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

THE CORRECTED VERSION OF THE DEFENCE FOR MR. HUSSEIN HASSAN ONEISSI'S MOTION CHALLENGING THE LEGALITY OF THE TRIBUNAL

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I. INTRODUCTION

1. Under Resolution 1757 dated 30 May 2007, the Security Council of the United Nations decided that the provisions of the "agreement" between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon ("the agreement")[1] would enter into force on 10 June 2007, unless the Government of Lebanon had provided notification under Article 19 (1) of the "agreement" before that date. The UN never received such notification.

2. The Special Tribunal for Lebanon (the "Tribunal") officially commenced functioning on 1 March 2009.

3. Based on the principle of *Kompetenz-Kompetenz*, the Defence for Mr. Oneissi (the "Defence") respectfully submits this motion challenging the legality of the Tribunal.

4. The Defense submits that the Tribunal was not validly constituted, lacks the legitimate power to exercise a judicial function and therefore has no primary jurisdiction for the following reasons:

    a) Lebanon never consented to be bound by the "agreement" which was a) negotiated, adopted and signed on behalf of the Lebanese Republic by persons acting without the requisite legal capacity, b) never ratified in compliance with the provisions of the Constitution of the Lebanese Republic as required by international law and c) consequently, never entered into force. As a result, the "agreement" is illegal and as such, shall not have any legal effect.

    b) The UN intention to establish the Tribunal on a conventional basis and the context in which Resolution 1757 was passed establish that the Security Council (the "SC") used Chapter VII to bypass the law of treaties, thereby exceeding the executive powers endowed upon it by the United Nations (the "UN") to achieve an end other than the one initially intended by the UN. As a result, Resolution 1757 is illegal and shall not have any effect.

[1] The Agreement between the United Nations and Lebanon will herein be referred to as the 'agreement' given that it is not considered a legal agreement. In effect, it is a draft agreement.

5. It is sustained that no judicial power has been granted to the Tribunal since it is created on the basis of an act which has no legal existence and that the SC misused its powers in adopting the Resolution 1757 which is therefore illegal and shall not have any effect. Consequently the Tribunal has no primary jurisdiction as it is illegally established.

II. PROCEDURAL BACKGROUND.

6. On 14 February 2005 an explosion in Beirut killed former Lebanese Prime Minister Rafiq Hariri ("Hariri") and 22 others.[2]

7. On 7 April 2005, pursuant to SC Resolution 1595, the United Nations International Independent Investigation Commission ("UNIIIC") was established. It commenced its investigation on 16 June 2005. The UNIIIC ceased its investigation on 28 February 2009. It produced a total of eleven reports.

8. On 13 December 2005, the Prime Minister of Lebanon ("the PM") sent a letter to the UN requesting "to establish a tribunal of an international character to convene in or outside Lebanon, to try all those who are found responsible for the terrorist crime perpetrated against Hariri."[3]

9. On 29 March 2006, following the PM's request, the SC issued Resolution 1644 requesting the Secretary General ("SG") "to negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice.[4] Resolution 1664 does not invoke Chapter VII of the UN Charter.

10. This was followed by intense discussions between the representatives of the UN and of the PM.[5]

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[2] Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, 25 February-24 March 2005, Executive Summary

[3] See 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 and 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 (S/2005/783).

[4] SC Res/1664 (2006), para. 1 .

[5] Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, S/2006/893, 15 November 2006 ("15 Nov 2006 SG Report"); Addendum to the Report of the Secretary-General on the establishment of a special tribunal for Lebanon, S/2006/893/Add. 1 (21 November 2006); Annex A, para 2.

11. On the 11 November 2006, as a result of disagreements over the proposed establishment of the Tribunal, all Shiite ministers resigned from the Council of Ministers.[6]

12. On 13 November 2006, in an extraordinary session held by the Council's remaining members, unattended by the Lebanese President, the draft agreement between Lebanon and the UN was approved by the remaining Ministers.[7]

13. On 14 November 2006, President Lahoud wrote to the SG to inform him of the constitutional issues raised by the procedure under which the draft agreement had been negotiated and adopted. The letter details the complex political situation of Lebanon, how it has impacted on the legitimacy of the procedure, and resulted in the violation of at least four articles of the Constitution of the Lebanese Republic ("Constitution"), paragraph (j) of its preamble and thus, of the National Pact of Mutual Existence.[8] President Lahoud in substance informed the SG that: (i) he had only recently received the draft agreement, which he was told had been the object of intense discussions for several months; (ii) the project had not been discussed with him by the Prime Minister; (iii) since the document had not been approved by him in agreement with the PM, the decision of 13 November 2006 was "devoid of all legal value" and "in no way binding on the Lebanese Republic." He also asked for the support of the SG in preserving Lebanon from the "dangerous divisions" that were threatening peace before requesting him that the text of his letter be included in his forthcoming report.[9]

14. On 15 November 2006 the SG submitted his report and draft agreement on the establishment of the Tribunal and Statute to the President of the SC.[10] The report merely mentions the concerns expressed by President Lahoud, only in the concluding paragraph, referring to them as "observations ... including a challenge to the decision of the Council of Ministers." Despite the very explicit letter sent by President Lahoud, the SG report did not emphasise its exact substance to the SC as the matter was not simply a "challenge" of the decision of the Council of Ministers" but as will be developed below the existence of fundamental constitutional obstacles relating to the negotiation and adoption of international treaties, such as the "agreement".

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[6] Annex A, para.3
[7] See the conclusions of 15 November 2006 SG Report; Annex A, para. 2.
[8] *Ibid*
[9] *Ibid.*
[10] 15 November 2006 SG Report, para 54

15. The report was followed by an addendum dated 21 November 2006 where the Under-Secretary General in charge of Legal Affairs reported "the Lebanese constitutional process for the conclusion of an agreement with the UN 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."[11]

16. On 22 November 2006, the SG wrote to the PM inviting him to proceed with the final steps for the conclusion of the "agreement", in conformity with the Constitution of Lebanon,[12] which at that stage meant ratification by the Parliament followed by promulgation and publication by the President.[13]

17. On 25 November 2006, a second extraordinary session of the Council of Ministers was held further to which a draft decree was issued to refer to the Parliament the urgent draft law authorizing the Government to conclude the mentioned agreement.[14]

18. Ignoring these circumstances and the alarming letter sent by President Lahoud,[15] the PM and the UN signed the "agreement" on 22 January and 6 February 2007 respectively.[16]

19. However, on 5 February 2007, a day before the UN signed the "agreement", President Lahoud had written again to the SG, referring him to the four letters he had previously sent in connection to the draft agreement. He detailed further how the whole procedure had been conducted in violation of the Constitution and reported again that the Government authority led by Mr Siniora had bypassed the constitutional mechanisms and disregarded constitutional prerogatives belonging solely to the Head of State and to Parliament. He further recalled that the Government lacked legitimacy following the resignation of a large group of its ministers on 11 November 2006.[17]

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[11] Addendum to the Report of the Secretary-General on the establishment of a special tribunal for Lebanon, S/2006/893/Add. 1 (21 November 2006).
[12] *See* Annex B.
[13] Constitution Arts 51; 52.
[14] Presidency of the Republic's General Directorate, Letter No. 260 to General Secretariat of the Council of Ministers, 9th December 2006, referred to Annex G, preamble.
[15] Annex A.
[16] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, United Nations Treaty Series, Volume 2461, Year 2007, I-44232, p. 292,
[17] Annex C.

20. In a letter to the SG dated 14 May 2007, the Prime Minister of Lebanon wrote that the Speaker of Parliament had refused to "convene a session of Parliament to formally ratify the statutes of the Tribunal and the bilateral agreement with the United Nations."[18] The Prime Minister of Lebanon explained that an "impasse [...] had been created by the refusal of the Speaker of parliament to convene a session of parliament to formally ratify the statutes of the Tribunal and the bilateral agreement with the United Nations." The Prime Minister went on to state: "We therefore ask you, as a matter of urgency, to put before the SC our request that the Special Tribunal be put into effect." On 15 May 2007, as he conveyed the letter of the PM dated 14 May 2007 to the SC, the SG was fully aware that according to President Lahoud, the negotiation and adoption of the "agreement" had been conducted in breach of the Constitution. Indeed, he had previously received the letters dated 14 November 2006 and 5 February 2007 from President Lahoud. However, on the 16 May 2007, the SG forwarded to the President of the SC a letter from President Lahoud transmitted the previous day where President Lahoud had challenged the assertions made by the Prime Minister. At that point the exclusion of the President from the whole process was such that he reports:

> I have learned through the news media that Mr. Fuad Siniora, the Prime Minister of a Government which is devoid of legitimacy in terms of the National Pact and the Constitution sent you a letter.[19]

21. He highlighted that the Prime Minister did not have the powers to negotiate international treaties[20] and that consequently, the publication of the draft Statute of the Tribunal in Lebanon's Official Gazette and its submission to Parliament was in contravention of Articles 52 and 53(6) of Lebanon's Constitution. He further noted that he had previously pointed out that approval of the Tribunal by the SC would constitute a transgression of Lebanon's Constitution, which would increase "anxiety about its being politicized or used for political purposes, [and] which would ultimately rob it of its capacity to produce the juridical result expected of it, resulting in dire consequences for the stability and civil peace of the country."[21] President Lahoud referred the SG to his letter dated 5 February 2007[22] and reminded him that he was still expecting a reply to

[18] Annex D.
[19] Annex E, para.1.
[20] *Ibid.*
[21] *Ibid*
[22] *Ibid,* point 3

"the detailed observations [h]e had made on two occasions in response to the successive 'last minute' drafts" he had received in breach of the Constitution.[23]

22. On 30 May 2007 the SC adopted Resolution 1757 pursuant to Chapter VII of the UN Charter. The Resolution determined that the provisions of the "agreement" and its annexed Statute would enter into force on 10 June 2007, unless the Lebanese Government provided notification that it had been ratified in terms of the Article 19(1) of the "agreement". China, Russia, South Africa, Indonesia and Qatar abstained from the vote, raising their utmost concerns as to the legality of the resolution from the point of view of both domestic and international law and complaining that it would infringe Lebanon's sovereignty, could exacerbate the situation and threaten peace.[24] The resolution referred to the Prime Minister's letter advising that the ratification process had reached an 'impasse', but failed to refer to the President's letter alleging constitutional infringements. The Lebanese Government did not notify the SG within the time limits required, and the SG decided that the Tribunal would commence operation on 1 March 2009.[25]

III. LEGAL BASIS FOR A MOTION CHALLENGING LEGALITY.

23. The Appeals Chamber has affirmed that a customary international rule has developed allowing international tribunals to exercise their inherent jurisdiction in pronouncing on matters not contemplated by the governing statutory provisions.[26] The principle of *Kompetenz-Kompetenz* is a major part of inherent jurisdiction and consists of a judicial tribunal's jurisdiction to determine its own jurisdiction.[27]

24. It is important to recall that on 11 August 2011, the President of the Special Tribunal for Lebanon invited the four accused, if they deemed it necessary, to challenge the

[23] *Ibid*, point 7.
[24] See SC 5685th meeting, UN Doc. S/PV.5685, 30 May 2007
[25] Third report of the Secretary-General submitted pursuant to Security Council resolution 1757 (2007), S/2008/734 (26 November 2008).
[26] *In the matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010 (*hereinafter El Sayed* decision), paras. 45, 46.
[27] ICTY, *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (*"Tadic"*), para. 18; STL, *In the matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010 (*hereinafter El Sayed*), para. 43; *See authorities quoted in footnote* 67.

legitimacy or illegality of the tribunal through their legal counsel.[28] To quote the President's words verbatim:

> If you believe this Tribunal is illegal or illegitimate, argue this point through legal counsel chosen by you – you will thus have your voice heard on this issue. Use your counsel to make your case and zealously protect your rights.[29]

25. This challenge is brought before the Trial Chamber because: (i) legality of the creation of a Tribunal is an inseparable component of jurisdiction;[30] and (ii) it falls on the Trial Chamber to adjudicate on a jurisdictional challenge.[31] The invocation of the Tribunal's inherent jurisdiction stems from the necessity of the Tribunal to determine jurisdictional issues as well as other procedural matters not addressed in its statute.[32] The basis for this is the lack of an alternative judicial body that can adjudicate on these matters.[33] Legality is one such issue. Given that a tribunal cannot properly exercise jurisdiction if it is improperly established, its legality is an incidental matter that the tribunal can decide on through the exercise of inherent jurisdiction.[34]

26. It is on record that Defence Counsel on multiple occasions during the Status Conference sought guidance from the Pre-Trial Judge on the applicable deadlines for a legality challenge.[35] Nevertheless, in the interests of judicial expediency, the Defence files this legality challenge pursuant to the tribunal's inherent jurisdiction as per the deadline set by the Pre-Trial Judge for a jurisdictional challenge.

27. Lastly, the legality of this Tribunal is an issue that directly touches on the rights of the accused persons. [36] Everyone has a right to be tried by a tribunal that is *inter alia competent,* and *established by law.*[37] This right has *jus cogens* status due to its non-

[28] Statement of Judge Antonio Cassese, President of the Special Tribunal for Lebanon, 11 August 2011.
[29] Statement of Judge Antonio Cassese, President of the Special Tribunal for Lebanon, 11 August 2011, para. 4.
[30] ICTY, *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 10 – 12. *See also* Prosecutor v Karadzic, IT-95-5/18-T, Decision on the Accused's Motion Challenging the Legal Validity and Legitimacy of the Tribunal, 7 December 2009, para. 8
[31] Special Tribunal for Lebanon, Rules of Procedure and Evidence 2012 ("RPE"), Rule 90 (A).
[32] STL, In the matter of *El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010 (*hereinafter El Sayed* decision), para. 42.
[33] *El Sayed* decision, para. 43
[34] *El Sayed* decision, para. 45
[35] Official transcript of the Status conference held on the 12th April 2012 ("T(E)"), 17:4-18:6; T(E)20:19-21:3; T(E)22:14-22:17; T(E)26:23-27:6; T(E)31:18-31:25.
[36] *See* Statement of Judge Antonio Cassese, President of the Special Tribunal for Lebanon, 11 August 2011, para. 4.
[37] *See* ICCPR, Art. 14(1) (emphasis added).

derogable nature.[38] In the context of these *in absentia*, it falls on appointed counsel to protect Mr. Oneissi's fundamental rights by contesting the legality of this Tribunal.[39]

IV. SUBMISSIONS

A. The Law

28. International *ad hoc* Tribunals have been created by either: (i) a valid international agreement; or (ii) a Resolution of the SC under Chapter VII of the Charter of the UN.

29. The SCSL was established by an agreement signed on 16 January 2002 between the Government of Sierra Leone and the United Nations by their respective duly authorized representatives. The Special Court Agreement was incorporated in the national law of Sierra Leone through the Ratification Act enacted by the Parliament in March 2002. The ECCC was established by an agreement signed on 6 June 2003 between the Royal Government of Cambodia and the United Nations. The ECCC Agreement was incorporated in the national law of Cambodia through the law on the establishment of the ECCC.[40]

30. The ICTY was established pursuant to SC Resolution 827 (25 May 1993) by the SC acting under Chapter VII of the UN Charter. The Resolution approved the report of the UN Secretary General, which annexed the ICTY Statute. The ICTR was established pursuant to SC Resolution 955 (8 November 1994) by the SC acting under Chapter VII of the UN Charter. The Resolution approved the report of the UN Secretary General, which annexed the ICTR Statute.

31. In the case of the Special Tribunal for Lebanon (the "Tribunal"), it has been neither, nor.

32. On 16 February 2011, the Appeals Chambers noted that it remained to be decided whether the Statute was held to be part of, and so whether the tribunal had been established by: (i) an international agreement concluded between Lebanon and the UN

[38] Human Rights Committee, General Comment No. 29, *States of Emergency*, para. 11 (2001), referred to in Erika de Wet, The Chapter VII Powers of the United Nations Security Council, 345 (Hart Publishing, 2004).
[39] STL, Directive on Assignment of Counsel, Art 25.
[40] See article 47 bis new of the law on the establishment of the ECCC as promulgated on 27 October 2004 where Cambodia accepts the ECCC Agreement as the Law of the land

of which the Statute is part; or (ii) a binding resolution adopted by the SC under Chapter VII of the UN Charter, of which the constitutive documents are both part.[41]

33. None of these two options can be retained. Lebanon never validly consented to be bound by the "agreement" on the establishment of the Tribunal, which as a result was never validly concluded. The SC was not empowered to unilaterally impose the entry into force of the provisions of a bilateral international treaty or give them effect in any way under these circumstances. As a result, the Tribunal was not validly constituted, lacks the legitimate power to exercise a judicial function within any ambit and therefore has no jurisdiction.

34. Resolution 1664 (2006) requested the SG of the UN to:

> "negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character [...]"

35. In doing so the SC vested the SG of the UN with the responsibility of negotiating an agreement between the UN and the Lebanese Government. The aim was the establishment of a tribunal of international character through an international treaty.

36. In negotiating this agreement, both negotiating parties were bound by: (i) principles and purposes of the UN Charter[42]; (ii) principles of treaty making forming part of international law;[43] (iii) principles of customary international law embodied in the 1969 Vienna Convention on the Law of Treaties ("VCLT");[44] and (iv) the 1986 Vienna Convention on the Law of Treaties between States and International Organizations ("VCLTIO").[45]

37. The binding force of the UN Charter on the UN and all its organs stems from the fact that it is the Charter that established the UN on the basis of clearly identified principles and purposes.[46] However wide the SC's discretion is, it cannot act in a manner that is in

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[41] *Prosecutor v Ayyash and al*, STL-11/01/I F0010, Appeals Chamber, 16 February 2011, Interlocutory Decision on the Applicable Law. Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, para. 26.
[42] See UN Charter, Chapter 1.
[43] See Brian D. Lepard, *Customary International Law A New Theory with Practical Applications*, (Cambridge University Press, 2011), 281- 282
[44] *Ibid.*
[45] *See* Yearbook of the International Law Commission, 1965, vol. I, pp 97 – 110.
[46] *See* UN Charter, Chapter 1.

contradiction with the Principles and Purposes of the UN Charter.[47] International law is binding on the UN and all its organs since Article 1(1) of the Charter obliges the UN in maintaining international peace to act in conformity with the principles of justice and international law. The principles relating to negotiation, approval, entry into force and validity of international conventions form part of international law and are binding on the SC by virtue of Article 1(1) of the UN Charter. [48] It is also on this basis that the UN is bound by principles of international law that are contained in the VCLT and VCLTIO.

38. The basis upon which the UN is bound by the VCLTIO deserves particularly focused treatment. Much as the convention has not yet entered in force, the UN has expressed its consent to be bound by this Convention by formal confirmation (the equivalent of ratification) on 21 December 1998. It is a principle of international law that an entity that has signed a treaty or agreed to be bound by such treaty is prohibited from acting in a manner that defeats the object and purpose of such a treaty.[49] From this, it emerges that the UN is required to refrain from acts that would defeat the object and purpose of the VCLTIO.

B. The agreement was negotiated, adopted and signed by persons acting without the requisite legal capacity

39. Neither the UN nor the PM respected the customary international law principles of treaty making. Under international law, a treaty can only be negotiated, adopted and signed by a person possessing the requisite legal capacity.[50] While a head of government is presumed to have the capacity to bind a state in negotiating and adopting an international agreement[51] this presumption ceases to operate provided that two cumulative conditions are satisfied: (i) a fundamental domestic norm was violated and (ii) this violation was manifest.[52]

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[47] *Tadic* , para. 23.
[48] See *Yearbook of the International Law Commission, 1959*, vol. II, document A/4169, para 18.
[49] *See VCLTIO* Arts. 18(a),(b). Joni S. Charme, The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma, (1991-1992) 25 *George Washington Journal of International Law and Economics,* 84.
[50] *See* VCLT and VCLTIO Arts. 2(c), 7 *Also* Corten, Klein, THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (New York: Oxford University Press, 2011), pp. 126 – 127.
[51] VCLT, VCLTIO, Art. 7 (2)(a)
[52] See VCLT, VCLTIO Art. 46(1); ICJ, Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v Nigeria*)10 October 2002, para 265

40. Constitutional rules concerning the authority to sign treaties for a State have been considered of fundamental importance by the International Court of Justice; their violation would invalidate a treaty if: (i) manifest; and (ii) properly publicized.[53]

41. From this it follows that the "agreement" on the establishment of the Tribunal was negotiated, adopted and signed by persons unauthorized to do so by the Constitution and this violation was manifest.

C. The "agreement" was negotiated, adopted and signed in violation of the Constitution

42. Article 52 of the Constitution requires that the President of the Republic negotiates international treaties in agreement with the Prime Minister. This provision gives a lead role to the President in the negotiation of international treaties while the Prime Minister's role is secondary. Such was not the case for the negotiation of the Tribunal. First, the negotiations on the establishment of the Tribunal started further to a unilateral request by the PM.[54] The President was not involved. Further to that request and to SC Resolution 1664,[55] negotiations were conducted throughout 2006 with representatives of the Lebanese Government in the absence of the President.[56] These discussions resulted in the production of a draft agreement that was communicated to the President at the very last minute.[57] The comments of the President were ignored and he never approved this draft agreement,[58] which was nevertheless transmitted for approval to the Council of Ministers. The letters from the President of Lebanon addressed to the SG on 14 November 2006, 5 February 2007 and 15 May 2007 establish that the UN had been notified of these elements.[59]

43. The Council of Ministers adopted the draft agreement in breach of article 53(12) and 65.5 of the Constitution. The draft agreement was discussed in two extraordinary sessions of the Council of Ministers held on 13 and 25 November 2006 and adopted on

[53] *Ibid*
[54] *Supra* para. 8.
[55] *See* point 6.
[56] 15 November 2006 SG Report, paras 3,4; Addendum to the Report of the SG on the establishment of a special tribunal for Lebanon, S/2006/893/Add 1, 21 November 2006.
[57] Annex A, point 2.
[58] Annex A, point 2, paragraph 2 and 3.
[59] Annex A ; Annex C; Annex E.

13 November 2006.[60] The Prime Minister called these extraordinary sessions whilst under article 53(12) of the Constitution only the President of Lebanon is allowed to call such sessions.[61] The Council of Ministers adopted the draft agreement two days after the resignation of the Shiite representatives over disagreements related to the creation of the Tribunal.[62] As a result, the legal quorum required by article 65.5 of the Constitution was not representative of the Lebanese religious communities. In adopting the "agreement" despite the circumstances, the Council of Ministers acted in breach of the National Pact of Mutual Existence. Here again, the letters from the President of Lebanon addressed to the SG on 14 November 2006, 5 February 2007 and 14 May 2007 establish that the UN had been notified of these elements.[63]

44. The National Pact of Mutual Existence touches to the foundations of Lebanese democracy and its system of representation. It aims at maintaining peace and security in Lebanon by abolishing political sectarianism and ensuring the participation of all religious communities in the democratic process. It is enshrined in the Constitution that the representatives of all religious communities must be consulted decisions on public matters. The Constitution stresses this principle of fundamental importance in its introduction "*no authority is legitimate if it violates the Pact of Mutual Existence*"[64] and in the text of its provisions.[65] The Constitutional Council reaffirmed the importance of this principle in a decision dated 31 January 2002 where it decided that any political representation that would threaten Lebanese mutual existence is not legitimate.[66]

45. The exclusion of the Christian President in the request and negotiation of the draft agreement and of the Shiite religious community in its adoption violated the National Pact of Mutual Existence. This violation persisted when the Prime Minister signed the

[60] Annex G, Preamble.
[61] Article 53(12) of the Constitution..
[62] Annex G, para. 6.
[63] Annex A ; Annex C; Annex E.
[64] See (j) of the Preamble of the Constitution; Decision n° 2/99, Constitutional Council of Lebanon, Appeal on articles 15 and 16 of Law N°140/99, 24 November 2011 (author translation).
[65] See in particular article 95 of the Constitution.
[66] Decision No. 1/2002, Constitutional Council of Lebanon, request against law No. 379, 31 January 2002, p.34 (author translation).

draft agreement on 22 January, acting alone again and therefore in breach of the provisions of article 52 of the Constitution.[67]

46. To be more convinced of the above, the Trial Chamber will have to refer to the consultancy of Salim Jreissati, Professor at the Faculty of Law and Political Sciences of University Saint Joseph, former member of the Constitutional Council of Lebanon, where he exposes in detail the constitutional laws of Lebanon and demonstrates how the ratification process of international treaties was breached in this case.[68]

47. The "agreement" was negotiated, adopted and signed by persons who did not have the requisite capacity to bind the Lebanese State. They did so in breach of *inter alia* articles 52, 53(12), 65.5 of the Constitution, all constitutional rules which are of fundamental importance. The first condition required by international law for the invalidity of these proceedings is satisfied.

The violation was manifest and publicized

48. The fact that the "agreement" on the establishment of the Tribunal had been negotiated, adopted and signed in breach of the Lebanese constitutional requirements was manifest to both parties, and properly publicized.

49. On 14 November 2006, the day after the extraordinary session of the Council of Ministers, the President wrote to the SG to alert him on the significant breaches of the Constitution which had occurred. In his letter he explained in detail why the Prime Minister alone and the Council of Ministers as it was composed did not have either the constitutional powers or the legitimacy to approve the draft documents.[69]

50. Nevertheless, in his report dated 15 November 2006[70] the SG mentioned the correspondence of the President but without referring to the constitutional obstacles that this correspondence raised.[71] Clear and unequivocal information regarding the violation of fundamental Lebanese norms in the negotiation of the "agreement" had previously been addressed by the Lebanese President to the SG. The SG subsequently wrote to the

[67] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, United Nations Treaty Series, Volume 2461, Year 2007, I-44232, available at http://treaties.un.org/doc/Publication/UNTS/Volume%202461/v2461.pdf
[68] Annex F
[69] Annex A.
[70] S/2006/893, Report of the Secretary-General, 15 November 2006, para 54.
[71] Annex A ; Annex C; Annex E

Prime Minister of Lebanon requesting to be informed when the necessary steps will have been taken, in conformity with the Constitution of Lebanon, thereby recognizing that such was not the case.[72]

51. It cannot be denied that the issue of the violations of the Lebanese constitutional requirements were objectively evident to both the UN and the State as it would have been to any party conducting itself in accordance with normal practice and in good faith. Further, these violations were deliberately ignored by the UN. The second condition required by international law for the invalidity of these proceedings is satisfied.

D. Lebanon never consented to be bound by the "agreement"

52. International jurisprudence supports the Defence's assertion that Lebanon never consented to be bound by the "agreement".

53. In the *Arbitral Award Regarding the border between Costa Rica and Nicaragua* it was held that the validity of a treaty concluded on behalf of a state is determined by the fundamental law of that country.[73]

54. The primacy of a State's consent to be bound has also been recognized by other international instruments. One of the clearest articulations of this principle is to be found in the Helsinki Declaration which affirms that States have the right to be or not to be a party to a bilateral treaty.[74]

55. The dictum of the ICJ is particularly persuasive in demonstrating the interplay between consent to be bound and ratification. In the *North Sea Continental Shelf Case,* the ICJ held:[75]

> [I]n principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention is to be manifested-namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do

[72] Annex B.
[73] Award Regarding the border between Costa Rica and Nicaragua, 22 March 1883, p. 202.
[74] The Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 I.L.M. 1292 (Helsinki Declaration), Art. 1.
[75] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands)*, International Court of Justice (ICJ), 20 February 1969, para 28.

so, has nevertheless somehow become bound in another way [...].

56. The principle that negotiating parties have the freedom of choice to determine (i) how their consent to be bound by a treaty may be expressed and (ii) how such a convention will enter into force is part of customary international law.[76] This customary international rule has been codified in both the VCLT and VCLTIO.

57. Article 11 of the VCLT and VCLTIO leaves it to the discretion of the parties to choose how they will express their consent to be bound to a treaty.[77] Article 16 (1)(c) of the VCLT provides that:[78]

> a. 16 (1) Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:
>
> b. [...]
>
> c. (c) their notification to the contracting States or to the depositary, if so agreed.

58. In accordance with Articles 16(1)(c), Lebanon's consent to be bound was to only be expressed through notification to the UN of its ratification. This is evident from Article 19 (1) of the agreement.

59. However, Lebanon never notified the UN that it had ratified the "agreement" because as it is well documented, the "agreement" was never ratified.

60. Article 52 of the Constitution provided that a treaty involving the finances of the State is not considered ratified until it has been approved by the Chamber of the Deputy.[79] Such approbation is to be given through a legal parliamentary session.[80] With the Speaker of the Parliament refusing to convene a session to formally proceed to ratification, the Lebanese Republic never formally expressed its sovereign consent to be bound by the "agreement" with the UN.[81]

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[76] Corten, Klein, THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (New York: Oxford University Press, 2011), p. 192, para. 12.
[77] VCLT, Art. 11, VCLTIO, Arts. 11(1).
[78] See also VCLTIO, Art. 16(c).
[79] See article 52 of the Constitution; Annex A.
[80] Article 31 of the Constitution.
[81] Annex D, para. 2 p. 1; Annex E

61. From this, it emerges that consent of a state to be bound by an international agreement is a principle of customary international law whose imposition on a state cannot be countenanced. Lebanon never consented to be bound by the "agreement" and there is no legal basis for such consent to be burdened on it.

E. The "agreement" never entered into force

62. Article 24(1) of the VCLT/VCLTIO gives the negotiating states and organizations a free hand in determining how an agreement will enter into force.[82] These provisions apply to both bilateral and multi-lateral treaties.[83] It is beyond dispute that Article 24 of the VCLT has customary international law status.[84]

63. Here, the negotiating parties agreed that the "agreement" was to enter into force on the day after the Lebanese Government had notified the UN in writing that the legal requirements for entry into force have been complied with.[85]

64. As explained above, the negotiating parties could not ignore the fact that the Lebanese Parliament had to ratify the "agreement" and that such ratification had to be followed by its promulgation by the President before it could enter into force.[86] Only then could the Lebanese Government notify the UN of this ratification; hence expressing its consent to be bound.

65. Such was not the case since the Speaker of the Lebanese Parliament never convened a session to formally ratify the "agreement", which as a result never occurred.[87]

66. It is therefore established that for the reasons developed above, the "agreement", was adopted in breach of the Constitution, is therefore neither valid; nor internationally ratified and never entered into force as far as the Lebanese State is concerned.

The intentions of the UN

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[82] VCLT, Art. 24 (1); ILC, 849th meeting, 11 May 1966, YILC, 1966, vol. I, Part Two, p. 35, para. 47.
[83] *See* Corten, Klein, THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (New York. Oxford University Press, 2011), p. 629, para. 5.
[84] *See Cameroon v Nigeria,; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* Preliminary Objections, Dissenting Opinion of Judge Kreca, para. 120.
[85] See article 19(1) of the « agreement » *Also* Report of the ILC to the General Assembly, *YILC*, 1965, vol I, p. 91, para. 47.
[86] Constitution, Arts. 51, 52, 56; Annex A, Annex C.
[87] Annex D.

67. It is equally clear that the UN considered that they were bound by an international convention.

68. First, unlike the Prime Minister of Lebanon, the SG had the capacity to negotiate.

69. Second, it is indisputable that Resolution 1664 (2006),[88] which endowed the SG of the UN with an express mandate to negotiate an agreement on behalf of the UN, expressed the determination and intent of the UN to achieve this end through the conclusion of an international agreement international.

70. In selecting this legal framework, the SC accepted to abide by the principles and rules applicable to the negotiations of international agreements with sovereign States; and that negotiating with a sovereign state implies that obstacles, constitutional or others, may arise at any time of the negotiation, particularly the latest stage.

71. The initial reports of the SG and resolutions of the SC also demonstrate that the intention of the UN was to establish the Tribunal by mutual consent, through the lawful conclusion of a bilateral agreement with the Republic of Lebanon.[89]

72. An organ of the UN such as the SC cannot ignore that any democratic State must comply with its constitutional requirements, and respect its institutions and its political life when adopting an international treaty on behalf of its People; particularly so when some of its members such as the United States, refused to be part in the Versailles Treaty or the Rome Statute established the International Criminal Court on that basis.

73. Since it decided to apply the international law of treaties, unlike the Lebanese Republic, the UN expressed its consent to be bound by the "agreement" upon signing.

74. The fact that signature was sufficient to express the United Nation's consent to be bound under Article 12(b) of the VCLTIO[90] can be implied from the fact that the "agreement's" entry into force was tied on a one-sided obligation incumbent on Lebanon to communicate to the UN that the "agreement" had been ratified. There was

[88] SC Res/1664(2006), para. 1.
[89] S/2006/176 (21 March 2006), Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005), para. 6; S/2006/893 (15 November 2006), Report of the Secretary-General on the establishment of a special tribunal for Lebanon, point 6; S/2006/893 (15 November 2006), Report of the Secretary-General on the establishment of a special tribunal for Lebanon, point. 44.
[90] *Article 12 of the VCLT.*.

no requirement that the UN notify Lebanon that the "agreement" had been formally confirmed.[91] A close examination of the agreements which established the SCSL and the ECCC confirms this analysis: both agreements required both parties to notify each other in writing that the legal requirements for entry into force had been complied for the agreement to actually enter into force.[92] In the draft agreement on the establishment of the Tribunal, there is no such requirement for formal confirmation by the UN in the sense of Article 14 (2) of the VCLTIO.[93] Had the UN wished to suspend its consent to a formal confirmation, it could have easily done so by using the exact same articles.

75. Besides, the conventional nature of the UN's approach as well as its acknowledgment of the conventional nature of the international agreement bearing its signature are further demonstrated by the registration *ex officio* by the UN on 1 August 2007 with the Secretariat of the UN in accordance with Article 102 of the UN Charter and recorded as having entered into force on 10 June 2007.[94]

76. Such registration clearly established that the UN considered itself a party to an agreement. Under article 4(1) of the regulations on the registration and publication of treaties and international agreements[95] *"Every treaty or international agreement subject to article 1 of these regulations shall be registered ex officio by the United Nations (...) where the United Nations is a party to the treaty or agreement [emphasis added]."* The UN would have not registered the "agreement" as such had it not considered itself a party thereto, particularly in the case of an agreement or treaty of international nature.

77. The "agreement" is registered *"between the United Nations and the Lebanese Republic."*[96]

[91] Article 19(1) of the "agreement"
[92] Article 21,Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, 12 January 2002; Article 32, Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of the crimes committed during the period of Democratic Kampuchea, 6 June 2003.
[93] *VCLT*, Art. 14.
[94] See Certificate of Registration No. 44232, 7 September 2007, UN Doc. ST/LEG/SER.A/726, 2007, at 15 and 'Lebanon and United Nations', No. 44232, UN Treaty Collection, Volume 2461, page 257.
[95] Registration and Publication of Treaties and International Agreements: Regulations to Give Effect to Article 102 of the Charter of the United Nations, A/RES/97(I), Art. 4(1) also Art. 1.
[96] United Nations Treaty Series, Volume 2461, Year 2007, I-44232.

78. With this registration, the UN reaffirmed that it is the rules normally governing the entry into force of a convention that apply thereby confirming the conventional nature of the "agreement".

79. Finally, another factor that supports the argument that the Security Council imposed a Treaty in Lebanon is the financial aspects of this agreement. The fact that the agreement entailed financial obligations on Lebanon shows that this agreement could only have entered into force with Lebanon's consent – and not through the SC unilateral action. Lebanon as a state was not being sanctioned for violating an international obligation, and even if that was the case, the SC cannot compel a state to spend its public resources to finance an institution without such a state's consent.

F. A Resolution cannot be used to bypass the law of treaties

80. However, an essential element was and is missing from the fiction that some members of the SC have attempted to uphold for the " agreement" to be valid and even exist: its ratification by the Lebanese State

81. International law does not allow the entry into force of an international treaty unless the required conditions detailed above have been fulfilled. A party – international organization or State – to a bilateral agreement which has not been ratified or entered into force cannot unilaterally decides that the other is bound and the agreement is in force, when the other has previously claimed it did not consider itself bound and that the negotiation of the treaty had been conducted in violation of its constitutional rules.

82. A resolution of the SC, even adopted under Chapter VII of the UN Charter, cannot act as a substitute for the Lebanon's voluntary consent to be bound by the 'treaty' and in breach of the fundamental domestic norms and of the principles of international law laws applicable to the conclusion of treaties and agreement binding upon the UN.

83. The SC is entrusted with the obligation of maintaining international peace and security.[97] It derives its powers to determine the existence of any threat to international

[97] UN Charter, Art. 24.

peace and security and take any appropriate measures from the UN Charter,[98] which is the UN's constitution framework.[99]

84. The SC enjoys a broad discretion under Article 39 of the UN Charter to determine the existence of a threat to peace or international security and to choose the range of measures it will adopt to maintain peace.[100] Nevertheless, this discretion does not release the SC from "the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment."[101]

85. The SC in exercising its Chapter VII powers is not only bound by the UN Charter, but also by principles of customary international law that are embodied in the 1986 VCLT and VCLTIO, more so Arts. 18 and 24 of the VCLT and VCLTIO.[102] More particularly, Article 24 of the VCLT and VCLTIO, also part of customary international law, provides that "A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree."[103] The UN was bound, and indeed prevented by Article 19(1) of the "agreement" from unilaterally entering the "agreement" in force.

86. The UN possesses international personality capable of having rights and suffering obligations. The fact that it is a *subject* of international law means that the UN and indeed the SC is not above the law, and certainly not above the states that are its creators.[104]

87. The Permanent Court of International Justice well articulated the fetter that the act of treaty making imposes on states.[105] In addition to recognizing the fact that entering into international engagements is an attribute of state sovereignty, the PCIJ noted that:

> [A]ny convention creating an obligation [...] places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way.

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[98] Cf. UN Charter Arts. 1, 39
[99] *Tadic*, para. 28.
[100] *Tadic*, paras 28 and 32.
[101] 1948 I.C.J. 57, 1948 WL 2 (I.C.J.) *Conditions of admission of a State to membership in the United Nations*, International Court of Justice, Advisory Opinion of May 28, 1948 p. 64
[102] *See* paras. 36-38 *supra*
[103] ILC, 849th meeting, 11 May 1966, YILC, 1966, vol I, Part Two, p. 35, para. 47; *Cameroon v Nigeria*, para. 31; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Dissenting Opinion of Judge Kreca, para. 120.
[104] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, p. 178-179.
[105] *Permanent Court of International Justice, Case of the S.S Wimbledon, United Kingdom, France, Italy & Japan v Germany*, 17 August 1923, Judgment, para. 35.

88. With the evolution of treaties between states and international organisations, this concept holds true for international organizations as well. By entering into an international agreement, the margin of discretion that such an organization previously enjoyed is constricted.

89. Similarly, upon the UN signing the "agreement", the UN's margin of discretion was tapered. As a result, the SC could not use Chapter VII to impel into entry an agreement which Lebanon had not consented to be bound to.

90. In light of the above, it is evident that, under the UN Charter and the principles of international law, the SC does not have the power to to impose the entry into force of a treaty that a sovereign State does not wish to adopt.[106] A treaty is based on the concurrent consent of two or more parties to be bound by the terms of the treaty.[107] Pursuant to international customary law and international principles applicable to treaties, consent cannot be substituted by a decision of the SC especially if the other treaty party is the UN itself and the SC cannot change or override this concept by virtue of a Chapter VII resolution.[108] This is in contrast to the effect of Article 103 of the UN Charter, which can enable a subordination or suspension of treaty obligations by virtue of decisions of the SC. As aptly put by one scholar, "[t]he Council can break treaties, but it cannot make treaties".[109]

91. It is clear from an examination of the text of Resolution 1757, and the context, including statements and positions expressed by Members of the SC, together with the UN's registration *ex officio* of the agreement as a treaty, that the SC intent was to impose the entry into force of a treaty upon Lebanon in order to establish the Tribunal.

92. This interpretation is supported by the fact that the entire "agreement" was brought into force, and not just selected provisions containing particular obligations.

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[106] Bardo Fassbender, "Reflections on the International Legality of the Special Tribunal For Lebanon" *Journal of International Criminal Justice* 5 (2007) 1091-1105
[107] VCLT, VCLTIO Arts 2(1)(a), 11 VCLT.
[108] Stefan Talmon, "Security Council Treaty Action" (2009) 62 *Revue Hellenique de Droit International* 65-116. See p. 22.
[109] Bardo Fassbender, "Reflections on the International Legality of the Special Tribunal For Lebanon" *Journal of International Criminal Justice* 5 (2007), 1100.

93. The content of certain provisions of the "agreement" further corroborates the interpretation according to which the SC intended to substitute the internal process of ratification in passing the resolution : articles 18-20 of the 'agreement' have been retained although they impose 'rights' that are normally accorded to parties to a treaty, particularly the right to negotiate an amendment.

94. These provisions allow Lebanon to act as a party on equal footing to the UN within the framework of the 'agreement' and would presumably allow Lebanon to invoke principles governing the withdrawal and termination of treaties.

95. Further, the reference to Article 19(1) of the "agreement" in Paragraph 1(a) of the Resolution makes it clear that there remained a possibility for the 'agreement' to be brought into force through the Constitutional process in Lebanon which, as the preamble confirms, was "facing serious obstacles".

96. The invalidity of the SC's action of unilaterally entering into force the agreement was pointed out at the very outset. The statements made by the Member States at the time – some of whose extracts the Defence reproduce verbatim below – are instructive in highlighting this illegality. For instance:

i. *Qatar*: "we feel that the draft resolution before the Council now entails legal encroachments known to all".[110]

ii. *Indonesia*: "On the draft resolution, my delegation considers that it has changed the legal nature of article 19 of the agreement, which clearly states that the agreement shall enter into force on the day after the Government of Lebanon has notified the United Nations that the internal legal requirements for its entry into force have been met. If the draft resolution is adopted, it will bypass constitutional procedure and national processes".[111]

iii. *South Africa*: "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. In discarding the Lebanese Constitution the Security Council is contravening its own decision regarding the need to respect the sovereignty, territorial integrity, unity and political independence of Lebanon".[112]

iv. *China*: "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 agreement ... China believes that by invoking Chapter VII of the

[110] Doc. S/PV 5685, Page 2
[111] Doc. S/PV.5685, Page 3
[112] Doc. S/PV.5685, Page 4

Charter, the resolution will override Lebanon's legislative organs by arbitrarily deciding on the date of the entry into force of the draft statute".[113]

v. *Russian Federation*: "The draft should have focused on the implementation, under a Council decision, of the agreement between the United Nations and Lebanon, not on the entry into force of the agreement ... The arrangement chosen by the sponsors is dubious from the point of view of international law. The 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 ... 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".[114]

97. These declarations highlight the many defects of the SC resolution: (i) it breaches legal principles accepted by all; (ii) it breaches the constitutional laws of a sovereign State, (iii) it contravenes the SC's own resolutions recalling that Lebanese sovereignty must be strictly respected; (iv) it is arbitrary; v) it obviously breaches the international law of treaties where by definition an agreement cannot enter into force through the unilateral decision of one of its parties.

98. Besides, the lack of legal basis when using Chapter VII to impose the entry into force of the treaty could not be better expressed by the following member of the SC – who nevertheless voted in favour of the adoption of the resolution:

vi. *Peru*: "[G]iven the exceptional political circumstances ... [and] 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*".[115]

99. That a Member State attaches to its vote the public wish that the Charter of the UN shall not be used in the future in such a way highlights that using a resolution to enter into force an agreement between two subjects of international law on the basis of a decision by only one party, in addition to being suspicious, is inherently illegal and thus deprived of any legal effect.

[113] Doc. S/PV.5685, Page 4
[114] Doc. S/PV.5685, Page 5
[115] Doc. S/PV.5685, Page 6 [emphasis added]

100. Also, a resolution of the SC aimed at compelling the entry into force of a treaty could not achieve the desired goal since the SC did not possess the legal power to unilaterally enter a treaty in force

101. As customary and conventional international law deprived the "agreement" and related instruments of their validity, resolution 1757 addressed itself to documents devoid of any legal existence and consequently, it could not legally enforce that which did not exist.

102. In these conditions, no jurisdictional legitimacy could be accorded to the Tribunal as it is founded on acts that are devoid of any legal existence.

G. The SC misused its powers in issuing Resolution 1757

103. In addition, in issuing Resolution 1757, the SC exceeded the powers endowed upon it by the UN: it contravened the provisions of its Charter and the principle of international law in using Chapter VII to unilaterally impose treaty obligations on Lebanon.

104. On this point, the Trial Chamber is invited to refer to the jurisprudence of the Court of Justice of the European Communities which controls the legality of the acts of the European institutions.

105. Seized of cases involving misuse of powers by the European Commission,[116] the Council of the European Union[117] or the European Coal and Steel Community,[118] European jurisdictions (the Court of Justice of the European Communities, the Court of Justice of the European Union and the Court of First Instance of the European Communities) have ruled that "a measure is vitiated by misuse of powers only if it appears on the basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated or of evading a procedure specifically prescribed."[119]

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[116] Court of Justice of the European Communities, Case C-285/94, European Commission v. Italy, 25 June 1997.
[117] Court of First Instance of the European Communities, Case T-509/10, *Manufacturing Support & Procurement Kala Nafi Co , Tehran v Council of the European Union*, 25 April 2012
[118] Court of Justice of the European Communities, Case 6-54, *Kingdom of the Netherlands v High Authority of the European Coal and Steel Community*, 21 March 1955, para. F;
[119] Court of Justice of the European Communities, Case T-390/08, *Bank Melli Iran v. Council of the European Union*, Coll. p. II-3967, 14 October 2009, para. 50.

106. In all cases, European, authorities were blamed for having used their executive powers to accomplish an unlawful purpose or to circumvent a specific procedure. The test used by the European jurisdictions posed three conditions, which are all satisfied when applied to the SC:

a) achieving an end other than that stated or of evading a procedure specifically prescribed

In passing resolution 1757 on the basis of Chapter VII, a procedure specifically designed in cases " of any threat to the peace, breach of the peace, or act of aggression", the SC overtly wanted to evade the rules applicable to the conclusion of an international bilateral convention recalled above; in this case between a State and an international organization.

b) exclusive or main purpose

It is evident upon examination of the context in which the Resolution was passed, the initial intention of the UN, the fact that it consented to be bound by the "agreement" whilst the Lebanese Republic did not that the main purpose of Resolution 1757 was to circumvent the rules applicable to the conclusion of an international bilateral convention.

c) objective, relevant and consistent evidence

107. Here again, the provisions of the "agreement" and statute annexed to Resolution 1757, the circumstances of its adoptions, the reports of the SG, UN correspondence with Lebanese officials are as many objective, relevant and consistent evidence that the SC wanted to impose the entry into force of the "agreement", and therefore misused its powers.

108. The SC misused its powers in adopting the Resolution 1757 which is therefore illegal and shall not have any effect.

109. In any case, such a resolution cannot impose the entry into force of a treaty.

110. The Judges of the Tribunal shall not apply a document which does not have any legal existence or a resolution adopted through a misuse of powers.

V. PRAYER

111. May it please the Honourable Trial Chamber to:

a) FIND that no judicial power has been granted to the Tribunal since it is created on the basis of an act which has no legal existence.

b) FIND that the SC misused its powers in adopting the Resolution 1757 which is therefore illegal and shall not have any effect.

c) FIND that the Tribunal has no primary jurisdiction as it is illegally established.

Respectfully submitted, on 10 May 2012,

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