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Grounds for challenging/defending tribunal's establishment and jurisdiction what are the possible legal challenges relating to the establishment and jurisdiction of the tribunal? How can these arguments best be refuted?

Jacqueline C. Greene

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CASE WESTERN RESERVE
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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
SPECIAL TRIBUNAL FOR LEBANON

ISSUE: GROUNDS FOR CHALLENGING/DEFENDING TRIBUNAL'S ESTABLISHMENT AND JURISDICTION

WHAT ARE THE POSSIBLE LEGAL CHALLENGES RELATING TO THE ESTABLISHMENT AND
JURISDICTION OF THE TRIBUNAL? HOW CAN THESE ARGUMENTS BEST BE REFUTED?

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J.D. Candidate, May 2011
Fall Semester, 2009

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. INTRODUCTION

The Special Tribunal for Lebanon (STL) is unique among the various ad hoc and hybrid tribunals. The STL is the first tribunal to try only domestically defined crimes, has a very short temporal jurisdiction, and is the first tribunal of its kind in the Arab world. The Security Council brought the Tribunal into effect through a resolution invoked under Chapter VII of the U.N. Charter. This resolution brought an Agreement between the U.N. and Lebanon into effect, through which the Tribunal was created, after the Lebanese Parliament failed to ratify the Agreement. Critics of the STL assert that establishing the Tribunal under Chapter VII powers was illegal and infringed Lebanon's sovereignty and democracy. Resistance from states, namely Syria, also poses significant challenges to the STL in exercising its jurisdiction. This memo examines the legality of the establishment and jurisdiction of the Special Tribunal for Lebanon.*

B. SUMMARY OF CONCLUSIONS

(1) The legality of the STL's establishment is tenuous. Though it meets one of the legal establishment interpretations under the *Tadic* case as a Tribunal established by Chapter VII powers, it may fail to remain a court established "in accordance with the rule of law." The STL may not qualify as established in accordance with the rule of law if trials in absentia are determined to violate due process or if Article 3 of the STL's Statute is applied to utilize joint criminal enterprise or superior responsibility, in violation of *nullum crime sine lege*.

* Grounds for challenging/defending Tribunal's establishment and jurisdiction: What are the possible legal challenges relating to the establishment and jurisdiction of the Tribunal? How can these arguments best be refuted?

(2) The Tribunal may encounter significant difficulties in securing cooperation from third-party states to exercise its jurisdiction. The STL's Statute does not create an express obligation for third-party states to cooperate. Investigations will almost certainly implicate Syria as a state holding defendants whom the STL would like to prosecute. However, Syria will likely prove to be particularly problematic for the STL in exercising its jurisdiction, considering its hostility to the Tribunal.

II. FACTUAL BACKGROUND

A. HISTORY

Lebanon exists as a historically weak state because of the structure of its political system. The Lebanese Constitution of 1926 created a power-sharing system to prevent one-sided political dominance and to protect minorities. The system creates checks and balances, which unfortunately causes the system to tend toward paralysis in the face of conflict among the various political parties.¹ Furthermore, during the mid-20th century, a security doctrine emerged in Lebanese foreign policy, where Lebanon depended upon diplomacy over military power.²

Lebanon “repeatedly served as a battleground for the parties to the Arab-Israeli conflict.”³ The country also suffered through a civil war from 1975 to 1990, and in the aftermath of this war, Syria gained de facto control over Lebanon. This period saw Syrian presence and influence in military, security, and other governmental bodies in Lebanon, and those with Syrian sympathies held major political positions throughout the period.⁴ The Syrian military presence began in 1976, while political influence gained strength from 1990, solidified by the 1991 treaty

¹ Nadim Shehadi and Elizabeth Wilmschurst, *The Special Tribunal for Lebanon: The UN on Trial?* (hereinafter *The UN on Trial?*), Chatham House, at 2 (July 2007). [reproduced at Tab 51]

² *Id.* at 3. [reproduced at Tab 51]

³ Secretary-General, *Report of the U.N. Fact-Finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Rafik Hariri* (hereinafter *FitzGerald Report*), ¶ 6, U.N. Doc S/2005/203 (March 24, 2005) (prepared by Peter FitzGerald). [reproduced at Tab 38]

⁴ *The UN on Trial?*, *supra*, at 3. [reproduced at Tab 51]

of “Brotherhood, Cooperation and Coordination.”⁵ The Syrian presence remained relatively uncontested until 2000, when Israel withdrew forces from Southern Lebanon.⁶

Prime Minister Rafiq Hariri was elected in 1992. Hariri had close ties with the United States, France, and Saudi Arabia, and tension existed between Hariri and pro-Syrian president Émile Lahoud during the latter portion of his service as Prime Minister.⁷ President Lahoud’s term would have ended in 2004 under the Lebanese Constitution, but when Syrian leadership endorsed an extension of his term, tensions between Hariri and the Syrian leadership increased. Eventually, the Syrian leadership gave Hariri clear indication that he and Lahoud would no longer work together.⁸ Further, Syrian President Bashar Assad allegedly threatened Hariri with physical harm if he and his supporters opposed the extension of Lahoud’s term.⁹

Shortly thereafter, the U.N. Security Council adopted Resolution 1559 (2004), calling for “all remaining foreign forces to withdraw from Lebanon” and “support for a free and fair electoral process in Lebanon’s upcoming presidential elections conducted according to Lebanese constitutional rules devised without foreign interference or influence.”¹⁰ However, the amendment for extension of Lahoud’s term passed and Hariri resigned from his position as Prime Minister.¹¹ Even after his resignation, however, the adoption of U.N. Security Council

⁵ *FitzGerald Report*, ¶6. [reproduced at Tab 38]

⁶ *Id.* at ¶7. [reproduced at Tab 38].

⁷ *The UN on Trial?* at 4. [reproduced at Tab 51]

⁸ *FitzGerald Report*, ¶ 8-9. [reproduced at Tab 38]

⁹ *Id.* at ¶10. . [reproduced at Tab 38]

¹⁰ S.C. Res. 1559, ¶ 2, 5, U.N. Doc S/RES/1559 (September 2, 2004). [reproduced at Tab 19]

¹¹ *FitzGerald Report*, ¶11. [reproduced at Tab 38]

Resolution 1559 combined with politically-targeted violence created mounting tension in Lebanon. The establishment of an anti-Syrian bloc followed, with Hariri at the center.¹²

On 14 February 2005, a car bomb killed Hariri and 22 others when it exploded into Hariri's motorcade in Beirut. Public response to the assassination included mass anti-Syrian demonstrations and a call for an international tribunal to prosecute those responsible for the deaths.¹³

B. ESTABLISHMENT OF THE TRIBUNAL

Following Hariri's assassination, violence continued in Lebanon and political tensions soared. The U.N. deployed fact-finding mission to Lebanon to investigate the assassinations. This fact-finding mission acted under the direction of Peter FitzGerald, and reported the weakness of the Lebanon's ability to investigate and adjudicate over the murders.¹⁴ The report by the mission came to be known as the *FitzGerald Report*. Following this initial investigation, the Lebanese government approved a U.N. Security Council-created commission¹⁵, called the U.N. International Independent Investigation Commission (UNIIC). The U.N. established UNIIC under Security Council Resolution 1595¹⁶ on 7 April 2005 to assist the Lebanese government in their investigation¹⁷ following the recommendation from the *FitzGerald Report*, which

¹² *Id.* at ¶ 12-14. [reproduced at Tab 38]

¹³ *The UN on Trial?* at 4. [reproduced at Tab 51]

¹⁴ *Id.* [reproduced at Tab 51]

¹⁵ Letter from the Lebanese Government to the Secretary-General, 29 March 2005, U.N. Doc. S/2005/208. [reproduced at Tab 46]

¹⁶ S.C. Res. 1595, U.N. Doc S/RES/1595 (Apr. 7, 2005). [reproduced at Tab 20]

¹⁷ *The UN on Trial?* at 4. [reproduced at Tab 51]

recognized the “serious flaws” of the Lebanese investigation process.¹⁸ Syria withdrew its troops from Lebanon days later, ending twenty-nine years of military presence.¹⁹ During this time, anti-Syrian candidates swept the Lebanese elections in May 2005. Many Syrian allies lost seats in parliament and for the first time, a single bloc, known as the Hariri coalition, held an absolute majority.²⁰ In October 2005, the Security Council passed Resolution 1636, recognizing UNIIIC’s difficulties in dealing with Syria and calling on Syria to cooperate with the commission and to refrain from engaging in Lebanese affairs.²¹ However, further violence against anti-Syrian public figures continued through 2005²², including the deaths of a journalist, politician, television presenter, and Gibran Tueni, a member of Parliament. Other non-fatal explosions also occurred throughout the country. These murders and explosions indicated Syria’s intentions of reestablishing power through terror.²³

In response, the Lebanese government sent a letter to the U.N. the day after Tueni’s death requesting the creation of “a tribunal of an international character to convene in or outside Lebanon, to try all those who are responsible for the terrorist crime perpetrated against Prime Minister Hariri.” The letter also sought authorization to allow UNIIIC to continue investigation into all violence occurring after 4 October 2004.²⁴ The Security Council responded to this

¹⁸ *FitzGerald Report*, ¶ 62. [reproduced at Tab 38]

¹⁹ *Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution (2005)* (hereinafter *First Mehlis Report*), 8, U.N. Doc S/2005/662 (October 20, 2005) (prepared by Detlev Mehlis). [reproduced at Tab 39]

²⁰ *The UN on Trial?* at 4. [reproduced at Tab 51]

²¹ S.C. Res. 1636, at ¶ 10-12, U.N. Doc S/RES/1636 (Oct. 31, 2005). [reproduced at Tab 21]

²² A chronology of events is available in the *The UN on Trial?* at 16. [reproduced at Tab 51]

²³ *First Mehlis Report*, 8-9. [reproduced at Tab 39]

²⁴ Letter from the Prime Minister of Lebanon to the Secretary-General, U.N. Doc. S/2005/783, 13 December 2005. [reproduced at Tab 47]

request, asking the Secretary-General to “help the Lebanese Government identify the nature and scope of the international assistance needed” with Resolution 1664.²⁵ The Secretary-General understood this request to be “a shared assumption that a purely national tribunal would not be able to effectively fulfill the task of trying those accused of the crime.”²⁶ Moreover, the Secretary-General recognized in his report “that the creation of an exclusively international tribunal would remove Lebanese responsibility for seeing justice done regarding a crime that primarily and significantly affected Lebanon.... The establishment of a mixed tribunal would best balance the end for Lebanese and international involvement.”²⁷

The U.N. Secretariat issued a report in March 2006 on the scope and nature of the tribunal, and the Security Council requested unanimously that the Secretary-General negotiate an agreement with the Lebanese government to create a tribunal international in nature.²⁸ The U.N. held preliminary consultations with the Lebanese government in January 2006, and later, from 31 May to 1 June and between 3 and 7 July 2006. Lebanese judges represented the Lebanese government in these consultations, and negotiations on the framework commenced between these judges and the Office of Legal Affairs of the Secretariat. Finally, on 6 September, “the Legal Counsel travelled to Beirut and presented the initial draft Agreement and Statute to the Prime Minister and to the Minister of Justice of Lebanon for their consideration.”²⁹ On 10 November, the Secretary-General transmitted the final draft Agreement, including the annexed

²⁵ S.C. Res. 1664, U.N. Doc S/RES/1664 (Mar. 29, 2006). [reproduced at Tab 22]

²⁶ Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1644 (2005)*, ¶ 5, U.N. Doc S/2005/176 (Mar. 21, 2005). [reproduced at Tab 32]

²⁷ *Id.* [reproduced at Tab 32]

²⁸ *The UN on Trial?* at 6. [reproduced at Tab 51]

²⁹ Secretary-General, *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon* (hereinafter *Sec-Gen Report*), ¶ 3, U.N. Doc S/2006/893 (November 15, 2006). [reproduced at Tab 33]

draft Statute. The Prime Minister informed the Secretary-General by letter on 13 November 2006 that the Lebanese Council of Ministers agreed to the draft, and “looked forward to the completion of the remaining steps leading to the establishment of the tribunal.”³⁰ The Tribunal was intended to be a treaty-based organ, as “neither a subsidiary of the U.N. nor a part of the Lebanese court system.”³¹

The Lebanese government, however, became transfixed over whether such a tribunal should be created. Though the Council of Ministers approved the draft Agreement, President Lahoud expressed his opposition, sending a challenge to the Council of Ministers’ decision to the Secretary-General.³² The Security Council nonetheless approved the draft Agreement, and the Lebanese government signed it on 23 January 2007. The Agreement was transmitted to Parliament, but the Speaker of the House, Nabih Berri, refused to call a session of Parliament so the Agreement could be ratified and entered into force. The Lebanese Parliament did not approve the Agreement, nor did the President ratify it³³ under Article 52 of the Lebanese Constitution.³⁴ Therefore, the Lebanese government was unable to bring the agreement into effect as put forth in Article 19(1) of the Agreement.³⁵ In response, a petition by a majority of Parliament, including seventy members, and a letter from Prime Minister Siniora called for the

³⁰ *Id.* at ¶ 54. [reproduced at Tab 33]

³¹ *Id.* at ¶ 6. [reproduced at Tab 33]

³² *Id.* at ¶ 54. [reproduced at Tab 33]

³³ Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1091, 1092 (2007). [reproduced at Tab 9]

³⁴ Lebanese Constitution, adopted 23 May 1926, as amended, art. 52. (Leb.). [reproduced at Tab 50]

³⁵ *Id.* [reproduced at Tab 50]

Secretary-General to ask the Security Council to put the Tribunal into effect as written in the draft Agreement.³⁶

In response, the Security Council adopted Resolution 1757(2007) with ten votes and no opposition, despite protest from Syria and Hizbullah leadership. Five states, however, abstained. Abstentions included two permanent members, China and Russia, and two regional powers, Indonesia and South Africa, as well as Qatar.³⁷ Each abstaining state gave a speech in the Security Council meeting.³⁸ As observed by Frédéric Mégret, the abstentions ultimately indicated concerns about overstepping the bounds of Lebanon's sovereignty and democratic agreement.³⁹ Votes in favor of adopting the resolution generally expressed a commitment to

³⁶ *The UN on Trial?* at 6 (July 2007). [reproduced at Tab 51]

³⁷ U.N. S.C., 62nd Sess., 5685th mtg., U.N. Doc S/PV.5685 (30 May 2007). [reproduced at Tab 31]

³⁸ Qatar's representative stated that the resolution "entails legal encroachments known to all. That may not promote national détente and could further complicate the situation in a country that is at present in dire need of national cohesion and political stability." *Id.* at 2. [reproduced at Tab 31]

Indonesia's representative expressed concern that, "The Council should not fail to take into consideration that there is no unified voice among Lebanese leaders.... If the draft resolution is adopted, it will bypass constitutional procedure and national processes. There are no legal grounds for the Security Council to take over an issue that is domestic in nature.... Establishment of the tribunal will not serve the greater interests of the Lebanese people, namely, reconciliation, national unity, peace, and stability." *Id.* at 3. [reproduced at Tab 31]

South Africa's representative noted that, "We maintain that it is not appropriate for the Security Council to impose such a tribunal on Lebanon, especially under Chapter VII.... We also do not believe that the Council has the right to bypass the procedures required by the Lebanese Constitution of 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.... There is a danger that the imposition of the special tribunal on Lebanon without the consent of all the parties concerned will detrimentally affect the political stability of the already fragile Lebanese state." *Id.* at 3-4. [reproduced at Tab 31]

China's representative stated that, "By invoking Chapter VII of the Charter, the resolution will override Lebanon's legislative organs by arbitrarily deciding on the date of the entry into force of the draft statute. This move will give rise to a series of political and legal problems that are likely to add to the uncertainty surrounding the already turbulent political and security situation in Lebanon and create a precedent of Security Council interference in the domestic affairs and legislative independence of a sovereign state." *Id.* at 4. [reproduced at Tab 31]

Russia's representative asserted that, "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 –

ending impunity and combating terrorism.⁴⁰ The President of the meeting, who represented the United States, responded to the abstainers' comments, "We have heard many voices warn of the risks to peace and stability in Lebanon. We urge all parties to ... support Lebanon's sovereignty and political independence."⁴¹

The Security Council adopted the Resolution 1757 under Chapter VII of the U.N. Charter. The Resolution's principle operative paragraph stated that it would enter into force on 10 June 2007, unless the Government of Lebanon provided notification that Lebanese constitutional procedures were met.⁴² The Lebanese government did not send notification to the U.N., and on 10 June 2007, the "provisions of the Annex and the Statute entered into force."⁴³

In addition to the unorthodox transition from Agreement to Chapter VII establishment for creation of a tribunal, the STL is "the first international criminal court operating within the Arab world."⁴⁴ Further, the STL's application of domestic law only and its internationalized trial of terrorist crimes will all, no doubt, contribute to the scrutiny the STL will experience throughout its existence.

essentially represent an encroachment on the sovereignty of Lebanon. ... it is important to heed the views of all the Lebanese people on this critical issue." *Id.* at 5. [reproduced at Tab 31]

³⁹ Frédéric Mégret, *A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice*, 21 LEIDEN J. INT'L L. 485, 485-6, 90 (2008). [reproduced at Tab 19]

⁴⁰ U.N. SC, 62nd Sess., 5685th mtg., at 6-8, U.N. Doc S/PV.5685 (30 May 2007). [reproduced at Tab 31]

⁴¹ *Id.* [reproduced at Tab 31]

⁴² S.C. Res. 1757, U.N. Doc S/RES/1757 (May 30, 2007). [reproduced at Tab 24]

⁴³ Secretary-General, *Report of the Secretary-General Submitted Pursuant to Security Council Resolution 1757 (2007) of May 30, 2007*, ¶ 2-3, U.N. Doc S/2007/525 (September 4, 2007). [reproduced at Tab 34]

⁴⁴ Antonio Cassese, "The STL Six Months On: A Bird's Eye View" (14 September 2009). [reproduced at Tab 52]

III. THE TRIBUNAL

The Agreement between Lebanon and the U.N. was made effective under Resolution 1757, thereby bringing the Statute defining the creation of the STL into effect.⁴⁵ The Statute defined jurisdiction and applicable law, organization of the Tribunal, rights of defendants and victims, and conduct of the proceedings.

A. APPLICABLE LAW

Unlike previous ad hoc and hybrid tribunals, the STL will apply only domestic Lebanese law. Prosecution and punishment of crimes are subject to the provisions of the Lebanese Criminal Code relating to “acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offenses.”⁴⁶ Further, the STL will apply Articles 6 and 7 of Lebanese law on “increasing the penalties for sedition, civil war and interfaith struggle.”⁴⁷ Because the STL will not prosecute crimes under international law, no defendant can be charged with international crimes, including war crimes and crimes against humanity. The Secretary-General reports that the “standards of justice and guarantees of due process of law are modeled on the highest international standards of criminal justice.”⁴⁸ The STL’s application of these standards includes rights of suspects under questioning to speak in a language he or she understands, and the right to be informed that he or she is a suspect, to remain silent, to have legal assistance of his or her own choosing, and to be questioned in the presence

⁴⁵ Statute for the Special Tribunal for Lebanon (hereinafter STL Statute), S.C. Res. 1757, Attachment, U.N. Doc S/RES/1757 (May 30, 2007). [reproduced at Tab 24]

⁴⁶ *Id.* at Art. 2(a). [reproduced at Tab 24]

⁴⁷ *Id.* at (b). [reproduced at Tab 24]

⁴⁸ *Sec-Gen Report* at ¶ 31. [reproduced at Tab 33]

of counsel.⁴⁹ Further, the accused are “equal before the Tribunal” and are entitled to a fair and public hearing, are presumed innocent until proven guilty, and are entitled to minimum guarantees of due process under Article 16 of the STL Statute.⁵⁰

Unlike other “criminal tribunals established or assisted by the United Nations” that have come before it, the STL utilizes more civil than common law elements and is the first tribunal to “combine substantial elements of both legal systems.”⁵¹ The STL, in fact, has an investigating judge; further, judges “will take a more active role in the conduct of the trial process and the examination of witnesses.”⁵² The STL also intends to utilize trials in absentia⁵³, common in many civil law systems. Finally, the UNIIC investigations became beginnings of the Office of the Prosecutor⁵⁴ with a transition from UNIIC operations⁵⁵ to operation of the Office of the Prosecution occurring during January and February of 2009, concluding with the Prosecutor taking his seat on 1 March 2009.⁵⁶

⁴⁹ STL Statute at Art. 15. [reproduced at Tab 24]

⁵⁰ *Id.* at Article 16. [reproduced at Tab 24]

⁵¹ *Sec-Gen Report* at ¶ 8-9. [reproduced at Tab 33]

⁵² *Id.* at ¶32. [reproduced at Tab 33]

⁵³ STL Statute at Art. 22. [reproduced at Tab 24]

⁵⁴ *Sec-Gen Report* at ¶ 8-9. [reproduced at Tab 33]

⁵⁵ UNIIC operations were extended beyond its initial mandate, pursuant to S.C. Res. 1748, U.N. Doc S/RES/1748 (Mar. 27, 2007) [reproduced at Tab 22] and S.C. Res. 1852, U.N. Doc S/RES/1852 (Dec. 17, 2008). [reproduced at Tab 25]

⁵⁶ Secretary-General, *Fourth Report of the Secretary-General Submitted Pursuant to Security Council Resolution 1757 (2007)*, ¶ 17-19, U.N. Doc S/200/106 (February 24, 2009). [reproduced at Tab 37]

B. JURISDICTION

The STL exercises very limited temporal jurisdiction, covering only “the 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.”⁵⁷ However, if the Tribunal finds other violence in Lebanon connected by motive, purpose, nature of the victims targeted, pattern of attacks, or perpetrators between 1 October 2004 and 12 December 2005 or any later date during the course of its investigation, the U.N. can grant consent to expand jurisdiction.⁵⁸ The Secretary-General explained that expansion of jurisdiction would be “not an extension of the temporal jurisdiction,” but instead “an extension of its jurisdiction to include, within a specified period, other attacks that the tribunal might find to be connected to the Hariri assassination and similar to it in nature and gravity.”⁵⁹ He also explained that the other attacks’ inclusion comes from the emerging links between the violence and the Hariri assassination, as well as the interest of the Security Council in “judicial accountability beyond” Hariri’s assassination, and an interest in avoiding “perception of selective justice.”⁶⁰

The STL’s Statute explains its personal jurisdiction, providing the Tribunal with “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.”⁶¹ The

⁵⁷ STL Statute at Art. 1. [reproduced at Tab 24]

⁵⁸ *Id.* [reproduced at Tab 24]

⁵⁹ *Sec-Gen Report* at ¶ 11. [reproduced at Tab 33]

⁶⁰ *Id.* at ¶12. [reproduced at Tab 33]

⁶¹ STL Statute at Art. 1. [reproduced at Tab 24]

Secretary-General notes that this language permits the prosecution “to pursue its prosecutorial strategy” and to use the evidence gathered by UNIIC to create its list of indictees.⁶²

The STL’s subject matter jurisdiction derives from crimes outlined in Article 1 of the Statute, including crimes related to terrorism, sedition, civil war, and interfaith struggle.⁶³ The Security Council chose not to find these crimes to be crimes against humanity.⁶⁴

The STL’s jurisdiction is territorially based, as the crimes and their effects happened and were felt in Lebanon. Article 4 of the STL Statute states that the STL and the national courts of Lebanon have concurrent jurisdiction, and that the STL has primacy over the national courts.⁶⁵ This primacy, established through U.N. Resolution 1757⁶⁶, confers jurisdiction to the STL much in the same way that the U.N. conferred jurisdiction to the International Criminal Tribunal for the former Yugoslavia (ICTY) or International Criminal Tribunal for Rwanda (ICTR). As Michael P. Scharf explains, “member states of the Security Council decided to establish the ICTY and ICTR” with a “binding decision of the Security Council. In doing so, they acted not as individual states on their own behalf, but rather as member states of the Security Council of the United Nations acting on behalf of the international community of States.”⁶⁷ The Security Council established the STL through Chapter VII powers, just as the ICTY and ICTR were

⁶² *Sec-Gen Report* at ¶ 20. [reproduced at Tab 33]

⁶³ STL Statute at Art. 2. [reproduced at Tab 24]

⁶⁴ *Sec-Gen Report* at ¶ 23-25. [reproduced at Tab 33]

⁶⁵ STL Statute at Art. 4. [reproduced at Tab 24]

⁶⁶ S.C. Res. 1757, U.N. Doc S/RES/1757 (May 30, 2007). [reproduced at Tab 24]

⁶⁷ Michael P. Scharf, *The ICC’s Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW AND CONTEMPORARY PROBLEMS 67, 108 (2001). [reproduced at Tab 14]

established, in the interest of peace, stability, and ending impunity on behalf of the international community.⁶⁸

C. INTERNATIONAL NATURE OF THE STL

The STL is a Tribunal international in character. A different memo for the Prosecution addresses this issue at length,⁶⁹ though this memo addresses it briefly. Article 8 of the Statute designates the composition of the chambers of the courts. The STL consists of one international pre-trial judge, three judges in the trial chamber, with one Lebanese judge and two international judges, and five judges in the appeals chamber, two of whom will be Lebanese and three of whom will be international. One of the two alternate judges will be Lebanese and the other international.⁷⁰ The STL sits outside of Lebanon in neutral territory, in The Hague, and has an international prosecutor and registrar.⁷¹ While the STL does not apply international law, the mixed composition and location indicate the international character of the tribunal.

This type of international tribunal finds its first incarnation in the STL, though it is not so unlike its ad hoc and hybrid counterparts; the STL simply sits further toward the domestic end of the continuum of tribunals. It is noteworthy that the Extraordinary Chambers in the Courts of Cambodia have jurisdiction over domestic crimes under the Cambodian Penal Code, including homicide, torture, and religious persecution, while the Special Court for Sierra Leone has

⁶⁸ U.N. S.C., 62nd Sess., 5685th mtg., U.N. Doc S/PV.5685 (30 May 2007). [reproduced at Tab 31]

⁶⁹ Heather Ludwig, *State Official Immunity Claims before the Special Tribunal for Lebanon*.

⁷⁰ U.N. S.C., 62nd Sess., 5685th mtg., Art. 8(1), U.N. Doc S/PV.5685 (30 May 2007). [reproduced at Tab 31]

⁷¹ “About the STL”, *Special Tribunal for Lebanon*, <http://www.stl-tsl.org/section/AbouttheSTL>. [reproduced at Tab 56]

jurisdiction over arson and sexual abuse of children under domestic law.⁷² While the STL does not have jurisdiction over crimes based in international law, jurisdiction over domestic crimes is certainly not unprecedented in internationalized tribunals.

In order to assess the relative international character of the STL as compared to the other ad hoc and hybrid tribunals, a comparison of staff composition, location, applicable law, funding, and establishing mechanisms provide insight:

⁷² Marko Milanovi, *An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1139, 1141-2 (2007). [reproduced at Tab 11]

TABLE: Comparison of Internationalized, Ad Hoc, and Hybrid Tribunals

	Staff	Funding	Law	Location	Establishing Mechanism
Special Tribunal for Lebanon⁷³	Mixed	Mixed	Domestic	Neutral territory	U.N. Security Council Chapter VII
International Criminal Tribunal for the former Yugoslavia⁷⁴	Mixed	International	International	Neutral territory	U.N. Security Council Chapter VII
International Criminal Tribunal for Rwanda⁷⁵	Mixed	International	International	Neutral territory	U.N. Security Council Chapter VII
Special Court for Sierra Leone⁷⁶	Mixed	International	Mixed	In Sierra Leone and neutral territory	Agreement between Sierra Leone and the U.N.
Extraordinary Chambers in the Courts of Cambodia⁷⁷	Mixed	Mixed	Mixed	In Cambodia	Agreement between Cambodia and the U.N.

As is clear in the table, the STL does not differ greatly in most indicators, including location, funding, and establishing mechanism from other ad hoc and hybrid tribunals. However, the conspicuous absence of an application of international law does set the STL apart. Further, the STL is a strange combination where it is like the other hybrid tribunals, yet brought into force in the manner used for the ad hoc tribunals. However, the remaining indicators tend to signal that

⁷³ S.C. Res. 1757, U.N. Doc S/RES/1757 (May 30, 2007). [reproduced at Tab 24]

⁷⁴ S.C. Res. 827, S/RES/827 (May 25, 1993). [reproduced at Tab 29]

⁷⁵ S.C. Res. 995, S/RES/955 (Nov. 8, 1994). [reproduced at Tab 30]

⁷⁶ Staff, funding, location, establishment mechanism: Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N. – Sierra Leone, Jan. 16, 2002. [reproduced at Tab 41] Law: Statute of the Special Court for Sierra Leone, Jan. 16, 2002. [reproduced at Tab 42]

⁷⁷ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea. U.N. – Cambodia, June 6, 2003. [reproduced at Tab 43]

the STL is international in character, even if it is unique because of the combination of its attributes.

IV. LEGALITY OF THE ESTABLISHMENT OF THE STL

Critics have attacked the legality of the STL. Its legality should be evaluated under the ICTY's *Tadic* criteria, as well as in response to allegations of infringement of sovereignty and democratic agreement. The STL's legality is tenuous when considering the *Tadic* criteria; however, infringement of sovereignty and democratic agreement should not be considered legitimate criticisms.

A. ON THE ISSUE OF ESTABLISHMENT BY LAW UNDER *TADIC*

1. The *Tadic* Case: Background

The Appeals Chamber of the International Tribunal for the Former Yugoslavia (ICTY) articulated the requirements for legal establishment of international tribunals in *Prosecutor v. Dusko Tadic*⁷⁸, the seminal case in legal establishment of Tribunals. Dusko Tadic was charged with “thirty-one counts of grave breaches of the Geneva Conventions, violations of the laws and customs of war, and crimes against humanity related to the torture and murder of Muslims ... during the summer of 1992.”⁷⁹ Tadic asserted, however, that the ICTY lacked jurisdiction and sought a preliminary motion seeking dismissal of all charges.⁸⁰ Tadic specifically charged that the Security Council illegally established the ICTY and also challenged the primacy of its

⁷⁸ *Prosecutor v. Tadic*, Case No. IT-95-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (Oct. 2, 1995). [reproduced at Tab 6]

⁷⁹ Michael P. Scharf, *International Decision: Humanitarian Law – 1949 Geneva Conventions – Grave Breaches – Role of Serbia in Conflict in Bosnia and Herzegovina* 91, AM. J. INT’L L. (1997). [reproduced at Tab 15]

⁸⁰ Aaron K. Baltus, *Prosecutor v. Tadic: Legitimizing the Establishment of the International Criminal Tribunal for the Former Yugoslavia*, 49 ME. L. REV. 577, 590 (1997). [reproduced at Tab 7]

jurisdiction and its subject-matter jurisdiction.⁸¹ The Trial Chamber dismissed the challenges to primacy and subject-matter jurisdiction, but held that the legality of the establishment of the ICTY was a non-justiciable question, which the ICTY was not competent to address.⁸² The Appeals Chamber unanimously upheld the decision regarding primacy, and with one judge dissenting, that the ICTY had subject-matter jurisdiction. However, the Appeals Chamber reversed the Trial Chamber’s holding on the legality issue, deciding that the ICTY “was empowered to pronounce upon the legality of its establishment by the Security Council.”⁸³

2. Applying *Tadic* to the STL: The Tribunal Has Competence to Establish Jurisdiction

Before examining jurisdictional and establishment issues, the ICTY Appeals Chamber established that it had jurisdiction to determine its own jurisdiction under the principle of *la compétence de la compétence*. *Tadic* states, in fact, that this ability “is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals.”⁸⁴ Further, the Appeals Chamber considered whether it was able to establish the legality of its establishment by the Security Council, thereby deciphering the legality of an act by the Security Council, the ICTY’s “creator.”⁸⁵ While the ICTY determined that it was not “established for that purpose,” the Court held that it was able to

⁸¹ *Prosecutor v. Tadic*, Case No. IT-94-1-T, at ¶14. [reproduced at Tab 5]

⁸² *Id.* at ¶15. [reproduced at Tab 5]

⁸³ *Id.* at ¶16. [reproduced at Tab 5]

⁸⁴ *Prosecutor v. Tadic*, Case No. IT-95-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (hereinafter *Tadic* Appeal), at ¶18 (Oct. 2, 1995). [reproduced at Tab 6]

exercise “incidental” jurisdiction and examine the legality of its establishment, “solely for the purpose of ascertaining its own ‘primary’ jurisdiction over the case before it.”⁸⁶

Like the ICTY, the STL, under this principle of *la compétence de la compétence*, has the jurisdiction to determine its own jurisdiction and to assess the legality of its establishment. Further, when the STL determines its jurisdiction, it may then attempt to exercise it. However, it is in this exercise of jurisdiction that the STL will likely encounter issues, which are addressed later in this memo under the section titled “Jurisdictional Challenges.”

3. Legitimacy is Not a Non-Justiciable Question

Before addressing the issue of legality itself, it is important to note that the *Tadic* Appeals Chamber held that the legality of the ICTY’s establishment is not a non-justiciable⁸⁷ question.⁸⁸ The Court stated that it “consistently rejected this argument as a bar to examining a case. It considered it unfounded in law.”⁸⁹ The Court stated:

As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considered that it is duty-bound to take jurisdiction over it, regardless of the political background or other political facets of the issue.⁹⁰

⁸⁵ *Id.* at ¶ 20. [reproduced at Tab 6]

⁸⁶ *Id.* [reproduced at Tab 6]

⁸⁷ Non-justiciable, or political questions, are governed by “[t]he judicial principle that a court should refuse to decide an issue involving the exercise of discretionary power by the executive or legislative branch of government.” BLACK’S LAW DICTIONARY (8th ed. 2004).

⁸⁸ *Tadic* Appeal at ¶ 23. [reproduced at Tab 6]

⁸⁹ *Id.* at ¶ 24. [reproduced at Tab 6]

⁹⁰ *Id.* [reproduced at Tab 6]

The ICTY found that the issues raised in the *Tadic* case were all legal questions and therefore the Court could examine them. The STL, too, will have the power to examine all legal questions with legal answers before it, under this holding.

4. The STL's Establishment: Legality Under *Tadic*

Regarding legal establishment, the *Tadic* appellate decision is the current international standard for assessing legitimacy of a tribunal, and designates that a tribunal must be “established by law” to be legitimate.⁹¹ This requirement comes from the *International Covenant on Civil and Political Rights*, which states that “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁹² The ICTY Appeals Chamber expressed three possible ways for a tribunal to be so established, while the first two cover methods of establishment, and the third interpretation assesses establishment under the rule of law.

First, the ICTY suggested that a tribunal could be legally established if it were promulgated by the legislature.⁹³ Second, the ICTY suggested legal creation as possible through an “establishment by a body which, though not a Parliament, has a limited power to take binding decisions... one such body is the Security Council when, acting under Chapter VII of the United

⁹¹ *Id.* at ¶ 41. [reproduced at Tab 6]

⁹² *International Covenant on Civil and Political Rights*, adopted December 16, 1966, Art. 14, U.N. Doc A/6316 (1966). [reproduced at Tab 4]

⁹³ *Tadic* Appeal at ¶41. [reproduced at Tab 6]

Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter.”⁹⁴ Because the Lebanese Parliament never ratified the statute creating the STL, nor has it implicitly ratified the statute since with related legislative acts, the first method of legality is not met. In the future, should the Lebanese Parliament take such legislative action, this first method of legality could be met. However, the STL does meet the second method of legal creation, where the STL was established by the Security Council under Chapter VII powers. Therefore, the STL is clearly established by law under this second interpretation.

Finally, when a Tribunal is created through legal method of establishment, the ICTY offered a third interpretation. This third interpretation finds legal establishment when a tribunal is established “in accordance with the rule of law,” where the Tribunal “must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.”⁹⁵ The *Tadic* court considered this interpretation as the most “sensible” interpretation for use in international law⁹⁶, and it should be considered along with whichever method of establishment through the first two interpretations applies. The STL states that its “standards of justice, including principles of due process of law, will be based on the highest international standards of criminal justice as applied in other international tribunals.”⁹⁷ While the STL seemingly meets this third interpretation of legal establishment by its own description, it could encounter multiple obstacles regarding its rules and procedures. The STL’s statute authorizes it to prosecute defendants through trials in absentia, an internationally

⁹⁴ *Id.* at ¶44. [reproduced at Tab 6]

⁹⁵ *Id.* at ¶45. [reproduced at Tab 6]

⁹⁶ *Id.* [reproduced at Tab 6]

⁹⁷ ‘About the STL’, Special Tribunal for Lebanon, available online at <http://www.stl-tsl.org/section/AbouttheSTL>. [reproduced at Tab 56]

controversial topic. Furthermore, the STL's Statute implicates international modes of criminal responsibility, when only domestic Lebanese law will be applied.

Trials in absentia could be considered a violation of due process in the international community. The debate over this issue is extensive and unresolved, and beyond the scope of this memo. Further discussion on this topic and its potential resolution can be found in another memo for the Prosecution.⁹⁸

As discussed at length by Marko Milanovi, the STL's Statute only applies Lebanese law, and yet implicates joint criminal enterprise (JCE) and superior responsibility in Article 3. The application of these modes of criminal responsibility would be problematic under the principle of *nullum crime sine lege*,⁹⁹ meaning "no crime without law." Violation of this principle is problematic both in international human rights law, as evidenced by the Article 11 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Civil and Political Rights, as well as criminal law, as seen in Article 22 of the Rome Statute of the ICC.¹⁰⁰ If this mode of criminal responsibility does not exist within Lebanese law, then a defendant cannot lawfully be charged with it.

Article 3(1) states:

(1) A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person ... (b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of

⁹⁸ Jason A. Greenglass, *Trials in absentia in International Criminal Jurisprudence & Human Rights Law*.

⁹⁹ Marko Milanovi, *An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1139 (2007). [reproduced at Tab 11]

¹⁰⁰ *Id.* at 1142. [reproduced at Tab 11]

the group or in the knowledge of the intention of the group to commit the crime.¹⁰¹

Joint criminal enterprise (JCE) consists of the elements of: (1) a plurality of persons; (2) existence of a common criminal plan; and (3) participation of the accused in the plan. JCE exists in three types, including: (1) basic, where all perpetrators act together; (2) systemic, where the system is criminal in intent and any support of that system equates to responsibility for the crimes; and (3) extended, the controversial category of JCE, where any violation outside of the plan that is foreseeable as a result of the plan can create responsibility for all members of the plan.¹⁰²

Article 3 of the Statute for the STL looks much like basic or systemic JCE, which are clear international modes of criminal responsibility. Article 3 should not be applied if the Tribunal is to maintain its legality as established in accordance with the rule of law.

Further, the STL Statute implicates superior responsibility. Article 2 states:

2. With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

¹⁰¹ STL Statute at Art. 3. [reproduced at Tab 24]

¹⁰² Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606, 608-9 (2004). [reproduced at Tab 12]

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.¹⁰³

The STL's definition of superior responsibility is almost identical to the language in Article 28 of the Rome Statute¹⁰⁴, and clearly indicates an international mode of criminal responsibility.

Milanovi notes that modes of criminal responsibility like JCE and superior responsibility, as it is formulated in international law, generally do not exist in domestic criminal law. It is

¹⁰³ STL Statute at Art. 2. [reproduced at Tab 24]

¹⁰⁴ Rome Statute, at Art. 28: Responsibility of commanders and other superiors [reproduced at Tab 1]

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

therefore unlikely that these modes of responsibility exist within the Lebanese Criminal Code.¹⁰⁵ If the Prosecutor should choose to charge a defendant with either of these modes of criminal responsibility, he runs the risk of undermining the STL's legality. The Prosecution should conduct a careful review of Lebanese law to find analogous provisions which might allow the use of these modes of responsibility. Without finding evidence that JCE or superior responsibility are part of Lebanese domestic law, applying these international modes of criminal responsibility will render the STL illegally established, where the STL is not established "in accordance with the rule of law."

Should trials in absentia be found a violation of international standards of due process, or should the Prosecutor apply international modes of criminal responsibility in the domestic law setting, the STL will likely not be seen as established in accordance with the rule of law. Failure to meet this interpretation of legal establishment threatens to undermine the entire STL and any respect it has in the international community. Therefore, the STL's legal establishment should still be considered tenuous at best under the *Tadic* decision, contingent upon international receptivity to trials in absentia and the Prosecutor's discretion in bringing charges against defendants.

B. ON THE ISSUE OF LEBANON'S SOVEREIGNTY

Critics of the STL assert that establishment of the STL infringes upon Lebanon's sovereignty¹⁰⁶ as an "interfere[nce] with the inviolable constitutional order of a sovereign state

¹⁰⁵ Marko Milanovi, An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon, 5 J. INT'L CRIM. JUST. 1139 (2007). [reproduced at Tab 11]

¹⁰⁶ Frédéric Mégret, *A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice*, 21 LEIDEN J. INT'L L. 485, 486 (2008). [reproduced at Tab 19.]

...[which]... very likely violated the implicit obligation not to take sides in the confrontation between the different religious groups recognized by the Lebanese Constitution.”¹⁰⁷ Critics object because the Lebanese Parliament never ratified the agreement, and because the adoption of Resolution 1757 under Chapter VII powers of the UN Charter bypassed that parliamentary ratification process.¹⁰⁸

1. Resolution 1757 Does Not Violate the 1986 Vienna Conventions on the Law of Treaties

First, the Security Council did have the ability to act as it did in adopting Resolution 1757 and did not violate the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations. Some critics assume that Resolution 1757 created a treaty, and assert that the resolution constituted a substitution of Lebanon’s signature on the Agreement. These critics believe that this so-called substitution for a signature created a treaty through coercion under Resolution 1757 without actual assent from Lebanon.

Under this critical interpretation of the creation of the STL, concern may arise as to whether Articles 51 and 52 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations are violated.¹⁰⁹ If

¹⁰⁷ Gianluca Serra, *Special Tribunal for Lebanon: A Commentary on Its Major Legal Aspects*, 18 INT’L CRIM. JUST. REV. 344 (2008). [reproduced at Tab 16]

¹⁰⁸ Frédéric Mégret, *A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice*, 21 LEIDEN J. INT’L L. 485,488-9 (2008). [reproduced at Tab 19.]

Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1091 (2007). [reproduced at Tab 9]

¹⁰⁹ Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (1986). [reproduced at Tab 3]

Article 51 states: “*Coercion of a representative of a State or of an international organization:*
The expression by a State or an international organization of consent to be bound by a treaty which has been

these Articles applied, the U.N. should have necessarily “refrain[ed] from any coercion of a representative of a state through acts of threats against him or her (Article 51), or any threat or use of force as defined in Article 52.”¹¹⁰ However, as Bardo Fassbender notes, Article 51 only applies to coercion or threats directed at individuals “with respect to their own persons or in their personal capacity.”¹¹¹ Further, Fassbender notes that Article 52 is also inapplicable, where it requires the threat of force to rise to the level of a loss of territory or grave economic disadvantage, and does not “[assist] the government of the country in question in meeting its obligations under domestic and international law.”¹¹² Therefore, Resolution 1757 did not violate Articles 51 and 52 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations.

2. Resolution 1757 Is Not a Treaty

Further, Resolution 1757 passed under Chapter VII powers does not itself set up the Tribunal, but instead puts into effect the Agreement between Lebanon and the U.N. that sets up the Tribunal. The resolution does not imprint Lebanon’s signature on an Agreement to which it has not consented. However, the Resolution does bring into force the language of the Agreement, as appended to the Resolution in the Annex. The language of the Agreement, then,

procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.”

Article 52 states: “*Coercion of a State or of an international organization by the threat or use of force*: A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

¹¹⁰ Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1091, 1102 (2007). [reproduced at Tab 9]

¹¹¹ 1986 Vienna Convention, Art. 245. [reproduced at Tab 3]

¹¹² Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1091, 1103 (2007). [reproduced at Tab 9]

was included as part of the Resolution. The Agreement itself was not made effectual as an instrument on its own.

The Security Council carefully articulated in Resolution 1757 the Agreement as an “annexed document.” This approach allowed the Security Council to “[transfer] the substance of a treaty into a resolution under Chapter VII,” an action not prohibited by the U.N. Charter.¹¹³ In doing so, the Security Council put the Agreement into effect, which, in turn, created the STL.

3. Resolution 1757 Is Not an Assault on Lebanese Sovereignty

Critics see Resolution 1757 as a bypass of the Lebanese Parliament and of official Lebanese agreement to the STL, and therefore as an assault on Lebanon’s sovereignty. However, the initiative for creation of the Tribunal began in Lebanon, and was clearly desired by at least some of Lebanon’s representatives. The Prime Minister, in fact, asked the Secretary-General to put the matter before the Security Council in his letter after Tueni’s death, and that a resolution be adopted to make the Tribunal binding.¹¹⁴ The Lebanese government also signed Memorandums of Understanding regarding operation of the Tribunal.¹¹⁵ Finally, Lebanon has not complained that its sovereignty has been infringed.

¹¹³ Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1091, 1092 (2007). [reproduced at Tab 9]

¹¹⁴ Frédéric Mégret, *A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice*, 21 LEIDEN J. INT’L L. 485, 494-5 (2008). [reproduced at Tab 19.]

¹¹⁵ Memorandum of Understanding Between the Government of the Republic of Lebanon and the Office of the Prosecutor of the Special Tribunal for Lebanon Regarding the Modalities of Cooperation Between Them, June 5, 2009. [reproduced at Tab 44]

Memorandum of Understanding Between the Government of the Republic of Lebanon and the Special Tribunal for Lebanon Concerning the Office of the Special Tribunal in Lebanon, June 17, 2009. [reproduced at Tab 45]

Furthermore, noting the hybrid nature of the court, Lebanon is continually engaged in the processes. Further, the national courts have concurrent jurisdiction over the matters and Lebanon contributes to funding the STL. The STL will only apply domestic Lebanese law. Lebanon is involved in the STL at every stage. In fact, Lebanon has been involved much more deeply into the creation process than the ICTR, and more completely than the states affected by cases heard in the ICTY, where Bosnia and Herzegovina supported the Tribunal but it was imposed upon Croatia and Serbia-Montenegro.¹¹⁶

Lebanon has not complained that its sovereignty has been unduly infringed and has been involved in the process, even absent formal assent to the Tribunal. Other states should consider this an indication that Lebanon's sovereignty, in fact, remains intact.

4. The STL's Hybrid Nature Is Not Unconstitutional

Finally, regarding constitutional establishment of the STL, some critics assert that the creation of the STL would have been unconstitutional under Article 20 of the Lebanese Constitution had it been ratified by Parliament.¹¹⁷ Certain scholars believe that the STL imposes upon Lebanese sovereignty by "relinquishing the exercise of judicial power to a foreign entity"¹¹⁸ and that ratification, therefore, would never have been constitutionally possible. This unconstitutionality would indicate that Parliament would not have ratified the Agreement, and that the STL would never have come to be under democratic agreement and domestic processes.

¹¹⁶ Frédéric Mégret, *supra*, at 501. [reproduced at Tab 19.]

¹¹⁷ Lebanese Constitution, adopted 23 May 1926, as amended, art. 20. (Leb.). [reproduced at Tab 50]

¹¹⁸ Choucri Sader, *A Lebanese Perspective on the Special Tribunal for Lebanon: Hopes and Disillusions*, 5 J. IN'L CRIM. JUST. 1083, 1084 (2007). [reproduced at Tab 13]

Coucri Sader, a Lebanese judge, responds to this criticism. Sader notes that Article 20 established that “judicial power shall be exercised by the courts formed in compliance with the law.”¹¹⁹ Sader states, however, that courts must not necessarily be Lebanese under Article 20, but this Article stipulates only that exercise of judicial power must respect the separation of powers in accordance with the law.¹²⁰ In fact, Sader explains that mixed tribunals are not unprecedented in Lebanon. Under the French mandate, Lebanon’s legal system “relied on mixed tribunals, which included French and Lebanese judges” in existence from the 1920s through the mid-1940s. Further, a special tribunal with Lebanese and Syrian judges existed from 1978 until 1983.¹²¹ Therefore, the STL does not force Lebanon’s courts to unconstitutionally relinquish judicial control to foreign entities and the STL is not unconstitutional.

C. ON THE ISSUE OF DEMOCRATIC AGREEMENT

Critics cite the absence of a formal agreement between the Lebanese government and the U.N. as another indicator of the illegality of the STL, where a lack of formal agreement does not constitute “informal” agreement. In fact, these critics believe that the lack of a formal agreement is clear evidence of lack of *any* agreement by the Lebanese democracy.¹²²

However, other tribunals came to exist absent formal assent, without affecting their legality. Frédéric Mégret asserts that, “When it comes to the ad hoc tribunals, the fact that all of them have been imposed against sovereign will seems to circumvent democratic involvement

¹¹⁹ *Id.* [reproduced at Tab 13]

¹²⁰ *Id.* [reproduced at Tab 13]

¹²¹ *Id.* [reproduced at Tab 13]

¹²² Frédéric Mégret, *supra*, 496. [reproduced at Tab 19]

form the start.”¹²³ Further, noting that a power crisis existed in Lebanon at the time that the Lebanese Parliament should have ratified the agreement, overall democratic agreement for the Tribunal existed in the midst of this crisis. This overall agreement is evidenced by the initiative taken by the Lebanese government throughout most of the stages of the creation of the Tribunal, and by its non-objection to and participation in the Tribunal now. These circumstances imply that the Security Council’s adoption of Resolution 1757 was recognition of the “real” democratic will of Lebanon, regardless of whether a formal democratic agreement was ever made.

Evidence of this implicit agreement abounds. Reuters reported that the STL’s Registrar noted that by February 24, 2009, Lebanon “had already made a significant down payment” toward its required contribution of 49% of the costs of the Tribunal.¹²⁴ These costs have been financed through decrees, which allocated LBP 28 billion of the LBP 38 billion required from Lebanon this year.¹²⁵ Further, the Lebanese government has signed two Memorandums of Understanding (MoU) regarding the STL and its operation. The MoU regarding modalities of cooperation between the government and the Office of the Prosecutor recognizes that the STL is a functioning body, and requires cooperation from the Lebanese government with the Prosecutor in extensive capacities. The MoU was signed by the Minister of Justice and the Prosecutor on

¹²³ Id. at 504. [reproduced at Tab 19]

¹²⁴ Aaron Gray-Block, “Lebanon Tribunal Starts Work on Sunday – Registrar”, Reuters, February 24, 2009. <<http://www.reuters.com/article/latestCrisis/idUSLO81459>>. The remaining costs are financed by voluntary contributions from UN member states and stored in a trust fund established by the Secretariat on 19 July 2007. Secretary-General, *Third Report of the Secretary-General Submitted Pursuant to Security Council Resolution 1757 (2007)*, ¶ 24, U.N. Doc S/2008/734 (November 26, 2008). [reproduced at Tab 54]

¹²⁵ “LBP 44 Billion So Far for the Investigation Committee and Rafic Hariri’s International Tribunal”, *LebanonIssues.com*, August 17, 2009. <http://www.lebanonissues.com/en/?p=406>. [reproduced at Tab 53]

June 5, 2009.¹²⁶ The second MoU, signed on June 17, 2009, requires full complicity and cooperation of the government with the STL's local office.¹²⁷ With full-fledged agreements of cooperation plus funding already allocated to the STL, it is clear that the Lebanese government is not protesting or otherwise hampering the progress of the STL, and rather working toward its success.

Finally, as Lebanon is a member state of the U.N., resolutions passed under Chapter VII powers are binding on Lebanon. Under Article 25 in Chapter V of the U.N. Charter, "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."¹²⁸ Therefore, as a member state, Lebanon implicitly agreed to the adoption of the resolution.

E. ESTOPPEL

The STL may be able to employ estoppel to recognize Lebanon's assent to its existence. Christopher Brown describes estoppel as:

[W]here one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by

¹²⁶ Memorandum of Understanding Between the Government of the Republic of Lebanon and the Office of the Prosecutor of the Special Tribunal for Lebanon Regarding the Modalities of Cooperation Between Them, June 5, 2009. [reproduced at Tab 44]

¹²⁷ Memorandum of Understanding Between the Government of the Republic of Lebanon and the Special Tribunal for Lebanon Concerning the Office of the Special Tribunal in Lebanon, June 17, 2009. [reproduced at Tab 45]

¹²⁸ UN Charter Ch V, article 25. [reproduced at Tab 2]

evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.¹²⁹

Applying this definition to the STL, state governments, or the U.N., for example, the references to individuals in this definition can simply be interchanged with the entity in question. Brown discusses the concept of estoppel in international law, noting that it is a tool utilized with “broad inconsistency,”¹³⁰ and that “estoppel is not a principle that can be applied with any certainty.”¹³¹ However, if sovereignty and democratic agreement become the issues upon which the legality of the STL turns, the STL may attempt to use evidence of cooperation and implicit agreement discussed above to show reliance and to use estoppel for the purpose of maintaining its existence, operation, and notion of legality.

D. CONCLUSION

Under *Tadic*, the STL’s legality is tenuous and dependant upon the Prosecution’s choices to employ international modes of criminal responsibility and the international perception of trials in absentia. Lebanon’s sovereignty has not been infringed, and democratic agreement is evident. Further, the hybrid nature of the STL is not unconstitutional. Finally, if the prosecution seeks additional support for legality, it may be able to employ estoppel, where Lebanon has indicated agreement for the STL, and upon which the STL has come to rely in the notion of its own legality.

¹²⁹ Christopher Brown, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV. 369 (1996). [reproduced at Tab 8]

¹³⁰ *Id.* at 407. [reproduced at Tab 8]

¹³¹ *Id.* at 410. [reproduced at Tab 8]

V. JURISDICTIONAL CHALLENGES FOR THE STL

Regarding jurisdictional challenges, the STL will likely encounter problems with state cooperation in its attempts to exercise jurisdiction over defendants. Unfortunately, no state other than Lebanon is obligated to cooperate with the STL under the language of its statute. Unless the Security Council were to pass ad hoc resolutions requiring cooperation¹³² or the state otherwise commits to cooperate through diplomatic efforts, the STL may not be able to secure cooperation in some cases. Syria is particularly unlikely to cooperate, which will likely prove to be extremely problematic for the STL.

A. THE STL'S STATUTE DOES NOT REQUIRE THIRD-PARTY STATE COOPERATION

The STL may not be able to exercise jurisdiction over defendants because third-party states are not forced to cooperate under the Resolution that created the STL. When these states are not required to cooperate, they may not extradite defendants to the STL. The ICTY and ICTR were established pursuant to Security Council resolutions under Chapter VII, as was the STL. The ICTY¹³³ and ICTR¹³⁴ statutes both create an obligation for third-party states to

¹³² Bert Swart, *Cooperation Challenges for the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1153 (2007). [reproduced at Tab 17]

¹³³ The ICTY Statute states in Article 29:

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal.

[reproduced at Tab 29]

cooperate with the Tribunals.¹³⁵ Bert Swart states that these statutes do not open “(explicit) avenues for states to refuse cooperation in specific cases or on specific grounds,” and “all state are obliged to cooperate with the tribunals in the investigation and prosecution of persons accused of having committed international crimes” within the tribunals’ jurisdictions.¹³⁶

The STL’s Statute, unfortunately, does not include the same provisions and therefore, states are not required to cooperate, nor does the STL have primacy over domestic courts in other countries. The absence of such a provision is interesting, considering the presence of cooperation requirements in earlier resolutions dealing with the UNIIC.¹³⁷ This conspicuously absent provision has necessitated the creation of the *Draft Agreement on Legal Cooperation with the Tribunal*, which the STL’s President encourages “as many States as possible to ratify ... or at least to consider ... as the general legal framework guiding relations of States with the Tribunal on a case by case basis.”¹³⁸ Perhaps this agreement will yield at least some international cooperation. However, Syria is unlikely to cooperate by adopting this agreement considering its hostility to the STL.

B. THE STL’S PRIMACY OVER DOMESTIC COURTS MAY PREVENT REQUESTS FOR COOPERATION

¹³⁴ S.C. Res. 995, S/RES/955 (Nov. 8, 1994) at 2: The Security Council “Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures.” [reproduced at Tab 30]

¹³⁵ Bert Swart, *Cooperation Challenges for the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1153, 1154 (2007). [reproduced at Tab 17]

¹³⁶ *Id.* [reproduced at Tab 17]

¹³⁷ S.C. Res. 1595 (2005), 1636 (2005), and 1644 (2005). [reproduced at Tabs 19, 21]

¹³⁸ Antonio Cassese, “The STL Six Months On: A Bird’s Eye View” (14 September 2009). [reproduced at Tab 52]

Furthermore, because the STL has primacy over the domestic courts, the domestic courts may not exercise jurisdiction over anyone indicted by the STL. Because the STL is not an organ of the Lebanese state, Lebanon may not request cooperation from another state for the judicial proceedings. However, because the STL is not a state, it cannot request cooperation from states because it may not become party to a convention on cooperation among states regarding criminal matters. These primacy issues coupled with the lack of language requiring state cooperation in its Statute likely makes the STL far less potent in securing cooperation than would be desirable.¹³⁹

C. THE UN MAY OBLIGE OBJECTING THIRD-PARTY STATES TO COOPERATE

The Security Council is free to pass ad hoc resolutions requiring cooperation of third-party states.¹⁴⁰ The UN, however, is unlikely to take such action requiring states to do so, particularly considering the conspicuous absence of such a requirement in the statute for the STL in the first place.

D. THIRD-PARTY STATES MAY PREFER TO PROSECUTE DOMESTICALLY, THEREBY DENYING THE STL JURISDICTION

Syria and other objecting states do have an “obligation to prosecute persons suspected of having committed terrorist crimes if [they] do not hand them over to other states” under international law generally.¹⁴¹ With the option between extraditing defendants or prosecuting domestically, Syria and any other objecting third-party state will likely prefer to prosecute any of

¹³⁹ Bert Swart, Cooperation Challenges for the Special Tribunal for Lebanon, 5 J. INT’L CRIM. JUST. 1153, 1159 (2007). [reproduced at Tab 17]

¹⁴⁰ *Id.* at 1159-60. [reproduced at Tab 17]

¹⁴¹ *Id.* at 1163. [reproduced at Tab 17]

its nationals in its own courts. States are entitled to this option under Security Council resolutions 1373 (2001)¹⁴², 1566 (2004)¹⁴³, and 1624 (2005)¹⁴⁴ regarding terrorist crimes.

E. DIPLOMACY AS A MEANS TO SECURE COOPERATION

The STL is left to rely upon diplomacy for third-party state cooperation. As an example, Nigeria did hand over Charles Taylor to Liberia¹⁴⁵, and Nigeria in turn handed him over to Sierra Leone. Charles Taylor's extradition was a success story for diplomacy and the international tribunals. However, considering that Syria is the most likely state to harbor necessary defendants in STL cases, and noting its hostility to the Tribunal and to Lebanon, diplomacy is an unlikely path to success.

F. CONCLUSION ON JURISDICTIONAL ISSUES

The STL does not have many tools to compel third-party state cooperation and must anticipate cooperative problems in its attempts to exercise jurisdiction. The STL is left to rely upon diplomacy or the unlikely commitment of the Security Council to coerce states into cooperation. Syria likely harbors defendants sought by the STL and some of its government officials may have been involved in the assassination plot and violence in Lebanon. Syria is likely to prove particularly difficult in the STL's attempts to exercise jurisdiction, considering the tumultuous history and political tension with Lebanon. As noted by Bruce Zagaris, Bashar Assad, President of Syria, has denied being involved in Hariri's assassination, and "has said that

¹⁴² S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001). [reproduced at Tab 26]

¹⁴³ S.C. Res. 1566, U.N. Doc. S/RES/1566 (2004). [reproduced at Tab 27]

¹⁴⁴ S.C. Res. 1624, U.N. Doc. S/RES/1624 (2005). [reproduced at Tab 28]

¹⁴⁵ BBC, "Nigeria to Give Up Charles Taylor", Mar. 25, 2006, <http://news.bbc.co.uk/2/hi/africa/4845088.stm>. [reproduced at Tab 55]

Syria will not permit its citizens to appear before the court.”¹⁴⁶ In conclusion, the STL faces difficult paths to cooperation, where cooperative challenges threaten to completely undermine the STL’s ability to exercise jurisdiction over charged defendants.

¹⁴⁶ Bruce Zagaris, Special Tribunal for Lebanon Ready to Start on March 1 in the Hague, 25 No. 4 INT’L ENFORCEMENT L. REP. 159 (2009). [reproduced at Tab 18]

VI. CONCLUSION

The STL is unique in the method of its establishment and in its application of only domestic law. The STL also faces challenges because of its uniqueness, where its legal establishment is tenuous and unclear and it will surely face many challenges to exercising its jurisdiction.

Regarding legality, the Security Council legally established the STL under Chapter VII powers under *Tadic*. However, the Prosecution must tread lightly in its approach to seeking justice, with respect to international opinion and procedure, if it wishes to maintain the legitimacy of the STL. If the Prosecutor pursues trials *in absentia* or utilizes Articles 2 or 3 of the STL's Statute with JCE- and superior responsibility-styled modes of criminal responsibility, the STL may be seen as not being established in accordance with the rule of law. However, criticisms of the STL infringing Lebanon's sovereignty and democratic agreement are unfounded and should be dismissed. Resolution 1757 is not a treaty, nor does it violate the 1986 Vienna Conventions on the Law of Treaties. Further, the hybrid nature of the STL is not unconstitutional. Lebanon continues to work with the STL, and indicating in no way that its sovereignty has been infringed or that broad democratic agreement for the STL does not exist. If the STL should find itself at odds with Lebanon in the future, it could attempt to rely upon estoppel to maintain the legality of the STL, where Lebanon has acted in such a way as to imply its agreement, and whereupon the STL has relied.

Regarding jurisdictional challenges, the STL faces serious obstacles to exercising its jurisdiction because its Statute does not oblige third-party states to cooperate. The STL must exercise extensive diplomacy to persuade third-party states to engage in the pursuit of justice, or

hope that the Security Council might be willing to oblige states to cooperate through ad hoc resolutions. This is unlikely, particularly as the *Draft Agreement on Legal Cooperation with the Tribunal* is already in circulation and states are encouraged to sign. Further, without obligation to cooperate, states may choose to prosecute defendants in their own courts where the STL does not have primacy over those domestic courts. Syria is extremely hostile to the STL and is likely the most important state regarding the STL's search for defendants to stand trial. Syria is likely to prevent the STL from exercising jurisdiction over some of the most crucial defendants.

In conclusion, the STL faces a challenging uphill quest to bring the perpetrators of terrorist violence to justice, but with caution and diplomacy, the STL may still find success.