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CASE WESTERN RESERVE
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MEMORANDUM FOR THE SPECIAL TRIBUNAL FOR LEBANON

ISSUE: CONCURRENT JURISDICTION AND PRIMACY

WHAT DO THE CONCEPTS OF "CONCURRENT JURISDICTION" AND "PRIMACY" MEAN CONCRETELY FOR THE STL AND THE LEBANESE NATIONAL COURTS? WHAT ARE THE EFFECTS ON THE STL AND LEBANESE AUTHORITIES OF THE DEFERRAL OF THE *HARIRI* CASE (SEE DEFERRAL ORDER OF 27 MARCH 2009 AND SUBSEQUENT COMPLIANCE BY THE LEBANESE INVESTIGATING JUDGE) AND/OR THE CONNECTED CASES TO THE STL PURSUANT TO ARTICLE 4 OF THE STATUTE AND RULE 17 OF THE RULES OF PROCEDURE AND EVIDENCE? IS DEFERRAL ITSELF AN EXERCISE OF PRIMACY OVER THE INVESTIGATION AND PROSECUTION? DOES DEFERRAL EQUAL EXCLUSIVE JURISDICTION OVER THE CASE? WHAT ARE THE LIMITATIONS, IF ANY, OF THE STL'S JURISDICTION? PLEASE BE SURE TO RESEARCH THE HISTORY AND MEANING OF THESE TERMS IN THE CONTEXT OF INTERNATIONALIZED/HYBRID COURTS.

Prepared by Helena Traner
J.D. Candidate May 2012
Fall Semester, 2010

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS 1
A. Introduction 1
B. Summary of Conclusions 2
II. BACKGROUND 3
A. History of Concurrent Jurisdiction and Primacy 3
B. Establishment of the STL 7
C. Character of the STL Compared to Other International Tribunals 8
III. JURISDICTION AND STATUTE 12
A. Jurisdiction 12
B. Statute, Agreement, and The Rules of Procedure and Evidence 13
C. Vertical Cooperation 15
IV. PRIMACY, CONCURRENT JURISDICTION, AND DEFERRAL ORDERS IN THE OTHER INTERNATIONAL TRIBUNALS 16
A. The International Criminal Tribunal for the Former Yugoslavia 16
1. The Duty of Compliance and Sovereignty Issues: Prosecutor v. Dusko Tadic 18
2. Compliance with National Judicial Authorities: Prosecutor v. Mile Mrksic, et. al 22
3. Primacy over Entire Events or Incidents: The Lasva River Valley and Macedonia Deferrals 23
B. The International Criminal Tribunal for Rwanda 25
Non Bis In Idem as a Potential Limit To Primacy and An Argument in Favor of Deferral: Thèoneste Bagosora, Alfred Musema, and Radio Television Libre Des Mille Collines Sarl 26
C. The Special Court for Sierra Leone 29
V. THE EFFECT OF A DEFERRAL ORDER ON THE STL AND LEBANON 30
A. The Deferral Order of Mar. 27, 2009 was an Exercise of Primacy 30
B. The STL Has Exclusive Jurisdiction Over the Hariri Case 31
VI. POTENTIAL LIMITATIONS 32
A. State Sovereignty May Act as a Limitation On the Jurisdiction of the STL 32
B. Non-Compliance By Lebanon May Inhibit the Exercise of Jurisdiction 34
C. Exclusive Jurisdiction Over an Isolated Event or Incident May Inhibit Prosecutorial Abilities of Lebanese Authorities 35
D. Non Bis In Idem May Limit Jurisdiction And Serve As an Argument for Deferral of Related Incidents 36
1. Non Bis In Idem As a Limitation 36
2. Non Bis In Idem As an Argument for Deferral of Related Incidents 38

VII. CONCLUSION 39

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. INTRODUCTION

The Special Tribunal for Lebanon (STL) was established at the request of Lebanon by the United Nations Security Council in order to try those allegedly responsible for the attack that killed former Lebanese Prime Minister Rafiq Hariri and 22 others on February 14, 2005. The STL is an international tribunal that will apply Lebanese law to bring the perpetrators of this attack (and other related attacks within its jurisdiction) to justice. In order to effectively carry out this mandate, the STL was given "concurrent jurisdiction" with the Lebanese national court system. The STL was also granted "primacy" over the national courts of Lebanon, over matters falling within its jurisdiction.

On March 27, 2009, the trial chamber of the STL granted the Prosecutor's application for a deferral order in the *Hariri* case, and the Lebanese judge subsequently complied with that request. This memo examines: (1) What "concurrent jurisdiction" and "primacy" have meant in the context of other international tribunals and domestic courts and what these terms will mean in the context of the STL and the Lebanese authorities; (2) what effect a deferral order and subsequent compliance has on the STL and the Lebanese authorities; whether such a deferral in and of itself is an exercise of primacy over the investigation and prosecution, and whether such a deferral grants the STL exclusive jurisdiction; and finally, (3) what limits, if any, there are to the extent of the STL's jurisdiction.[1]

[1] What do the concepts of "concurrent jurisdiction" and "primacy" mean concretely for the STL and the Lebanese national courts? What are the effects on the STL and Lebanese authorities of the deferral of the *Hariri* case (see Deferral Order of 27 March 2009 and subsequent compliance by the Lebanese investigating judge) and/or the connected cases to the STL pursuant to Article 4 of the Statute and Rule 17 of the Rules of Procedure and Evidence? Is deferral itself an exercise of primacy over the investigation and prosecution? Does deferral equal exclusive jurisdiction over the case? What are the limitations, if any, of the STL's jurisdiction? Please be sure to research the history and meaning of these terms in the context of internationalized/hybrid courts.

B. SUMMARY OF CONCLUSIONS

(1) In other international tribunals, "concurrent jurisdiction" and "primacy" have been interpreted and applied to mean that the international tribunals sit at the "top" of a vertical jurisdictional hierarchy. Domestic courts must comply with deferral orders and requests issued by the international tribunals. However, complying with this obligation requires national governments to have enacted implementing legislation. If Lebanon's domestic court system refuses to comply with a deferral order issued by the STL, there is a process by which the matter may be referred to the United Nations Security Council which may then take action to issue a binding resolution, compelling Lebanon to comply. Yet this procedure may still prove insufficient.[2] Thus the success of the STL's primacy is largely dependent on maintaining vertical cooperation with Lebanon.

(2) As demonstrated by the experience of the other tribunals, a deferral order issued by the STL is an attempt to exercise its primacy, and compliance with such an order by a Lebanese judge is an exercise in submission to the primacy of the jurisdiction of the STL. Once a deferral order has been issued, Lebanon must assume its duty to cooperate with the STL. Lebanon must cease prosecution and proceedings against the accused, turn over case files and records, and transfer the accused. Lebanese authorities may assist the STL in its pre-trial investigations if authorized or requested by the STL.

(3) While the STL's jurisdiction is exclusive in this respect, there are some limitations and potential policy problems with the STL's exercise of primacy:

[2] *See infra* note 90 (Like the International Criminal Tribunal for the former Yugoslavia (ICTY), the STL has the ability to refer such matters to the United Nations Security Council. However, the ICTY was never able to take such action with respect to Serbia due to political reasons).

a. State sovereignty issues may present an obstacle to the complete exercise of jurisdiction and primacy.

b. Non-compliance by Lebanon does not appear to be likely, but may present a limitation.

c. In the event the STL wishes to refer certain cases back to the national courts of Lebanon, there is currently no procedural mechanism in its statute by which to do so. The STL's exercise of exclusive jurisdiction over the *Hariri* case may therefore inhibit the Lebanese authorities' ability to prosecute in the future.

d. The *non bis in idem* provision of the STL's statute may present a significant obstacle to the exercise of jurisdiction.

    1. The STL may not try an individual if he/she has already been tried by Lebanon (or another state) unless certain conditions are met. This limitation may be overcome, but will pose significant difficulties with respect to third party states.

    2. As the jurisdiction of the STL may be expanded and subsequent deferrals order may become necessary, the *non bis in idem* provision can be used as an argument in favor of deferral for related attacks or incidents.

II. BACKGROUND

A. HISTORY OF CONCURRENT JURISDICTION AND PRIMACY

The relationship between national courts and international *ad hoc* tribunals such as the International Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) have depended upon a system of vertical cooperation, allowing the international tribunals generally to exercise "concurrent jurisdiction" with national courts, and at the same

time exercise "primacy" over specific cases within their jurisdiction. The purpose for implementing these seemingly contradicting mechanisms in the statutes of international tribunals is to preserve the sovereignty of the national courts to prosecute crimes within their jurisdiction while affording international tribunals the opportunity to seize matters crucial to their mandates (upholding the compelling humanitarian and international peace and security interests) that fall into the overlap between national and international jurisdiction.[3] This tension between national state sovereignty and primacy of the international tribunals has not been easy to resolve.

Both the ICTY and ICTR were established by the United Nations Security Council, invoking Chapter VII authority of the United Nations Charter.[4] This is significant as it thereby places a binding legal obligation on states to comply with the requests and orders of these tribunals.[5] However, the primacy of the ICTY over the national courts was the subject of debate during the adoption of its statute, and some permanent members indicated that the ICTY's exercise of primacy was intended to be limited in scope to situations of *non bis in idem*; situations where an accused has *already been tried* at the national level.[6] In practice, primacy expanded and became a useful tool for the international prosecutors to petition for requests for

[3] Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 882–83 (2002) [Reproduced at Tab 17].

[4] Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. Doc S/RES/827 (May 25, 1993) [hereinafter ICTY Statute] [Reproduced at Tab 29]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute] [Reproduced at Tab 30].

[5] UN Charter, Article 41 [Reproduced at Tab 2]; Dagmar Stroh, *State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 5 MAX PLANCK Y.B. U.N. L. 249, 253 (2001) [Reproduced at Tab 18].

[6] U.N. SCOR, 48th Sess., 3217th mtg., at 11, 16, 18–19, 46, U.N. Doc S/PV.3217 (1993) (France, the United Kingdom, and the United States all made statements suggesting that, in their view, the exercise of primacy was to be limited in scope to overcoming situations of *non bis in idem*. The President of the Security Council (Russian Federation) also noted, "As we understand it, the provisions of Article 9, paragraph 2, denote the duty of a state to give very serious consideration to a request by the Tribunal to refer to it a case that is being considered in a national court. But this is not a duty automatically to refer the proceedings to the Tribunal on such a matter. A refusal to refer the case naturally has to be justified. We take it that this provision will be reflected in the rules of procedure and the rules of evidence of the Tribunal.") [Reproduced at Tab 35].

deferral at various stages of proceedings, pursuant to newly adopted rules of procedure and evidence.[7] These requests were issued to both the national courts within the territory of the former Yugoslavia, and to judicial authorities of other states. While under a duty to comply with such requests, not all national courts immediately followed their legal obligation to do so.[8]

Whether due to the pressing attendant circumstance of compelling humanitarian concerns, or due to a growing acceptance of the idea of primacy, the ICTR's statute expanded primacy further than that of the ICTY.[9] When the creation of International Criminal Tribunal for Rwanda was considered, it was suggested that language be included in its statute such that, "any judicial proceedings which revealed any link whatsoever with crimes committed in Rwanda should be halted by the national court and referred to the International Tribunal for Rwanda."[10] For example, Zaire expressed a concern that, "the primacy of the International Tribunal is not guaranteed, since to recognize a competence concurrent to both jurisdictions is tantamount to recognizing that the first to be notified of a case must carry that case to judgment."[11] While this

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[7] Rules of Procedure and Evidence at Rules 9-12; *Prosecutor v. Tadic*, Case No. IT-95-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) [hereinafter Tadic Appeal] [Reproduced at Tab 4]; *Prosecutor v. Mrksic, et. al*, Case No. IT-95-13-R61, Decision on the Proposal of the Prosecutor for a Request to the Federal Republic of Yugoslavia (Serbia and Montenegro) to Defer the Pending Investigations and Criminal Proceedings to the Tribunal (Dec. 10, 1998) [hereinafter Mrksic][Reproduced at Tab 5]; *In Re: The Republic of Macedonia*, Case No. IT-02-55-MISC.6, Decision on Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia (Oct. 4, 2002) [hereinafter Macedonia Request for Deferral][Reproduced at Tab 6]; *Lasva River Valley*, Case No. IT-95-6-D, Decision on the Matter of a Proposal for a Formal Request for Deferral to the Competence of the International Tribunal Addressed to the Republic of Bosnia and Herzegovina (May 11, 1995) [hereinafter Lasva River Valley] [Reproduced at Tab 8].

[8] *See, e.g.*, Mrksic, *supra* note 7 (Serbia and Montenegro refusing to comply with a deferral order) [Reproduced at Tab 5].

[9] *See* Mohamed M. El Zeidy, *supra* note 3, at 885 (arguing the expansion of the ICTR's primacy was due to outside pressures) [Reproduced at Tab 17] *contra* Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and the International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 402 (1998) (claiming the use of "primacy over the national courts of all states" in the Statute of the ICTR reflects a trend toward consensus on expansion) [Reproduced at Tab 24].

[10] Letter dated 7 November 1994 from the Chargè d'affaires a.i. of the Permanent Mission of Zaire to the United Nations addressed to the President of the Security Council', U.N. Doc. S/1994/1267 [Reproduced at Tab 41].

[11] *Id*. [Reproduced at Tab 41].

language was not eventually adopted, the language of the ICTR Statute was altered to read, "the International Tribunal shall have primacy over national courts of *all* states."[12] Like the ICTY, the ICTR also includes a *non bis in idem* provision and several deferral orders issued by the Trial Chamber of the ICTR reflect how primacy was used to obtain exclusive jurisdiction over cases from national courts with concurrent jurisdiction.[13] However, like the ICTY, the ICTR has also faced its share of difficulties in securing the cooperation of national courts.

Unlike the ICTY and ICTR, the Special Court for Sierra Leone (SCSL) was established by way of a bilateral treaty between the UN and Sierra Leone, without the use of Chapter VII powers.[14] Although the SCSL was also vested with concurrent jurisdiction and primacy over the national courts of Sierra Leone, it has not had to issue a deferral order.[15] While challenges to the jurisdiction and legality of establishment of the SCSL have certainly been made by criminal defendants, the SCSL has not encountered problems with the exercise of concurrent jurisdiction with the national courts of Sierra Leone, and it appears unlikely that such issues will occur.[16]

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[12] ICTR Statute Art. 8 [Reproduced at Tab 30].

[13] Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Thèoneste Bagosora (Pursuant to Rules 9 and 10 of the RPE), *Thèoneste Bagosora* (ICTR-96-7-D), Trial Chamber I, 15 May 1996 [hereinafter Bagosora] [Reproduced at Tab 9]; Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Alfred Musema (Pursuant to Rules 9 and 10 of the RPE), *Alfred Musema* (ICTR-96-5-D), Trial Chamber I, 3 Dec. 1996 [hereinafter Musema] [Reproduced at Tab 10]; Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Radio des Mille Collines Sarl (pursuant to Rules 9 and 10 ICTR RPE), *SARL Radio des Mille Collines* (ICTR-96-6-D), Trial Chamber, 12 Mar. 1996 [hereinafter SARL] [Reproduced at Tab 11].

[14] Kate Gibson, *An Uneasy Co-existence: The Relationship Between Internationalised Criminal Courts and Their Domestic Counterparts*, 9 INT'L CRIM. L. REV. 275, 288 (2009) (discussing the SCSL) [Reproduced at Tab 19].

[15] Statute of the Special Court for Sierra Leone, Jan 16. 2002, Art. 8 [hereinafter SCSL Statute] [Reproduced at Tab 36]; Gibson, *supra* note 14, at 289 [Reproduced at Tab 19].

[16] Decision on Immunity from Jurisdiction, *Charles Ghankay Taylor* (SCSL-2003-01-I), Appeals Chamber, 31 May 2004 [hereinafter Charles Taylor][Reproduced at Tab 12]; Gibson, *supra* note 15, at 292 [Reproduced at Tab 19]; Stephen J. Rapp, *The Compact Model in International Criminal Justice: The Special Court for Sierra Leone* 57 DRAKE L. REV. 11, 24–25 (2008) (As a result of the Lome Accord, those not prosecuted by the SCSL were given

The largest difficulties the SCSL has had to face seem to relate to securing the cooperation of third party states, as it lacks primacy of jurisdiction over national courts outside Sierra Leone.[17] As the history and experiences of these courts indicates, though an international tribunal may be vested with primacy of jurisdiction over the national courts, ensuring cooperation from national authorities is vital to obtaining compliance with deferral orders, collecting evidence, and bringing the accused to justice before the international tribunal.

B. ESTABLISHMENT OF THE STL

In order to try those responsible for the assassination of former Prime Minister Rafiq Hariri and 22 others, the Government of Lebanon requested the United Nations establish an international tribunal.[18] Lebanon and the United Nations Security Council negotiated an agreement in accordance with Security Council Resolution 1664, which entered into force via Security Council Resolution 1757 on May 30, 2007.[19] Due to political stalemate within the Lebanese Parliament, the STL was established under the UN Security Council's Chapter VII powers, which rendered the Lebanon-UN Agreement, Statute, and Annexed documents an internationally binding agreement. As another memo addresses the implications and status of the annexed documents, this memo will assume these documents constitute an extension of the UN Security Council's Chapter VII authority.[20]

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amnesty, eliminating the need for the issuance of a deferral order as national courts were thereby precluded from prosecution) [Reproduced at Tab 28].

[17] Gibson, *supra* note 15 [Reproduced at Tab 19].

[18] Letter dated 13 December 2005 from the Chargè d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary General', U.N. Doc. S/2005/783 [Reproduced at Tab 42].

[19] S.C. Res. 1757, U.N. Doc S/RES/1757 (May 30, 2007) [hereinafter STL Statute] [Reproduced at Tab 31].

[20] *See* Keith White, The Cooperative Obligations Owed by Lebanon and Other States to the Special Tribunal for Lebanon, Fall 2010 (discussing the legality of these documents).

C. CHARACTER OF THE STL COMPARED TO OTHER INTERNATIONAL TRIBUNALS

Due to its method of establishment, the STL is most similar in character to *ad hoc* resolution-based tribunals, such as the ICTY and ICTR.[21] However, unlike the ICTY and ICTR, the STL does not have primacy of jurisdiction over third party states.[22] Thus, the STL is also somewhat similar in character to the SCSL, which, though established by international agreement, exercises concurrent jurisdiction and primacy over only the national courts of Sierra Leone.[23]

The STL bears several unique features. Chief among them, the STL will apply Lebanese law to prosecute those responsible for the assassination of Rafiq Hariri for:

> Terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy, and Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle."[24]

In contrast, the ICTY and ICTR have jurisdiction over international crimes, including genocide, war crimes, and crimes against humanity.[25] The SCSL has jurisdiction over these international crimes (excluding genocide), and domestic crimes under Sierra Leonean law.[26] While similar to the SCSL in the sense that the STL will prosecute for national crimes, the STL is the first

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[21] Jan Erik Wetzel & Yvonne Mitri, *The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country*, 7 L. & PRAC. INT'L COURTS AND TRIBUNALS 81, 94 (2008) (noting the similarities) [Reproduced at Tab 20].

[22] *See* Table 1.1.

[23] Gibson, *supra* note 17, at 288–89 [Reproduced at Tab 19].

[24] STL Statute, *supra* note 19, at Art. 2 [Reproduced at Tab 31]; Björn Elberling, *The Next Step in History-Writing through Criminal Law: Exactly How Tailor-Made Is the Special Tribunal for Lebanon?*, 21 LEIDEN J. INT'L L. 529, 534 (2008) [Reproduced at Tab 21].

[25] Wetzel & Mitri, *supra* note 21, at 100 (discussing jurisdiction) [Reproduced at Tab 20].

[26] SCSL Statute, *supra* note 15 [Reproduced at Tab 36].

international tribunal completely lacking jurisdiction over any of the "core crimes" against international law.[27] In addition, the STL is not bound or restricted by a duty to prosecute only those "most responsible," as is the SCSL, and as the ICTR sought to do in practice.[28]

The experiences of the other international hybrid courts with primacy and concurrent jurisdiction are intentionally excluded from this memo, as these courts are not as similar in structure, nature, and experience to the STL as the ICTY, ICTR and SCSL. For example, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and Special Panels in East Timor have been characterized as being established as part of the existing national court system, which is clearly not the case with the STL.[29] Furthermore, though the ECCC maintains concurrent jurisdiction with the national court system, it is unlikely that the national court system will attempt to interfere with the ECCC's proceedings, as no one has tried to prosecute those responsible for international crimes in Cambodia in decades, the statute of limitations in the national courts has expired, and many former Khmer Rouge allegedly responsible for the crimes at issue now make up the judiciary and national government of Cambodia.[30] As the ICTY, ICTR, and SCSL are the most similar in character for purposes of comparison, the following tables illustrate the primacy and jurisdiction of each of the ICTY, ICTR, SCSL, and STL as well as the deferral mechanisms of each.

[27] Wetzel & Mitri, *supra* note 25, at 101 [Reproduced at Tab 20].

[28] *Id.* at 98 [Reproduced at Tab 20].

[29] Gibson, *supra* note 24, at 279 [Reproduced at Tab 19].

[30] *Id.* at 293–95 [Reproduced at Tab 19].

Table 1.1: Primacy and Concurrent Jurisdiction by Statute[31]

ICTY	ICTR	SCSL	STL
Article 9 The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.	Article 8 The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994.	Article 8 The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.	Article 4 (1) The Special Tribunal shall have concurrent jurisdiction.
The International Tribunal shall have **primacy over national courts.**	The International Tribunal shall have **primacy over national courts of all states.**	The Special Court shall have **primacy over the national courts of Sierra Leone.**	Within its jurisdiction, the Tribunal shall have **primacy over the national courts of Lebanon.**

[31] ICTY Statute Art. 9 [Reproduced at Tab 29]; ICTR Statute Art. 8 [Reproduced at Tab 30]; SCSL Statute Art. 8 [Reproduced at Tab 36]; STL Statute Art. 4 [Reproduced at Tab 31].

Table 1.2: Deferral Mechanisms by Statute

ICTY	ICTR	SCSL	STL
Article 8 At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal	Article 9 At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal	Article 8 At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and Rules of Procedure and Evidence.	Article 4 (2) Upon the assumption of the office of the Prosecutor, as determined by the Secretary-General, and no later than two months thereafter, the Special Tribunal **shall request** the national judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer to its competence. The Lebanese judicial authority **shall refer** to the Tribunal the results of the investigation and a copy of the court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal. Article 4(3) At the request of the Special Tribunal, the national judicial authority seized with any of the other crimes committed between 1 October 2004 and 12 December 2005, or a later date decided pursuant to article 1, shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, for review by the Prosecutor; At the further request of the Tribunal, the national authority in question shall defer to the competence of the Tribunal. It shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, and persons detained in connection with any such case shall be transferred to the custody of the Tribunal; The national judicial authorities shall regularly inform the Tribunal of the progress of their investigation. At any stage of the proceedings, the Tribunal may formally request a national judicial authority to defer to its competence.

III. JURISDICTION AND STATUTE

A. JURISDICTION

Because the STL may only exercise primacy over matters falling within its jurisdiction, some discussion of exactly what matters fall within its jurisdiction is necessary. In comparison to the other international tribunals, the STL was granted a very limited temporal jurisdiction over only one incident: "the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons."[32] However, this jurisdiction may be expanded with the consent of the United Nations Security Council to cover other acts of violence between 1 October 2004 and 12 December 2005, or events occurring later, if the Tribunal finds that such acts are linked to Hariri's assassination in accordance with the principles of criminal justice, and are of a similar nature and gravity.[33] Such acts could be linked to Hariri's assassination by motive, purpose, nature of the victims targeted, pattern of attacks, or perpetrators.[34] As several other members of the Lebanese Parliament have been assassinated after the cut-off date for the STL's jurisdiction, an attempt to expand the temporal jurisdiction may eventually become necessary.[35]

The STL's personal jurisdiction gives the Tribunal jurisdiction over "persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons."[36] Finally, the STL's jurisdiction is

[32] STL Statute Art. 1 [Reproduced at Tab 31].

[33] STL Statute Art. 1 [Reproduced at Tab 31].

[34] STL Statute Art. 1 [Reproduced at Tab 31].

[35] David Cutler, *Chronology: Events in Lebanon Since Hariri's Killing*, REUTERS (Feb. 14, 2008), http://www.reuters.com/article/idUSL14627460 [Reproduced at Tab 47].

[36] STL Statute Art. 1 [Reproduced at Tab 31].

restricted territorially to events that occurred within Lebanon by Article 1 and 4(1) of the STL Statute.[37]

B. STATUTE, AGREEMENT, AND THE RULES OF PROCEDURE AND EVIDENCE

While Article 4(1) of the Tribunal's statute proscribes concurrent jurisdiction and primacy, Article 4(2) and 4(3) of the Statute provide two deferral regimes by which the Tribunal may exercise its primacy.[38] Article 4(3) of the Statute essentially mirrors the deferral system of the ICTY, ICTR, and SCSL.[39] However, Article 4(2) is unique in that it requires automatic deferral of the *Hariri* case to the Tribunal, a pre-determined result by the U.N. Security Council.[40]

In combination with the Tribunal's Statute, the Rules of Procedure and Evidence govern the means by which the Tribunal may exercise primacy over Lebanese courts. The Statute of the Tribunal required the judges to adopt Rules of Procedure and Evidence to govern the "conduct of the pre-trial, trial, and appellate proceedings, the admission of evidence, the participation of victims, the protection of victims and witnesses and other appropriate matters and may amend them, as appropriate."[41] The Tribunal adopted its Rules of Procedure of Evidence on March 20, 2009.[42]

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[37] STL Statute Art. 1, 4(1) (granting primacy of jurisdiction over the national courts of Lebanon, to the exclusion of jurisdiction over other national courts) [Reproduced at Tab 31].

[38] STL Statute Art. 4 [Reproduced at Tab 31].

[39] *See* Table 1.2, STL Statute Art. 4(3) [Reproduced at Tab 31].

[40] Guénaël Mettraux, *The Internationalization of Domestic Jurisdictions by International Tribunals: The Special Tribunal for Lebanon Renders Its First Decisions*, 7 J. INT'L CRIM. JUST. 911, 912 (2009) [Reproduced at Tab 22].

[41] STL Statute Art. 28 [Reproduced at Tab 31].

[42] Special Tribunal for Lebanon, Rules of Procedure and Evidence, STL/BD/2009/01/Rev.2 (Oct. 30, 2009) [hereinafter STL RPE][Reproduced at Tab 39].

Rule 17 of the Tribunal's Rules of Procedure and Evidence explains the procedures to be followed in issuing a deferral order.[43] Upon receipt of a deferral order pursuant to 17(A), the national court must "defer to the Tribunal's competence, hand over to the Prosecutor the results of the investigations and a copy of the relevant court records and other probative material, and submit to the Pre-Trial Judge a list of all persons detained in connection with the investigation."[44] In addition to this procedure for deferral which corresponds with Article 4(2) of the Statute, under Rule 17(E), the prosecutor may make a request to the pre-trial judge that "any investigation in Lebanon or criminal proceedings instituted in the courts of Lebanon … [be] defer[red] to the competence of the Tribunal."[45] The Pre-Trial Judge issued a deferral order of the *Hariri* case, as required by Article 4(2) and Rule 17(A) on March 27, 2009.[46]

If subject matter or temporal jurisdiction are expanded to cover events related to the Hariri attack or other attacks, Rule 16 of the Rules of Procedure and Evidence allows the Prosecutor to request information from the Lebanese authorities, and provides that the Prosecutor may request their assistance in investigations, request permission to conduct these activities independently with his staff, or a combination of the two.[47]

Lebanon is obligated to comply with such orders and requests. For example, Article 15 of the Lebanon-UN Agreement compels Lebanon to cooperate with the Tribunal in facilitating access to sites, persons, and relevant documents required for the investigation, and specifically states:

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[43] STL RPE Rule 17 [Reproduced at Tab 39].

[44] STL RPE Rule 17 [Reproduced at Tab 39].

[45] STL RPE Rule 17 (E) [Reproduced at Tab 39].

[46] Deferral Order of March 27, 2009 (CH/PTJ/2009/01) [Reproduced at Tab 13].

[47] STL RPE Rule 16 [Reproduced at Tab 39].

> The Government shall comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to: identification and location of persons, service of documents, arrest or detention of persons, and transfer of an indictee to the Tribunal.[48]

These obligations are reinforced by the Memorandum of Understanding between the Government of Lebanon and the Special Tribunal for Lebanon Concerning the Office of the Special Tribunal in Lebanon, signed on June 17, 2009.[49] In tandem with these provisions, Rule 20 of the Rules of Procedure and Evidence further stipulates the Lebanese authorities' duties to comply, and the procedure by which Lebanese non-compliance may be reported to the UN Security Council.[50] Unlike the ICTY and ICTR, this process requires the President of the Tribunal to conduct a consultation with Lebanese authorities in an attempt to gain the necessary compliance.[51] On April 8, 2009, the Lebanese judge complied with these duties outlined in the Statute and Rules of Procedure and Evidence, ordering the transfer of documents to the Tribunal and halting prosecution of the *Hariri* case.[52]

C. VERTICAL COOPERATION

Juxtaposed against these procedural mechanisms for ensuring primacy, the STL is largely dependent on a system of vertical cooperation with the Lebanese authorities for prosecutorial purposes. Under Article 11 of the Statute, the Office of the Prosecutor has the ability to

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[48] STL Statute, Agreement at Art. 15 [Reproduced at Tab 31].

[49] Memorandum of Understanding between the Government of Lebanon and the Special Tribunal for Lebanon Concerning the Office of the Special Tribunal in Lebanon, June 17, 2009 at Art. 4, 6 [Reproduced at Tab 40].

[50] STL RPE Rule 20 [Reproduced at Tab 39].

[51] STL RPE Rule 20 [Reproduced at Tab 39] *but compare* ICTY Rules of Procedure and Evidence Rule 11 [hereinafter ICTY RPE][Reproduced at Tab 37]; ICTR Rules of Procedure and Evidence Rule 11 [hereinafter ICTR RPE] [Reproduced at Tab 38].

[52] *Warrants Lifted Against Generals in Hariri Case*, AFP (Apr. 8, 2009), http://www.google.com/hostednews/afp/article/ALeqM5ji76JFxE1oDMTGGk50DyUETQzRRw [Reproduced at Tab 48].

"question suspects, victims, and witnesses, to collect evidence, and to conduct on-site investigations" independently of the Lebanese authorities "as appropriate."[53] In order to safeguard Lebanese sovereignty, however, the decision of the Prosecutor to do so is subject to judicial scrutiny, pursuant to Rule 77 of the Rules of Procedure and Evidence which state: "when necessary and appropriate, the Prosecutor must be authorized by the Pre-Trial Judge to conduct investigative acts without the involvement of Lebanese authorities."[54]

IV. PRIMACY, CONCURRENT JURISDICTION, AND DEFERRAL ORDERS IN THE OTHER INTERNATIONAL TRIBUNALS

A. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The ICTY has primacy over national courts and may issue a request for deferral at any stage of proceedings under its Statute and Rules of Procedure and Evidence.[55] Like the STL, the ICTY's Rules of Procedure and Evidence and Statute also include an obligation to comply with orders and requests to defer to the competence of the Tribunal.[56] Under the ICTY Statute, this obligation imposes duties on national judicial authorities to comply with requests from the Trial Chamber similar to those under the Agreement of the STL.[57]

[53] STL Statute Art. 11 [Reproduced at Tab 31].

[54] President of the Special Tribunal for Lebanon, *Special Tribunal for Lebanon: Annual Report (2009-2010)* (Mar. 1, 2010) at ¶51 [Reproduced at Tab 46].

[55] ICTY Statute Art. 9 [Reproduced at Tab 29].

[56] STL Statute, Agreement at Art. 15 [Reproduced at Tab 31]; STL RPE Rule 17 [Reproduced at Tab 39] *but compare* ICTY Statute Art.29 [Reproduced at Tab 29]; ICTY RPE Rule 8 [Reproduced at Tab 37].

[57] ICTY Statute Art. 29 [Reproduced at Tab 29]; *compare* STL Statute, Agreement at Art. 15 [Reproduced at Tab 31].

As the ICTY was largely based on an adversarial model, whether or not to exercise this primacy is initially up to the discretion of the Prosecutor.[58] The Prosecutor can make a request for deferral of a case under Rule 9 of the Rules of Procedure and Evidence, in three instances:

> (i) The act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;
>
> (ii) There is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted;
>
> (iii) What is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal.[59]

Nonetheless, the primacy of the ICTY was not intended to replace the jurisdiction of the national courts.[60] As such, the *non bis in idem* provision of Article 10 of the ICTY Statute protects an accused from "double jeopardy"; a convicted or acquitted person may not be retried at the international level for violations of international humanitarian law unless (at the domestic level) the crime was characterized as an ordinary crime or the national proceedings were somehow biased or not diligently prosecuted.[61] However, in the event a state refuses to comply with a deferral order, the Trial Chamber can report the issue to the President of the Tribunal, who may refer the matter to the Security Council.[62]

In terms of cooperation between national authorities, the chief responsibility for investigation lies with the Prosecutor of the ICTY. Article 18 of the ICTY Statute allows the

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[58] 1 VIRGINIA A. MORRIS AND MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 128 (1995) [Reproduced at Tab 16].

[59] ICTY RPE Rule 9 [Reproduced at Tab 37].

[60] U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 64, U.N. Doc. S/25704 (May 3, 1993) [Reproduced at Tab 43].

[61] ICTY Statute Art. 10 [Reproduced at Tab 29].

[62] ICTY RPE Rule 11 [Reproduced at Tab 37].

Prosecutor to conduct investigations independently of the host state, but enables the Prosecutor, where appropriate, to obtain assistance from national authorities.[63] Although the Security Council Resolution that created the ICTY is a binding international agreement, without permission from the host state via implementing legislation, the Prosecutor is unable to exercise this power.[64]

In the experience of the ICTY, deferral orders were therefore used in the initial stages of its operation to obtain exclusive jurisdiction over defendants but later became unnecessary as suspects were apprehended or turned themselves in to the ICTY before national proceedings had a chance to occur.[65] Several key cases demonstrate the effect of a deferral order and illustrate the extent of the ICTY's primacy over national courts.

1. THE DUTY OF COMPLIANCE AND SOVEREIGNTY ISSUES: PROSECUTOR V. DUSKO TADIC

The first case ever to come before the ICTY raised the issue of primacy. Proceedings were initially brought against Dusko Tadic by the Federal Republic of Germany.[66] Prosecutor Richard Goldstone subsequently sought deferral of the case to the ICTY, invoking Article 9 of the ICTY Statute and Rules 8, 9, and 10 of the Rules of Procedure and Evidence.[67] The Prosecutor maintained his request for deferral under Rule 9 (iii), arguing that the Tadic case

[63] ICTY Statute Art. 18 [Reproduced at Tab 29].

[64] Stroh, *supra* note 5, at 267 [Reproduced at Tab 18].

[65] WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE 383 (2006) [Reproduced at Tab 14].

[66] Faculty, The Judge Advocate General's School, *International Criminal Tribunal for the Former Yugoslavia*, DEPARTMENT OF THE ARMY PAMPHLET, 50 (November 1995) [Reproduced at Tab 23].

[67] *Prosecutor v. Tadic*, Case No. IT-94-1-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Dusko Tadic (Nov. 8, 1994) [Reproduced at Tab 3].

included "significant factual or legal questions which may have implications for the Tribunal."[68] To support his claim that the Tadic case was one in which the Tribunal should exercise primacy, the Prosecutor pointed to the fact that Germany may not have been able to get jurisdiction over other potential co-offenders and accomplices, that he had already interviewed witnesses outside of Germany necessary to the case, and that his investigation included investigations for additional offenses allegedly committed by Tadic which Germany had not yet undertaken.[69] He also added that this matter fell squarely within the jurisdiction of the Tribunal.[70] Taking into consideration these factors, the pre-trial judge granted the deferral order.[71]

In a demonstration of the ICTY's primacy over the national court of Germany, the pre-trial judge also specifically noted that Germany had a legal obligation under Article 29 of the Tribunal's Statute to comply with the order and could not use its domestic laws as a shield to avoid compliance.[72] Germany, willing to comply with the ICTY's request, implemented the necessary domestic legislation it needed to transfer the case and turned it over to the ICTY.[73] When the case proceeded to trial, Tadic filed a motion challenging this exercise of the ICTY's primacy of jurisdiction as unfounded, but the Trial Chamber refused to rule on this issue and dismissed the motion, as it turned on the question of the legality of the ICTY's establishment.[74]

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[68] *Id.* at ¶1 [Reproduced at Tab 3].

[69] *Id.* at ¶4–5 [Reproduced at Tab 3].

[70] *Id.* at ¶6 [Reproduced at Tab 3].

[71] *Id.* at 13 [Reproduced at Tab 3].

[72] *Id.* at ¶19–20 [Reproduced at Tab 3].

[73] Brown, *supra* note 10, at 403 [Reproduced at Tab 24].

[74] Tadic Appeal, *supra* note 7 at ¶2–3 [Reproduced at Tab 4].

When the matter was taken up in the interlocutory appeal, Tadic again attempted to challenge the ICTY's primacy. First, Tadic tried to maintain what is essentially a *non bis in idem* argument claiming that because Germany had already "tried" him and been diligent in his prosecution, the Trial Chamber had no authority to be able to claim primacy of jurisdiction.[75] However, the Appeals Chamber quickly dismissed this argument on the facts by distinguishing that the Germans were merely in the midst of investigations and had not yet actually begun to prosecute him, and by noting that under Article 9 of the Statute, a request for deferral can be made "at any stage of the procedure."[76] This was therefore not a true case of *non bis in idem*.

The heart of Tadic's unjustified primacy argument essentially rested upon four prongs: 1) Bosnia-Herzegovina had jurisdiction over the case, 2) the Security Council had illegally established the ICTY in violation of Article 2(7) of the United Nations Charter, and 3) under the principle of *jus de non evocando*, Tadic retained the right to be tried by his national courts under his national laws.[77] The Prosecutor did not dispute the first prong, which merely recognized the concurrent jurisdiction of the ICTY with Bosnia-Herzegovina.[78]

Examining the second prong, the Appeals Chamber found that while Tadic had a right to raise a plea of state sovereignty and was not barred for lack of standing, pursuant to Article 2(7) of the UN Charter, the Security Council is not restricted from interfering in the affairs of sovereign states when it invokes Chapter VII authority, which it exercised in establishing the ICTY.[79] The Appeals Chamber pointed to the fact that even without the exercise of Chapter VII

[75] *Id.* at ¶51 [Reproduced at Tab 4].

[76] *Id.* at ¶52 [Reproduced at Tab 4].

[77] *Id.* at ¶54–64. [Reproduced at Tab 4].

[78] *Id.* at ¶54 [Reproduced at Tab 4].

[79] *Id.* at ¶55–56 [Reproduced at Tab 4].

authority, Bosnia-Herzegovina and Germany had endorsed and cooperated with the ICTY, voluntarily submitting to the jurisdiction of the ICTY.[80] Furthermore, the Appeals Chamber considered the nature and gravity of the crimes alleged ("offenses which, if proven, do not affect the interests of one State alone but shock the conscience of mankind"), and found that this created a special need for primacy of jurisdiction over national courts because otherwise, "human nature being what it is, there would be a perennial danger of international crimes being characterized as 'ordinary crimes.'"[81]

Finally, under the third prong of Tadic's argument, the Appeals Chamber recognized the right of an accused to be tried by his national court when looking to various national constitutions, but found that the principle of *jus de non evocando* did not apply in an international tribunal established by the Security Council acting on behalf of the community of nations.[82] As all three prongs of Tadic's arguments against the primacy of the ICTY failed, the Appellate Chamber dismissed his claim that the ICTY was established illegally, and reaffirmed the primacy of its own jurisdiction.[83] While Tadic illustrates the exercise of primacy over a German court through the issuance of a deferral order, and how challenges to the legality of establishment may play a role in a primacy argument, the German court was more than willing to cooperate. What may happen when national authorities refuse to cooperate? The next case takes up this issue directly.

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[80] *Id.* at ¶56 [Reproduced at Tab 4].

[81] *Id.* at ¶57–58 [Reproduced at Tab 4].

[82] *Id.* at ¶61–63 [Reproduced at Tab 4].

[83] *Id.* at ¶146 [Reproduced at Tab 4].

2. COMPLIANCE WITH NATIONAL JUDICIAL AUTHORITIES: PROSECUTOR V. MILE MRKSIC, ET. AL

In *Mrksic*, the ICTY issued international warrants for the arrest of three officers, indicted for their alleged participation in a mass killing of captive non-Serb men taken from Vukovar Hospital.[84] The three were never arrested by the authorities of the former Yugoslavia (Serbia and Montenegro), though it had initiated an investigation into the killings. Upon learning of proceedings initiated against the three officers before the Military Court in Belgrade, the Prosecutor made a request for formal deferral of the case, this time under Rule 9(ii) and 9(iii).[85] The Trial Chamber held:

> Considering…the continuing refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) to surrender the said accused indicates that the proceedings initiated in its territory would be neither impartial nor independent and would be designed to shield the accused from his international criminal responsibility.[86]

As in *Tadic*, the Trial Chamber also noted the former Yugoslavia (Serbia and Montenegro)'s duty to comply under Article 29 of the Statute, finding there was no possibility the Military Court in Belgrade could have been unaware as to the ICTY's issuance of an international arrest warrant.[87] Finally, as the proceedings against the accused related to facts and questions of law that would have significant implications before the Tribunal, the Trial Chamber found this circumstance was sufficient, on its own, to justify issuing a deferral order over the case.[88]

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[84] Mrksic, *supra* note 7, at 4 [Reproduced at Tab 5]; Press Release, International Criminal Tribunal for the Former Yugoslavia, ICTY Press Release CC/PIU/370-E (Dec. 7, 1998) "Vukovar Hospital" Case: The Prosecutor Seeks the Deferral to the ICTY of Proceedings Instituted in Serbia Against M. Mrksic, V. Slijvancanin and M. Radic Deferral Hearing to be Held on Wednesday 9 December, *available at* http://www.icty.org/sid/7611 [Reproduced at Tab 44].

[85] Mrksic, *supra* note 84 [Reproduced at Tab 5].

[86] *Id.* at 3 [Reproduced at Tab 5].

[87] *Id.* at 4 [Reproduced at Tab 5].

[88] *Id.* at 4–5 [Reproduced at Tab 5].

While the Trial Chamber issued the deferral order to the Military Court in Belgrade, the former Yugoslavia (Serbia and Montenegro) failed to arrest and transfer all three officers.[89] Despite repeated referral of the issue to the Security Council, Mrksic and Radic were not handed over to the ICTY until 2002 when they turned themselves in, and Slijvancanin avoided prosecution until his capture in 2003.[90] Thus Mrksic illustrates that despite possessing primacy over the Military Court in Belgrade, the ICTY was limited in its efforts to bring these individuals to justice by simple non-compliance with its deferral order.

3. PRIMACY OVER ENTIRE EVENTS OR INCIDENTS: THE LASVA RIVER VALLEY AND MACEDONIA DEFERRALS

The Lasva River Valley and Macedonia deferrals represent instances in which the ICTY was faced with the ability to grant or deny a deferral order over an entire incident rather than a particular case or defendant. In the Lasva River Valley decision, the Trial Chamber granted a formal request for deferral under Rule 9(iii) of the Rules of Procedure and Evidence.[91] Bosnia and Herzegovina, like Germany in the *Tadic* case, was more than willing to defer prosecution of the incident to the ICTY.[92] The Trial Chamber accepted that the investigations were sufficiently related and invoked the ICTY's primacy, formally requesting that Bosnia and Herzegovina defer to the Tribunal:

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[89] Press Release, International Criminal Tribunal for the Former Yugoslavia, ICTY Press Release JL/P.I.S./444-E (Nov. 2, 1999) Letter from President Mcdonald to the President of the Security Council concerning Outstanding Issues of State Non-Compliance, *available at* http://www.icty.org/sid/7726 [Reproduced at Tab 45].

[90] Press Release, International Criminal Tribunal for the Former Yugoslavia, ICTY Press Release JL/P.I.S./444-E (Nov. 2, 1999) Letter from President Mcdonald to the President of the Security Council concerning Outstanding Issues of State Non-Compliance, *available at* http://www.icty.org/sid/7726 [Reproduced at Tab 45]; Reuters, *Vukovar Trial Starts at Hague War Crimes Tribunal*, Nzherald.co.nz (Oct. 11, 2005) http://www.nzherald.co.nz/news/print.cfm?objectid=10349713 [Reproduced at Tab 49].

[91] Lasva River Valley, *supra* note 7 [Reproduced at Tab 8].

[92] *Id.* at ¶7 [Reproduced at Tab 8].

> All investigations and criminal proceedings respecting serious violations of international humanitarian law, as set forth in Articles 2 to 5 of the Statute of the International Tribunal concerning the population of the Lasva River Valley between October 1992 and May 1993.[93]

In the case of the Macedonia deferrals, the Trial Chamber similarly granted a deferral order over several large scale incidents at once.[94] In the "Mavrovo Road Workers Case," the Prosecutor sought to obtain deferral of an entire incident, but was not, at that time, willing to prosecute two of the suspected individuals.[95] The Trial Chamber granted a deferral order over the incident, but respecting the principle of concurrent jurisdiction and noting the potentially frustrating effect this order could have on the domestic authorities' ability to prosecute, invited both parties to a new hearing after 9 months time to see if this "blocking effect" would still be justified.[96]

Another relevant incident within the Macedonia deferral is the "NLA Leadership" case. In the "NLA Leadership" case, the Trial Chamber declined to grant the Prosecutor's request for a clause in the decision requiring Macedonia to defer "all current and future investigations and prosecutions" of alleged crimes in one of the incidents, as this would "effectively block the domestic courts from initiating any investigation or prosecution with regard to these groups of alleged perpetrators."[97] While recognizing the denial of this request as perhaps the outer limit of the ICTY's primacy, this request may also have been denied due to a perception that the ICTY

[93] *Id.* at ¶16–17 [Reproduced at Tab 8].

[94] Macedonia Request for Deferral, *supra* note 7 [Reproduced at Tab 6].

[95] *Id.* at ¶36 [Reproduced at Tab 6].

[96] *Id.* at ¶40 [Reproduced at Tab 6].

[97] *Id.* at ¶48 [Reproduced at Tab 6].

should refer cases back to the national courts at this time rather than take up new ones, as confidence in the national court system of the former Yugoslavia started to develop.[98]

The Macedonian authorities complied with the request for deferral of these cases, and the Office of the Prosecutor for the ICTY began its investigations.[99] Thereafter, Security Council Resolutions 1503 and 1534 were issued and the Prosecutor decided to refer both cases back to the national authorities for prosecution as part of the completion strategy for the ICTY.[100] These cases still await resolution in the national courts.[101]

The experience of the ICTY demonstrates the procedure for the exercise of primacy over national courts through the issuance of a deferral order and that challenges to the legality of establishment of an international tribunal can play a role in a primacy argument. Most national authorities subsequently comply with deferral orders, but when they do not, the matter may be referred to the United Nations Security Council which has the power to issue a binding resolution on the matter. Finally, as the Macedonia deferrals illustrate, it is not unprecedented to obtain a deferral order over an entire event or incident.

B. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The ICTR has concurrent jurisdiction with national courts, but exercises primacy over "all national courts."[102] The ICTR may request deferral of a case at any stage of the proceedings,

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[98] SCHABAS, *supra* note 66, at 126 [Reproduced at Tab 14].

[99] *In Re: The Republic of Macedonia*, Case No. IT-02-55-MISC. 6, Prosecutor's Notification of Deferral (May 12, 2005) ¶5–6 [Reproduced at Tab 7].

[100] *Id.* at ¶7–10 [Reproduced at Tab 7].

[101] *See* Sase Dimovski, *Mavrovo Workers Trial Postponed in Macedonia*, BALKAN INSIGHT (Sept. 7, 2010), http://www.balkaninsight.com/en/article/mavrovo-workers-trial-postponed-in-macedonia (describing delays responsible for holding up these cases) [Reproduced at Tab 51].

[102] *See* Table 1.1.

but, like the ICTY, is limited by a *non bis in idem* provision.[103] A duty to comply with requests of the Tribunal is also enshrined in the ICTR's Statute.[104] The ICTR's Rules of Procedure and Evidence are essentially identical to those of the ICTY in outlining the deferral process and in further stipulating that any refusal to comply with its requests merit referral to the President and then to the Security Council.[105] The ICTR Prosecutor also possesses the ability to conduct investigations without the assistance of the host state, but is limited by a need for states to have implemented domestic legislation enabling deferral.[106] The Prosecutor may request assistance from the host state in its investigation.[107] While the previously discussed cases from the ICTY exemplify the scope of jurisdictional primacy, the following cases from the ICTR illustrate the way in which Rule 9 and the *non bis in idem* provision of the ICTR Statute may act as a limitation on an international tribunal's jurisdiction and as an argument in favor of deferral.

NON BIS IN IDEM AS A POTENTIAL LIMIT TO PRIMACY AND AN ARGUMENT IN FAVOR OF DEFERRAL: THÈONESTE BAGOSORA, ALFRED MUSEMA, AND RADIO TELEVISION LIBRE DES MILLE COLLINES SARL

In the case of *Thèoneste Bagosora*, the Prosecutor applied for a deferral order against Belgian authorities under Rule 9(iii) of the ICTR Rules of Procedure and Evidence.[108] In order to overcome the *non bis in idem* provision of Article 9 of the ICTR Statute and meet the requirements for the deferral order, the Prosecutor must demonstrate that: 1) proceedings have been initiated by the national authorities for crimes within the Tribunal's jurisdiction, 2) an

[103] ICTR Statute Art. 9–10 [Reproduced at Tab 30].

[104] ICTR Statute Art. 28 [Reproduced at Tab 30].

[105] ICTR RPE at Rule 9, 11 [Reproduced at Tab 38] *compare* ICTY RPE Rule 9, 11 [Reproduced at Tab 37].

[106] ICTR Statute Art. 17 [Reproduced at Tab 30]; Stroh, *supra* note 5, at 267 [Reproduced at Tab 18].

[107] ICTR Statute Art. 17 [Reproduced at Tab 30].

[108] Bagosora, *supra* note 14 [Reproduced at Tab 9].

investigation of the alleged crimes within the Tribunal's jurisdiction are in fact simultaneously being undertaken, and 3) that these investigations or criminal proceedings are "closely related to, or otherwise involve factual or legal questions which may have implications for the Prosecutor's investigations or prosecutions."[109] The Prosecutor therefore maintained that Belgium had begun investigations against Bagosora for murder and violating the Geneva Conventions of 12 August 1949 and Additional Protocols I and II of June 8 1977, that he had also initiated investigations into crimes allegedly perpetrated by Bagosora within the jurisdiction of the Tribunal, and that Belgium's investigations were closely related or otherwise involved factual and legal questions with implications for the Tribunal.[110] The Prosecutor also argued that Belgium's simultaneous investigations might frustrate the investigative process and cooperation of witnesses, potentially placing their lives at risk.[111]

Furthermore, the Prosecutor claimed that because Belgian law did not contain provisions against violations of international humanitarian law, there would be a significant risk that if Belgium were to try Bagosora, the Tribunal would be unable to subsequently prosecute him on the same facts for genocide and crimes against humanity due to the *non bis in idem* provision.[112] Accepting this argument as part of the Prosecutor's arguments under Rule 9(iii) and noting that, "the investigations by the Prosecutor focus mainly on persons in positions of authority…[and] Colonel Thèoneste Bagosora's alleged criminal responsibility seems most important", the Trial Chamber granted the deferral order.[113] Thus, as *Bagosora* tends to indicate, deferral orders are

[109] *Id.* at 5 [Reproduced at Tab 9].

[110] *Id.* at 2–3 [Reproduced at Tab 9].

[111] *Id.* at 3–4 [Reproduced at Tab 9].

[112] *Id.* at 6 [Reproduced at Tab 9].

[113] *Id.* at 3, 6–7 [Reproduced at Tab 9].

typically reserved for those thought to be most involved, at the highest levels of authority and responsibility.

In the case of *Alfred Musema*, the Trial Chamber accepted a 9(iii) argument for deferral identical to the argument for deferral made in *Bagosora*, as the Prosecutor claimed that if the Trial Chamber did not grant a deferral against the Swiss judicial authorities, the ICTR may be precluded from prosecuting Musema for serious violations of international humanitarian law in the future by the *non bis idem* provision.[114] The Swiss authorities had begun investigating Musema for allegations of murder and incitement to murder Tutsis and moderate Hutus, and crimes punishable under the Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977.[115] Noting the "seriousness of the factual charges and of the legal questions which are bound to be raised in connection with the case," the Trial Chamber granted the deferral order.[116]

Finally, similar to the Lasva River Valley and Macedonia Deferrals of the ICTY which granted deferral orders over entire incidents or events, in *Radio Television Mille Collines*, the Prosecutor requested deferral of all investigations and criminal proceedings being undertaken by Belgium relating to persons associated with a radio station, as well as the radio station itself.[117] Belgium had begun investigating the relationship between the activities and persons running the radio station, and the Prosecutor claimed these activities and persons were within the ICTR's jurisdiction.[118] The Trial Chamber, noting the possibility of preclusion by the *non bis in idem*

[114] Musema, *supra* note 14, at 6 [Reproduced at Tab 10].

[115] *Id.* at 3 [Reproduced at Tab 10].

[116] *Id.* at 5, 7 [Reproduced at Tab 10].

[117] SARL, *supra* note 14, at 3–4 [Reproduced at Tab 11].

[118] *Id.* at 3 [Reproduced at Tab 11].

provision if Belgium were to continue prosecution, granted the deferral order, just as in Bagosora and Musema.[119]

The experience of the ICTR reveals that *non bis in idem* may serve as a potential limit to the exercise of primacy. However, *non bis in idem* may also be used by the Prosecutor as an argument in favor of deferral. Finally, similar to the ICTY's ability to obtain a deferral order over entire events or incidents, the ICTR was able to obtain deferral over an entire entity as *Radio Television Mille Collines* readily demonstrates.

C. THE SPECIAL COURT FOR SIERRA LEONE

Unlike the ICTY and the ICTR, the SCSL was established by bilateral agreement.[120] The SCSL has concurrent jurisdiction with and primacy over the national courts of Sierra Leone.[121] In this sense, the SCSL asserts a "limited primacy."[122] The SCSL was vested with the power to issue a deferral order, however, it has yet to exercise this ability; it is possible that the mere inclusion of this ability has been enough to discourage the national courts of Sierra Leone from attempting to interfere.[123] However, this is more likely due to the fact that the rebels responsible for the violent coup de'tat in Sierra Leone were granted amnesty by the 1999 Lome Accord, barring them from national prosecution.[124] Similar to the other tribunals, the Statute of the SCSL

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[119] *Id.* at 6–7 [Reproduced at Tab 11].

[120] CRYER, ET. AL, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 182 (2nd ed., 2010) [Reproduced at Tab 15].

[121] *See* Table 1.1.

[122] Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EUR. J. INT'L L. 857, 860 (2000) [Reproduced at Tab 25].

[123] SCSL Statute Art. 8 [Reproduced at Tab 36]; Gibson, *supra* note 31, at 289 [Reproduced at Tab 19].

[124] Rapp, *supra* note 17 (Though this did not spare them from prosecution for violations of international law by the SCSL) [Reproduced at Tab 28].

also carries a *non bis in idem* provision, which allows the SCSL to try an individual that has already been tried by the national courts, but only in the event that the acts were characterized as ordinary crimes at the national level, the national proceedings were not impartial or independent, or the case was not diligently prosecuted.[125]

Though the experience of the SCSL reveals that it has not had much difficulty in maintaining primacy of jurisdiction over the national courts of Sierra Leone, the Charles Taylor case illustrates one way in which the legality of its establishment relates to the ability to exercise primacy. As the Appellate Chamber in Charles Taylor held, "the Agreement between the United Nations and Sierra Leone is… an agreement between *all* members of the United Nations and Sierra Leone."[126] Inherent in this statement is evidence that the judges considered the bilateral agreement as only the derived basis for legality of the SCSL's establishment, but found the primary basis in Chapter VII of the United Nations Charter.[127] Thus, the SCSL was able to assert itself as an international court, even though it was established by a bilateral agreement.[128]

V. THE EFFECT OF A DEFERRAL ORDER ON THE STL AND LEBANON

A. THE DEFERRAL ORDER OF MAR. 27, 2009 WAS AN EXERCISE OF PRIMACY

The Deferral Order issued by the Pre-Trial Judge of the STL on March 27, 2009 was an exercise of primacy. As the experience of the other international tribunals illustrates, once a deferral order has been issued and complied with, national authorities are relieved from

[125] SCSL Statute Art. 9 [Reproduced at Tab 36].

[126] Charles Taylor, *supra* note 17, at ¶38 [Reproduced at Tab 12].

[127] Gianluca Serra, *Special Tribunal for Lebanon: A Commentary on its Major Legal Aspects*, 18 INT'L CRIM. JUST. REV. 344, 349 (2008) [Reproduced at Tab 26].

[128] CRYER, ET. AL, *supra* note 121 at 182–83 [Reproduced at Tab 15]; SCSL Statute Art. 5 [Reproduced at Tab 36].

prosecution and cannot interfere.[129] Thus, in combination with the STL's Statute and Rules of Procedure and Evidence, once Lebanese judicial authorities receive a deferral order, they fall under a binding international legal duty to comply with such an order by transferring the case, halting prosecution, transferring the accused, and producing the required documents and records. The Lebanese judge's submission of the case to the STL relinquishes the ability of Lebanese judicial authorities to interfere or conduct simultaneous independent investigations, though the STL may still request and authorize their continued cooperation.[130]

B. THE STL HAS EXCLUSIVE JURISDICTION OVER THE HARIRI CASE

Similar to the other international tribunals, the STL exercises exclusive jurisdiction with respect to cases in which the Trial Chamber has granted a deferral order. As Article 4(2) of the STL Statute requires, "the Lebanese judicial authority shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal." Thus the concurrent jurisdictional relationship between Lebanese national authorities and the STL is one in which, "in relation to the *Hariri* incident at least, the Special Tribunal has been created with a view to **replacing** the jurisdictional competence of the Lebanese judicial authorities."[131]

This exclusive jurisdiction could be extended to cover future investigations of currently unknown perpetrators, via the deferral procedure enshrined in Article 4(2) of the STL Statute and Rule 17 of the Rules of Procedure and Evidence.[132] Like the ICTY in the case of the Lavsa

[129] *See, e.g.*, Bagosora, *supra* note 14 [Reproduced at Tab 9]; Musema, *supra* note 14 [Reproduced at Tab 10]; SARL, *supra* note 14 [Reproduced at Tab 11] (all granting deferral orders with which national authorities subsequently complied).

[130] STL RPE Rule 16 [Reproduced at Tab 39].

[131] Mettraux, *supra* note 41, at 913 (emphasis added) [Reproduced at Tab 22].

[132] *Id.* [Reproduced at Tab 22].

River Valley and Macedonia deferrals and the ICTR in the case of Radio Television Mille Collines, the STL is attempting to maintain jurisdiction over one isolated event or incident, that is, the *Hariri* case and potentially related incidents.[133] As it appears that Article 4(2) of the Statute is intended to replace the competence of the Lebanese judicial authorities, and there is no indication that the STL is currently interested in referring cases back to the Lebanese courts, the case for exclusive jurisdiction is quite strong. This exclusive jurisdiction may be extended over events related to the *Hariri* case under Article 4(3), though some limitations to the exercise of jurisdiction could arise.

VI. POTENTIAL LIMITATIONS

A. STATE SOVEREIGNTY MAY ACT AS A LIMITATION ON THE JURISDICTION OF THE STL

Unlike the ICTY and ICTR, the STL was only indirectly established under Chapter VII of the UN Charter by Security Council Resolution 1757.[134] Though securing cooperation from third party states with a deferral order may present potential obstacles and difficulties due to the conflict between state sovereignty and the lack of the STL's primacy over third party states, it is unlikely such a dilemma would arise with respect to Lebanon, as Lebanon requested the Tribunal be established in the first place.[135] Moreover, Lebanon is legally obligated to comply under Article 15 of the Agreement.[136]

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[133] Lasva River Valley, *supra* note 7 [Reproduced at Tab 8] Macedonia Request for Deferral, *supra* note 7 [Reproduced at Tab 6]; SARL, *supra* note 14 [Reproduced at Tab 11].

[134] STL Statute [Reproduced at Tab 31] *but compare* ICTY Statute [Reproduced at Tab 29]; ICTR Statute [Reproduced at Tab 30].

[135] Letter dated 13 December 2005 from the Chargè d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary General', U.N. Doc. S/2005/783 [Reproduced at Tab 42].

[136] STL Statute, Agreement at Art. 15 [Reproduced at Tab 31].

In addition, as in *Tadic*, the case for primacy of the STL over the assassination of Rafiq Hariri and related incidents is particularly strong, considering that a characterization of terrorist attacks committed in an attempt to destabilize Lebanon as an "ordinary crime" would not only have a detrimental impact on Lebanon, but could have serious implications for international peace and security.[137] Even without an internationally accepted definition of terrorism, the idea that such acts constitute threats to international peace and security has already been accepted by the international community.[138] Furthermore, as the experience of the SCSL has shown, by arguing that Chapter VII authority enveloped the Lebanese-UN Agreement into an international one, the Prosecutor may be able to create an argument that third party states are in fact obligated to comply with the deferral orders and requests of the STL, as Security Council Resolution 1757 and the annexed documents and agreement turned the entire package into "an expression of the will of the international community" and is therefore an internationally binding agreement.[139]

Nonetheless, even if such an argument were accepted, this would not supplant the need for states to have enacted domestic implementing legislation. For example, as evidenced by the experience of both the ICTY and the ICTR, states such as Germany, Belgium, and Switzerland (all more than willing to comply with the requests of the international tribunals), required national legislation implementing the respective establishing United Nations Security Council

[137] Tadic Appeal, *supra* note 7, at ¶57–58 [Reproduced at Tab 4].

[138] *See*, *e.g.*, International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. No. 13075, U.N. Doc. A/RES/54/109, 39 I.L.M. 270 [Reproduced at Tab 1]; S.C. Res. 1373, U.N. Doc S/RES/1373 (Sept. 28, 2001) [Reproduced at Tab 32]; S.C. Res. 1566, U.N. Doc S/RES/1566 (Oct. 8, 2004) [Reproduced at Tab 33]; S.C. Res. 1624, U.N. Doc S/RES/1624 (Sept. 14, 2005) [Reproduced at Tab 34] (recognizing terrorism threatens the security and territorial integrity of states).

[139] Serra, *supra* note 128 [Reproduced at Tab 26].

resolutions before they were able to comply with the tribunals' requests under their national constitutions.[140]

B. NON-COMPLIANCE BY LEBANON MAY INHIBIT THE EXERCISE OF JURISDICTION

Maintaining vertical cooperation with Lebanon is essential to securing jurisdiction over the perpetrators of the Hariri attacks and other potentially related incidents. As Lebanese cooperation with the STL has been "most forthcoming and effective" and Lebanon bears 49% of the STL's operating costs, it appears very unlikely that Lebanese judicial authorities will suddenly change course and cease to cooperate with the STL's requests or deferral orders.[141] Furthermore, as the Lebanese judge complied with the Deferral Order of March 27, 2009, Lebanese judicial authorities seem cognizant of their duties to comply with such orders from the STL.[142] In the event that Lebanese authorities do refuse to comply with a deferral order or request, the matter may be referred to the President of the Tribunal who may undertake steps to secure compliance or report the issue to the United Nations Security Council.[143] However, as demonstrated in *Prosecutor v. Mrksic*, despite such reports, a lack of political will in the United Nations Security Council could still inhibit the issuance of a binding resolution on the matter.[144]

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[140] Brown, *supra* note 74 [Reproduced at Tab 24].

[141] President of the Special Tribunal for Lebanon, *Special Tribunal for Lebanon: Annual Report (2009-2010)* (Mar. 1, 2010) at ¶52 [Reproduced at Tab 46]; "About the STL", *Special Tribunal for Lebanon*, http://www.stl-tsl.org/section/AbouttheSTL [Reproduced at Tab 50].

[142] *Warrants Lifted Against Generals in Hariri Case*, AFP (Apr. 8, 2009), http://www.google.com/hostednews/afp/article/ALeqM5ji76JFxE1oDMTGGk50DyUETQzRRw [Reproduced at Tab 48].

[143] STL RPE Rule 20 [Reproduced at Tab 39].

[144] Press Release, International Criminal Tribunal for the Former Yugoslavia, ICTY Press Release JL/P.I.S./444-E (Nov. 2, 1999) Letter from President Mcdonald to the President of the Security Council concerning Outstanding Issues of State Non-Compliance, *available at* http://www.icty.org/sid/7726 (Despite repeated referrals of the *Mrksic* case to the Security Council, a binding resolution was not issued on the matter) [Reproduced at Tab 45].

C. EXCLUSIVE JURISDICTION OVER AN ISOLATED EVENT OR INCIDENT MAY INHIBIT PROSECUTORIAL ABILITIES OF LEBANESE AUTHORITIES

While exclusive jurisdiction ensures the Prosecutor of the STL can maintain primacy with respect to the *Hariri* case, there are policy considerations the Office of the Prosecutor of the STL should bear in mind. For example, as was the case with the Macedonia deferrals, granting a deferral order over attacks related to the Hariri assassination could inhibit the ability of Lebanese authorities to prosecute such a case later on.[145] In the event the STL wishes to refer cases back to the Lebanese courts, there may be significant practical difficulties if the Prosecutor does not provide the Lebanese authorities with a record of his investigations or conduct his investigations in harmony with Lebanese law.[146]

If the STL wishes to preserve the ability to refer cases back to the Lebanese courts, one option in subsequent deferral hearings could be to implement a similar procedural mechanism to that used in the "Mavrovo Road Workers" case, requiring a new hearing to verify that the exclusivity of jurisdiction is justified.[147] Eventually this may require the STL to consider adopting a rule similar to Rule 11 *bis* of the ICTY's Rules of Procedure and Evidence, as the current STL Statute does not contain such a procedural mechanism.[148]

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[145]Mettraux, *supra* note 133, at 914 [Reproduced at Tab 22].

[146] *Id*. [Reproduced at Tab 22].

[147] *Id.* at 915 [Reproduced at Tab 22]; *In Re: The Republic of Macedonia*, Case No. IT-02-55-MISC.6, Decision on Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia (Oct. 4, 2002) [Reproduced at Tab 6].

[148] Mettraux, *supra* note 145 [Reproduced at Tab 22].

D. NON BIS IN IDEM MAY LIMIT JURISDICTION AND SERVE AS AN ARGUMENT FOR DEFERRAL OF RELATED INCIDENTS

1. NON BIS IN IDEM AS A LIMITATION

Like the other international tribunals, the STL also has a *non bis in idem* provision which could act as a limit to the scope of the STL's jurisdiction over the national courts.[149] Under Article 5 of the STL Statute, a person already tried by national authorities may ***only*** subsequently be tried by the STL if: 1) the national proceedings lacked impartiality or independence, 2) were intended to shield the accused from the STL's jurisdiction, or 3) the case was not diligently prosecuted.[150] Proving one of these exceptions to the *non bis in idem* provision is extremely unusual.[151]

As the STL is to apply Lebanese law, it would be quite difficult (if not impossible) for the Lebanese authorities to be able to prosecute and bring to trial an accused for a crime related to the Hariri assassination that would not fall within the STL's exclusive jurisdiction. For example, if Lebanese authorities refused to comply with the March 27, 2009 Deferral Order issued by the STL and charged and convicted an accused for a less serious crime in an effort to circumvent the STL's jurisdiction, this would provide strong evidence of an attempt to shield the accused from prosecution. This was precisely what the ICTY implied in *Prosecutor v. Mrksic, et.al*, as it held:

> The continuing refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) to surrender the said accused indicates that the proceedings initiated in its territory would be neither impartial nor independent and would be designed to shield the accused from his international criminal responsibility.[152]

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[149] STL Statute Art. 5 [Reproduced at Tab 31] *compare* ICTY Statute Art. 10 [Reproduced at Tab 29]; ICTR Statute Art. 9 [Reproduced at Tab 30]; SCSL Statute Art. 9 [Reproduced at Tab 36].

[150] STL Statute Art. 5 [Reproduced at Tab 31].

[151] Stroh, *supra* note 5, at 261 [Reproduced at Tab 18].

[152] Mrksic, *supra* note 7, at 3 (Though Serbia and Montenegro had not already tried and convicted the accused in this instance, this language clearly suggests that refusal to comply with a deferral order would provide evidence of an attempt to shield an accused from international criminal responsibility) [Reproduced at Tab 5].

Thus, while it may not be the norm, it does not seem that overcoming the *non bis in idem* provision would create a significant obstacle for the STL Prosecutor should Lebanon carry a case to trial relating to the assassination of Rafiq Hariri.

While this particular problem is avoided with respect to Lebanon, *non bis in idem* presents a more substantial dilemma with respect to third party states, as the STL lacks primacy over third party states which may attempt to prosecute.[153] As the STL lacks the same mechanisms for ensuring cooperation and primacy over third parties, hostile states such as Syria may prefer to exercise their jurisdiction, to the preclusion of the STL.[154] In the event such a state ignored a deferral order issued by the STL and prosecuted, leading to an acquittal or conviction of a lesser crime, it may not be possible for the STL to obtain jurisdiction without the issuance of a UN Security Council Resolution.[155]

The STL is further limited in this respect because even if the Lebanese authorities (which lack jurisdiction over the *Hariri* case) wished to assist the STL in its prosecutorial efforts, Lebanon could not request assistance from a third party state. For example, as one scholar notes:

> Once the STL has decided to investigate certain events and to prosecute certain accused, the Lebanese courts are prevented from exercising their jurisdiction over the same offences and the same persons. As a consequence, the competent Lebanese authorities can no longer request the assistance of other states in these matters; to request international assistance presupposes jurisdiction over the offences with regard to which assistance is requested.[156]

[153] STL Statute Art. 4(1) [Reproduced at Tab 31].

[154] Bert Swart, *Cooperation Challenges for the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1153, 1156– 63 (2007) (Discussing the hostile position of Syria toward the STL) [Reproduced at Tab 27].

[155] *Id.* at 1163 [Reproduced at Tab 27].

[156] *Id.* at 1159 [Reproduced at Tab 27].

As a result, it appears the prospects for international cooperation between Lebanon and other states have been somewhat narrowed.[157]

2. NON BIS IN IDEM AS AN ARGUMENT FOR DEFERRAL OF RELATED INCIDENTS

While the STL's jurisdiction over the *Hariri* case is exclusive, in the event that Lebanon or another state attempts to prosecute and bring to trial an accused for related crimes falling within the jurisdiction of the STL, the Prosecutor should motion for a deferral order under Rule 17(E) of the Rules of Procedure and Evidence in order to maintain primacy and extend exclusive jurisdiction over such a case. Several arguments can be made for such a deferral order to help ensure the STL's jurisdiction.

Drawing upon the experience of the ICTR, this conflict of overlapping jurisdiction would require the Prosecutor to demonstrate: 1) that proceedings have been initiated by national authorities for crimes within the STL's jurisdiction, 2) an investigation of the alleged crimes within the STL's jurisdiction are in fact simultaneously being undertaken by the national authorities, and 3) that these investigations or criminal proceedings are closely related to, or otherwise involve factual or legal questions which may have implications for the Prosecutor's investigations or prosecutions.[158] So long as these elements can be demonstrated, it is likely that a deferral order would be granted by the Pre-Trial Judge. As in *Bagosora, Musema,* and *Radio Television Mille Collines*, arguments that the lives of witnesses would be endangered, simultaneous investigations would frustrate the process of collecting testimony and create confusion, and that the *non bis in idem* provision could bar subsequent prosecution by the STL could all be advanced as additional support in an argument for a deferral order over a crime

[157] *Id.* [Reproduced at Tab 27].

[158] Bagosora, *supra* note 14 [Reproduced at Tab 9].

related to Hariri's assassination.[159] Issuing a second deferral order over a related attack or accused in this manner would allow the STL to maintain primacy of jurisdiction over such a case, as the Lebanese authorities would then fall under a legal duty to comply. Though noncompliance by either Lebanon or another state's national authorities with such an order could still present an obstacle, the deferral order itself creates an international diplomatic pressure to comply, which may be supplemented with a United Nations Security Council resolution if necessary.

VII. CONCLUSION

As demonstrated by the experience of the ICTY, ICTR, and SCSL, concurrent jurisdiction and primacy necessitate a commitment by the national authorities to a system of vertical cooperation. This requirement will naturally be imparted upon the STL and national authorities. As this memorandum has established, a deferral order issued by an international tribunal is in and of itself an exercise of primacy over investigation and prosecution. Subsequent compliance by national authorities with such orders and requests submits the case to the exclusive jurisdiction of the international tribunal, so that the investigation and trial of the accused may proceed uninhibited.

While state sovereignty may present an obstacle to an exercise of primacy of jurisdiction, Lebanon entered a legally binding agreement with the United Nations Security Council, under which it voluntarily requested the creation of a tribunal and through which the exercise of Chapter VII authority obligates it to comply with the deferral orders and requests of the STL. Lebanese cooperation to date has been successful, and it does not seem likely that the Lebanese

[159] Bagosora, *supra* note 14 [Reproduced at Tab 9]; Musema, *supra* note 14 [Reproduced at Tab 10]; SARL, *supra* note 14 [Reproduced at Tab 11].

authorities will refuse to comply in the near future. In the event that they do refuse to comply, procedural mechanisms for referral to the Security Council allow the STL to secure jurisdiction.

Though a deferral order grants exclusive jurisdiction to the STL, this may inhibit the ability of Lebanese authorities to prosecute a case at a later time. The STL may amend its Rules of Procedure and Evidence to include a rule similar to Rule 11 *bis* of the ICTY to enable this possibility. In the meantime, continuing to maintain the vertical cooperation scheme and keeping Lebanese authorities involved and apprised of the cases before the STL will protect this possibility as well.

While the *non bis in idem* provision could inhibit the STL's exercise of jurisdiction, the STL can issue deferral orders before an accused is brought to trial to help ensure its exclusive jurisdiction. In the event that Lebanese or third party states' authorities refuse to cooperate and defy such deferral orders, overcoming the *non bis in idem* provision is possible. *Non bis in idem* can also be used as a tool by the Prosecutor to argue in favor of deferral for crimes related to the assassination of Rafiq Hariri. However, this could produce the undesirable effect of precluding Lebanon from engaging in negotiation to secure jurisdiction. The most significant obstacle the STL will face in this respect is therefore securing jurisdiction over third party states, which do not have a binding legal obligation to comply with the STL's orders and requests, unless they have implemented domestic legislation. This would allow hostile states such as Syria to prevent the STL from exercising jurisdiction, as they are unlikely to implement such legislation.

In conclusion, while the STL has primacy over the national courts of Lebanon, its lack of procedural tools for ensuring third party states' compliance with its orders and requests is likely to serve as the largest limitation on its exercise of jurisdiction over defendants.