inter alia*, issues pertaining to the right of the accused to good treatment, to respect for his right to family life and religion.

<sup>103</sup> See, for instance, Article 243(e), LCCP; Article 107, LCCP.

<sup>104</sup> First, the Lebanese legal order provides for several levels of corrective judicial instances (including cassation). It is worth mentioning, in this context, that in the Lebanese legal order appellate courts are institutionally separate and independent from trial courts. At the STL, by contrast, trial and appellate courts are institutionally part of the same institution to which a purported violation of rights would be attributable. Secondly, it also provides for means to hold the State liable for deficiencies in the judicial process. See e.g.: Articles 741-761, of the Code of Civil Procedure ("LCCiP") specify the rules related to State liability for the acts of judicial judges. Accordingly, the State can be held liable before the Plenary Assembly of the Cassation Court (Article 743, LCCiP) for the acts of the judges (whether they are the ones who render judgements, investigate or the prosecution) in the cases enumerated in Article 741 LCCP: 1 Miscarriage of justice; 2 Deception or fraud; 3 Bribery; 4 A serious mistake that shall not be committed by a judge who gives his functions the normal attention. These texts are applicable in criminal matters even if they figure in the Code of Civil Procedure. That is based on article 6 LCCiP which holds that the general rules of the LCCiP are followed whenever there is a gap in the other laws and rules on procedure. According to the Lebanese Court of Cassation (Cass. Crim., Decision No. 13, 13 January 1972), the Code of Civil Procedure is considered the general law in regard of the Code of Criminal Procedure whenever there is a gap in the latter. See Dr. S. Alia, Collection of Jurisprudence of the Court of Cassation (1972-1973), 1992, Vol. 3, N° 608, p. 242-243.

<sup>105</sup> See M. Wierda et al., "Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon", 2007 5(5) JICJ 1065-1081. See also Amnesty International, *The Special Tribunal for Lebanon: Selective Justice?*, 27 February 2009, <http://www.amnesty.org/en.library/info/MDE18/001/2009>

criminal law, there might not be a case where, as at present, a new jurisdiction was created to adjudicate upon one criminal incident.<sup>106</sup> Again, the perceived lack of impartiality of the STL is a consequence of the displacement of a constitutionally able national judiciary in violation of the domestic democratic process. The guarantee of a tribunal that is *and appears* to be impartial is a right of the accused.<sup>107</sup> That guarantee has been undermined by the creation of a hyper-selective *tribunal d'exception* with a pre-determined jurisdiction over the case (and related incidents) over which it has jurisdiction. No such issue would have arisen had the competence of Lebanese courts not been displaced.

vii. *Conclusion*

70. The Lebanese Government had no authority to amend the legal and constitutional protections of Lebanese citizens; nor did the Security Council. By negotiating and agreeing to a regime that effectively lowered and undermined some of those guarantees, the Lebanese Government acted unconstitutionally and in violation of its international obligations.
71. The individual *and* combined effect of these diminutions of due process guarantees normally available to a Lebanese defendant means that proceedings before the STL could not be said to be “equally fair” to the accused when compared to the protection he would enjoy before a Lebanese criminal court. His right of *jus de non evocando* – and other affected rights, as listed above – would be prejudiced and, in some cases, rendered ineffective before the STL.
72. In these circumstances, the STL is not permitted as a matter of international law to exercise its statutory powers over the accused and should refrain from doing so. It should either: (i) order that competence over this case reverts to the Lebanese courts; and/or (ii) seek to bring the Statute and Rules in line with guarantees and protection applicable in the Lebanese legal order (subject to relevant human rights *de minimis*).

---

<sup>106</sup> The Tribunals at both Nuremberg and Tokyo were dealing with thousands of individual criminal incidents. Even so, they were criticised for being selective and “victor’s justice”.

<sup>107</sup> Article 6(1), ECHR See e.g. *Hulki Güneş v Turkey*, Judgment, 19 June 2003, § 84; Regarding “appearance”, see *Belilos v. Switzerland*, ECHR 29 April 1988), §67; *Le Compte, Van Leuven and De Meyere v Belgium*, 4 ECHR, para. 55; *Campbell and Fell v. United Kingdom* (28 June 1984) para 78. See also Article 14 (1), ICCPR, Article 8(1), ACHR.

Absent these, the Chamber would be required to stay the proceedings to guarantee the rights of the accused.<sup>108</sup>

#### IV. RELIEF REQUESTED

73. The Tribunal was not established by law such that any exercise of jurisdiction would be in contravention of fundamental international human rights standards. The Defence therefore respectfully requests that the Chamber decline to exercise its jurisdiction and dismiss the criminal charges against the accused as not validly brought.

Respectfully submitted, on 10 May 2012,



Mr. DAVID YOUNG  
Lead Counsel for Mr. Sabra



Dr. GUÉNAËL METTRAUX  
Co-Counsel for Mr. Sabra

Word Count: 9,741

