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## Can The International Criminal Court Accept A Referral From The United Nations Security Council Of The Murder Of Former Lebanese Prime Minister Rafik Hariri?

Madhusa Dissanayake

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**CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES RESEARCH LAB**

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**MEMORANDUM FOR THE  
INTERNATIONAL CRIMINAL COURT**

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**ISSUE:**

**CAN THE INTERNATIONAL CRIMINAL COURT ACCEPT A REFERRAL FROM  
THE UNITED NATIONS SECURITY COUNCIL OF THE MURDER OF FORMER  
LEBANESE PRIME MINISTER RAFIK HARIRI?**

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**Prepared by Madhusha Dissanayake  
Spring 2006**

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## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS**

### **A. Issues\***

On February 14, 2005, former Lebanese Prime Minister Rafik Hariri and 22 others were killed in Beirut. This memorandum addresses whether there is enough evidence to have the assassination of Mr. Hariri referred to the International Criminal Court (“ICC”) by the United Nations (“UN”) Security Council. In order for the ICC to exercise its jurisdiction in this case, the assassination of Mr. Hariri must constitute one of the limited number of international crimes over which the ICC has jurisdiction. Accordingly, this memorandum also addresses whether the assassination of Mr. Hariri constitutes a crime against humanity under Article 7 of the Rome Statute.

### **B. Summary of Conclusions**

#### **1. There Is Not Enough Evidence for the UN Security Council to Refer the Assassination of Mr. Hariri to the ICC.**

Article 13(b) of the Rome Statute<sup>1</sup> allows the ICC to exercise jurisdiction over crimes referred to the Prosecutor by the UN Security Council pursuant to Chapter VII of the Charter of the United Nations.<sup>2</sup> Once a referral has been made to the ICC, the Prosecutor decides whether to accept the case and begin an investigation.<sup>3</sup> According to Article 53, the Prosecutor considers three factors to determine whether to initiate an investigation: (1) whether the information before

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\*Lebanon-Syria Investigation and Murder as a Crime Against Humanity. Examine the Mehlis Reports by the UN Prosecutor about the assassination of former Prime Minister Hariri. Consider all the murders surrounding the death of Hariri. Is there enough evidence to have this matter referred to the ICC (assuming it was referred by the Security Council)? What would have to be proved to bring the crimes within the purview of the ICC? (Note, FYI, that Serge Brammerts, Deputy Prosecutor of the ICC, is now the lead Prosecutor on leave from the ICC).

<sup>1</sup>Rome Statute of the International Criminal Court, art. 13, July 17, 1998, U.N. Doc.A/CONF.183/9 [hereinafter Rome Statute] [reproduced in the accompanying notebook at Tab 1].

<sup>2</sup>U.N. Charter [reproduced in the accompanying notebook at Tab 2].

<sup>3</sup>Rome Statute, *supra* note 1, at art. 53.

“the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has” occurred; (2) whether the case is admissible under Article 17; and (3) whether there are any “substantial reasons to believe that an investigation would not serve the interests of justice.”<sup>4</sup>

Provided that the UN Security Council refers this case, the Prosecutor will most likely not accept the case and begin an investigation of the murder of Mr. Hariri because the first factor is not met. A reasonable basis to believe that the murder of Mr. Hariri constitutes a crime against humanity, which is within the jurisdiction of the ICC, does not exist.<sup>5</sup> The other two factors, however, are satisfied. Assuming that Lebanon wants the murder to be tried before the ICC, the case is admissible under Article 17.<sup>6</sup> Lastly, there are no “substantial reasons to believe that an investigation would not serve the interests of justice.”<sup>7</sup>

## **2. The Murder of Former Prime Minister Rafik Hariri Was Likely Not a Crime Against Humanity.**

Crimes against humanity are defined in Article 7 of the Rome Statute.<sup>8</sup> This crime would most likely fall under Article 7(1)(a) criminalizing murder.<sup>9</sup> There are five elements to crimes against humanity: (1) “the perpetrator killed one or more persons”;<sup>10</sup> (2) the murders were part of widespread or systematic attack; (3) the attack was directed against a civilian population; (4) the

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<sup>4</sup>*Id.*

<sup>5</sup>Crimes against humanity is one of four listed crimes that the Court has jurisdiction over. *Id.* at art. 5(1)(b).

<sup>6</sup>*Id.* at art. 17.

<sup>7</sup>*Id.* at art. 53.

<sup>8</sup>*Id.* at art. 7.

<sup>9</sup>*Id.*

<sup>10</sup>*Report of the Preparatory Commission for the International Criminal Court Addendum: Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000) [hereinafter ICC Elements of Crimes] [reproduced in the accompanying notebook at Tab 8]. *See also*, Rome Statute, *supra* note 1, at art. 7(1)(a).

attack was committed in furtherance of a State or organizational policy; and (5) the perpetrator(s) had knowledge of the attack.<sup>11</sup> The explosion that killed Mr. Hariri and 22 others likely satisfies all of these elements, except for the third one.

First, a total of 23 people died due to the explosion on February 14, 2005, therefore the initial element is satisfied. Second, though the murders were not part of a widespread attack, they may constitute a systematic attack because there was probably a high degree of planning and orchestration that went into the successful assassination.<sup>12</sup> Third, the attack was not directed against enough people to be classified as being directed against a civilian population. Fourth, there is evidence that there was a policy by top Syrian and Lebanese security officials to influence Lebanese politics and resist the opposition movement in Lebanon.<sup>13</sup> Lastly, the perpetrators most likely had knowledge of the attack if the suspects being tried are the top Syrian and Lebanese security officials.<sup>14</sup>

## **II. FACTUAL BACKGROUND**

The murder of Mr. Hariri occurred in a time of heightened political tension between Lebanon and Syria. It is no coincidence that Mr. Hariri's murder occurred only a few months prior to the holding of parliamentary elections in March 2005. Since the murder Mr. Hariri there have been demonstrations and unrest throughout Lebanon.

### **A. Lebanese-Syrian Relations**

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<sup>11</sup> Rome Statute, *supra* note 1, at art. 7.

<sup>12</sup> Int'l Indep. Investigation Comm'n, *Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595(2005)*, para. 123, U.N. Doc. S/2005/662 (Oct. 19, 2005) (prepared by Detlev Mehlis) [hereinafter Mehlis Report] [reproduced in the accompanying notebook at Tab 3].

<sup>13</sup> See generally Mehlis Report, *supra* note 12, paras. 23-30, & 124.

<sup>14</sup> *Id.* at para. 124.

Syria has occupied Lebanon for almost three decades.<sup>15</sup> A year after the outbreak of the Lebanese civil war in 1976, Syrian troops moved into Lebanon.<sup>16</sup> During Syria's occupation of Lebanon "[t]he Syrian regime determine[d] who filled the Lebanese government's top positions, supervised its foreign policy, and manipulated its elections."<sup>17</sup> During this time Syria held a great deal of influence over Lebanese policy, and it had a strong grip on all Lebanese political activity.<sup>18</sup> The Syrians had infiltrated the Lebanese security agencies, bureaucracy, and political structures.<sup>19</sup> For example, a series of agreements were put in place to ensure Syrian control of Lebanon, including the Orwellian May 1991 treaty of brotherhood, cooperation, and social accords, the September 1991 defense and security pact, the September 1992 economic and social accords, and the September 1994 arrangement for Syria to take the lion's share of the Orontes river water.<sup>20</sup> The Treaty of Brotherhood, Cooperation, and Coordination "established a mixed Higher Council to promote intergovernmental cooperation on economic, defense, culture and energy issues."<sup>21</sup>

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<sup>15</sup> William Harris, *Bashar al-Assad's Lebanon Gamble*, MIDDLE EAST Q., Summer 2005, at 33, 33 [reproduced in the accompanying notebook at Tab 35].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* Daniel Pipes, *Upheaval in Syria and Lebanon: "We Don't Need Syria in Lebanon"*, MIDDLE EAST Q., Sept. 2000, at 21, 23 ("As a former Lebanese diplomat puts it, "Everyone knows that Syria controls everything in Lebanon, totally.") [reproduced in the accompanying notebook at Tab 38]. Syria's "takeover of [Lebanon] occurred step by step, climaxing in 1990 with the domination of some 90 percent of the country." *Id.* at 21.

<sup>18</sup> Harris, *supra* note 15, at 33. Pipes, *supra* note 17, at 23 ("So subservient are Lebanese politicians to their suzerain in Damascus, they routinely visit the Syrian capital before making any major decision or even resolving problems among themselves.").

<sup>19</sup> Harris, *supra* note 15, at 35.

<sup>20</sup> *Id.*

<sup>21</sup> Kail C. Ellis, *Lebanon: The Struggle of a Small Country in a Regional Context*, ARAB STUDIES Q., Winter 1999, at 5, 17 [reproduced in the accompanying notebook at Tab 32]. Article I states:

The highest levels of cooperation and coordination in all fields, including political, economic, security, educational, scientific, and others, with the aim of promoting the mutual interests of the two sisterly states within the framework of their respective sovereignty and independence.

Syria's occupation of Lebanon was highly beneficial to Syria. The occupation was a major step towards Syrian president Hafiz al-Assad's goal of "bringing all of 'Greater Syria' under Damascus's direct control."<sup>22</sup> Syria's presence in Lebanon, also, allowed Hafiz the opportunity to engage with Israel in Lebanon without endangering Syria.<sup>23</sup> In addition, Syria derived "billions of dollars" from the occupation.<sup>24</sup> Lebanon served as a source of income for Hafiz and his officials, including an income from drug trafficking of more than a hundred million dollars.<sup>25</sup> Lebanon, also, served as place for unemployed Syrian workers to go and created a "protected market for Syrian products."<sup>26</sup> Over a million Syrian workers reside in Lebanon without paying taxes.<sup>27</sup>

It was not until Israel withdrew from Lebanon in 2000 and the succession of Bashar al-Assad to the presidency in Syria that the Lebanese public became more vocal in their "questioning of Syrian actions and involvement in Lebanon."<sup>28</sup> Bashar al-Assad was not considered to be as politically astute as his father Hafiz al-Assad.<sup>29</sup> For example, "Druze leader

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*Id.* at 17-18 (quoting *Treaty of Brotherhood, Cooperation, and Coordination Concluded Between Lebanon and Syria on May 22, 1991*, BEIRUT REVIEW, Fall 1991, at 115, 115-19).

<sup>22</sup> Pipes, *supra* note 17, at 21-22.

<sup>23</sup> *Id.*

<sup>24</sup> Gary C. Gambill, *Is Syria Losing Control of Lebanon?*, MIDDLE EAST Q., Spring 2001, at 41, 48 [reproduced in the accompanying notebook at Tab 34].

<sup>25</sup> Pipes, *supra* note 17, at 21-22

<sup>26</sup> *Id.*

<sup>27</sup> Gambill, *supra* note 24, at 48.

<sup>28</sup> Harris, *supra* note 15, at 35. Pipes, *supra* note 17, at 24. The Israelis withdrew on May 24, 2000. *Id.*

<sup>29</sup> Gambill, *supra* note 24, at 41.

Walid Jumblatt repeatedly attacked Syrian interference in Lebanese domestic politics.”<sup>30</sup> The opposition to Syrian involvement in Lebanon was “becoming increasingly multi-sectarian.”<sup>31</sup>

Tensions increased in Bashar al-Assad’s first presidential term. But Assad still maintained control of Lebanon through three organizations: “the Syrian military intelligence network based at Anjar in Lebanon’s Bekka Valley; Lahoud’s security machine, with the head of Lebanon’s General Security Directorate, Jamil al-Sayyid, as Syria’s leading Lebanese gate-keeper; and a close liaison with Hezbollah, which preserved a sophisticated paramilitary apparatus independent of Lebanese state control.”<sup>32</sup> Tensions started to escalate when Assad decided to override Lebanon’s constitution and extended the term of Lebanese president Emile Lahoud, which was ending in November 2004.<sup>33</sup>

Prior to the extension of Lahoud’s term Mr. Hariri and Lahoud had “repeated conflicts during Mr. Hariri’s term (2000-2004) to a point that required ‘external intervention and mediation on a daily basis’.”<sup>34</sup> The difficulties that Mr. Hariri had dealing with Lahoud were “widely interpreted as a sign of the Syrian Arab Republic’s mistrust of the former.”<sup>35</sup> Then on September 2, 2004, Resolution 1559 was adopted by the UN Security Council calling upon “all

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<sup>30</sup> Harris, *supra* note 15, at 36.

<sup>31</sup> Gambill, *supra* note 24, at 45.

<sup>32</sup> Harris, *supra* note 15, at 36.

<sup>33</sup> *Id.* at 34.

<sup>34</sup> U.N. Fact-finding Mission in Lebanon, *Report of the Fact-finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Rafik Hariri, March 24, 2005*, ¶ 7, U.N. Doc. S/2005/203 (Mar. 24, 2005) (prepared by Peter Fitzgerald) [reproduced in the accompanying notebook at Tab 16].

<sup>35</sup> *Id.*

remaining foreign forces to withdraw from Lebanon.”<sup>36</sup> The UN adoption of the resolution was widely thought to be the work of Mr. Hariri. The UN Fact-finding mission was told by many sources “that the Syrian leadership had held Mr. Hariri personally responsible for the adoption of the resolution, and that this resolution marked the end of whatever trust existed between the two sides.”<sup>37</sup>

Bashar al-Assad, however, needed the support of Mr. Hariri’s bloc in parliament to extend the term of Lahoud, something Mr. Hariri did not want to give.<sup>38</sup> On August 27, 2004 Mr. Hariri met with Assad and Assad ordered him to have parliament amend the constitution to allow Lahoud to remain in office for an additional three years.<sup>39</sup> At another meeting regarding the extension of Lahoud’s term Assad told Mr. Hariri that “Mr. Lahoud should be viewed as his personal representative in Lebanon and that ‘opposing him is tantamount to opposing Assad himself’.”<sup>40</sup> Assad also reportedly said that he “‘would rather break Lebanon over the heads of (Mr.) Hariri and (Druze leader Walid) Jumblatt than see his word in Lebanon broken’.”<sup>41</sup> On September 3 2004, Mr. Hariri’s bloc in parliament approved the constitutional amendment extending the term of Lahoud.

On September 6 2004, Marwan Hamadeh, Economy and Trade Minister, quit to protest the adoption of the constitutional amendment. One month later he was wounded and his guard

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<sup>36</sup> S.C. Res. 1559, U.N. Doc S/RES/1559 (Sept. 2, 2004) [reproduced in the accompanying notebook at Tab 9]. U.N. Fact-finding Mission in Lebanon, *supra* note 34, at ¶ 11.

<sup>37</sup> U.N. Fact-finding Mission in Lebanon, *supra* note 34, at ¶ 11.

<sup>38</sup> *Id.* at ¶ 8.

<sup>39</sup> Harris, *supra* note 15, at 37.

<sup>40</sup> U.N. Fact-finding Mission in Lebanon, *supra* note 34, at ¶ 10.

<sup>41</sup> *Id.*

killed when a bomb exploded near his car.<sup>42</sup> A heightened atmosphere of tension was present after the attempted assassination.<sup>43</sup> Soon after the attempted assassination, on October 4, 2004, Mr. Hariri resigned as prime minister.<sup>44</sup> Many people saw the assassination attempt as “a part of the ongoing power struggle with the Syrian leadership.”<sup>45</sup> However, by the end of early 2005 a power bloc was emerging composed of members of a variety of political groups as an opposition to Syrian domination in Lebanon.<sup>46</sup> The power bloc was independent of Syrian influence and was perceived to be able to win a majority in the upcoming parliamentary elections.<sup>47</sup> Many perceived Mr. Hariri to be at the heart of the power bloc.<sup>48</sup>

## **B. Murder**

Mr. Hariri was leaving a café at about 1 pm, just passing outside the Hotel St. Georges, when an explosion killed him and 22 others, and injured over 220 persons.<sup>49</sup> He was traveling in a motorcade of six cars with his security detail and a Member of Parliament, Bassel Fleyhan when the explosion occurred,<sup>50</sup> caused by a thousand kilograms of trinitrotoluene.<sup>51</sup> The route

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<sup>42</sup> On October 1, 2004 Hamadeh was the subject of an attempted assassination. *Marwan Hamadeh Escapes Assassination Bid*, MIDDLE EAST ONLINE, Oct. 1, 2004, <http://www.middle-east-online.com/english/?id=11437> [reproduced in the accompanying notebook at Tab 45]. See also U.N. Fact-finding Mission in Lebanon, *supra* note 34, at ¶ 13; and Mehlis Report, *supra* note 12, at 7.

<sup>43</sup> U.N. Fact-finding Mission in Lebanon, *supra* note 34, at ¶ 13.

<sup>44</sup> Mehlis Report, *supra* note 12, at 7.

<sup>45</sup> U.N. Fact-finding Mission in Lebanon, *supra* note 34, at ¶ 13.

<sup>46</sup> *Id.* at ¶ 14.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (“At the centre of this power bloc one man stood as its perceived architect: the former Prime Minister Rafik Hariri.”).

<sup>49</sup> *Id.* at ¶ 24-26; Mehlis Report, *supra* note 12, at ¶ 140-141.

<sup>50</sup> *Id.* at ¶ 140.

<sup>51</sup> U.N. Fact-finding Mission in Lebanon, *supra* note 34, at 2.



to leave the café was only communicated to the lead car as Mr. Hariri was leaving the café.<sup>52</sup>

This route had only been used by Mr. Hariri six times in the three months preceeding the explosion.<sup>53</sup>

After the explosion, Al-Jazeera TV received a phone call claiming responsibility for the explosion. The caller stated that “the Nasra and Jihad Group in Greater Syria claims responsibility for the execution of the agent Rafik Hariri, in the name of the oppressed, the Nasra and the Jihad.”<sup>54</sup> A second call was made to Al-Jazeera informing them of the location of a tape and requesting the tape to be aired on television.<sup>55</sup> The tape showed Ahmad Abu Adas “claiming responsibility for the killing of Mr. Hariri on behalf of the Nasra and Jihad Group in Greater Syria.”<sup>56</sup>

### **C. Lebanese Investigation**

After the explosion Judge Rasheed Mezhar of the Military Court took over the investigation of the crime.<sup>57</sup> There were several shortcomings in the investigation. The site of the explosion was not sufficiently secured to preserve all available evidence.<sup>58</sup> No record was kept of people entering and leaving the scene or of removal or placing of items at the scene.<sup>59</sup> The vehicles making up Mr. Hariri’s convoy were removed from the scene of the crime to be

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<sup>52</sup> *Id.* at ¶ 25.

<sup>53</sup> *Id.* at ¶ 26.

<sup>54</sup> *Id.* at ¶ 37.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at ¶ 32.

<sup>58</sup> *Id.* at ¶ 34.

<sup>59</sup> *Id.* at ¶ 35.

held at the Helou Police Barracks.<sup>60</sup> The resulting crater from the explosion was allowed to be filled with water, damaging evidence.<sup>61</sup> Also, evidence was planted by security services.<sup>62</sup> In addition, without judicial authority, intelligence agencies investigated the explosion site and failed to coordinate their findings.<sup>63</sup> The failure of the Lebanese investigators to use proper investigative methods likely resulted in the loss of important evidence and made it difficult for the UN Commission to determine key factors about the crime.<sup>64</sup>

#### **D. UN Involvement/Investigation**

On February 18 2005, the UN Secretary-General, Kofi Annan, announced the establishment of a Fact-finding mission to gather information on the murder of Mr. Hariri.<sup>65</sup> The UN Fact-finding mission arrived in Beirut on February 25 and concluded its mission on March 16, 2005.<sup>66</sup> After receiving the report of the Fact-finding mission, the UN passed Resolution 1595, to establish the International Independent Investigation Commission (“Commission”); a three month commission to investigate the bombing.<sup>67</sup> The Commission issued its first report on October 19, 2005.<sup>68</sup> The report contained information about how the assassination occurred, the

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Mehlis Report, *supra* note 12, at ¶ 147.

<sup>65</sup> U.N. Fact-finding Mission in Lebanon, *supra* note 34, at ¶ 2.

<sup>66</sup> *Id.*

<sup>67</sup> Press Release, Security Council, Security Council Establishes Commission to Assist Investigation into Beirut Bombing That Killed Former Lebanese Prime Minister, U.N. Doc. SC/8353 (July 4, 2005) [reproduced in the accompanying notebook at Tab 6]. S.C. Res. 1595, U.N. Doc. S/RES/1595 (Apr. 7, 2005) [reproduced in the accompanying notebook at Tab 11].

<sup>68</sup> Mehlis Report, *supra* note 12.

planning involved in the assassination, and explained what further steps needed to be taken to complete the investigation. After the report was issued, the Security Council decided to extend the term of the Commission until December 15, 2005 to continue its investigation.<sup>69</sup> A second report was issued by the Commission on December 10, 2005.<sup>70</sup> At this time the Commission had not completed the investigation, so the UN further extended the term of the Commission, in Resolution 1664, until June 15, 2006.<sup>71</sup> This Resolution also allowed the Commission to expand the scope of its investigation to include other terrorist attacks that had occurred in Lebanon since October 2004.<sup>72</sup>

Detlev Mehlis, the head of the Commission,<sup>73</sup> in his first report to the UN, made several conclusions about the how the crime occurred, who the perpetrators were, and what further steps needed to be taken.<sup>74</sup> The evidence gathered by the Commission indicated that the perpetrators were part of an organized operation, which included the use of improvised explosive devices, “a pattern of threats against targeted individuals,” the participation of Lebanese and Syrian security

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<sup>69</sup> S.C. Res. 1636, U.N. Doc. S/RES/1636 (Oct. 31, 2005) [reproduced in the accompanying notebook at Tab 12]. Int’l Indep. Investigation Comm’n, *Second Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 (2005) and 1636 (2005)*, ¶ 3, U.N. Doc. S/2005/775 (Dec. 10, 2005) (prepared by Detlev Mehlis) [hereinafter Second Report of IIIC] [reproduced in the accompanying notebook at Tab 4].

<sup>70</sup> Second Report of IIIC, *supra* note 69.

<sup>71</sup> S.C. Res. 1644, U.N. Doc. S/RES/1644 (Dec. 15, 2005) [reproduced in the accompanying notebook at Tab 13].

<sup>72</sup> *Id.* (“Authorizes the Commission, following the request of the Lebanese Government, to extend its technical assistance as appropriate to the Lebanese authorities with regard to their investigations on the terrorist attacks perpetrated in Lebanon since 1 October 2004, and requests the Secretary-General in consultations with the Commission and the Lebanese Government to present recommendations to expand the mandate of the Commission to include investigations of those other attacks.”)

<sup>73</sup> Mehlis stepped down as Commissioner and was replaced by Serge Bremertz in January 2006. *Syria Raising Funds to Pay for Defense of Hariri Murder Suspects*, YALIBNAN, Apr. 22, 2006, [http://yalibnan.com/site/archives/2006/04/syria\\_raising\\_f.php](http://yalibnan.com/site/archives/2006/04/syria_raising_f.php) [reproduced in the accompanying notebook at Tab 49].

<sup>74</sup> Mehlis Report, *supra* note 12.

officials, and the “planning of other criminal activities.”<sup>75</sup> Mehlis concluded that the assassination of Mr. Hariri could not have taken place “without the approval of top-ranked Syrian security officials and could not have been further organized without the collusion of their counterparts in the Lebanese security services.”<sup>76</sup> Mr. Hariri’s phones were wire tapped to allow the Lebanese and Syrian intelligence and security officials to monitor his contacts and movements.<sup>77</sup> The use of prepaid phone cards was also instrumental in the monitoring of Mr. Hariri’s movements.<sup>78</sup> There was little difficulty, given the amount of surveillance conducted on Mr. Hariri, for an individual “outside of Hariri’s ‘inner circle’ to predict the route that his convoy would follow” on the date of his death.<sup>79</sup>

There was a suggestion by witnesses that roadwork had been done in front of the St. George Hotel prior to the assassination allowing for an opportunity for the perpetrators to place a bomb underneath the road.<sup>80</sup> However, the Commission was not able to independently verify whether excavation work did in fact occur.<sup>81</sup> The bomb was most likely carried on a white Mitsubishi van seen at the scene of the explosion prior to the explosion.<sup>82</sup> However, the

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<sup>75</sup> *New Evidence Points to Syrian Involvement in Hariri Murder*, UN NEWS SERVICES, Dec. 13, 2005, <http://www.un.org/apps/news/printnewsAr.asp?nid=16917> [reproduced in the accompanying notebook at Tab 48].

<sup>76</sup> Mehlis Report, *supra* note 12, at ¶ 124.

<sup>77</sup> *Id.* at ¶ 128.

<sup>78</sup> *Id.* at ¶¶ 148-152.

<sup>79</sup> *Id.* at ¶ 147.

<sup>80</sup> *Id.* at ¶¶ 129-30.

<sup>81</sup> *Id.* at ¶ 131.

<sup>82</sup> *Id.* at ¶ 147. The explosion took place above ground with the use of about 1,000 kg of explosives. *Id.* at ¶ 169.

Commission was not able to determine how the IED was activated.<sup>83</sup> There were jamming devices in Mr. Hariri's convoy that were operational at the time of the explosion.<sup>84</sup>

The Commission also looked at the involvement of Abu Adass in the murder of Mr. Hariri.<sup>85</sup> The Commission determined that there was no evidence indicating that a suicide bombing had occurred.<sup>86</sup> There was some evidence, though not conclusive, indicating that the Syrians used Adass as a decoy in the assassination attempt.<sup>87</sup> Mehlis was only able to conclude that Adass left his home on January 16, 2005 and was taken to Syria where he disappeared.<sup>88</sup>

The Commission, though permitted by Resolution 1664, has not expanded the scope of its investigation outside of the murder of Mr. Hariri. However, the UN has been providing technical assistance to the Lebanese in the investigation of other terrorist attacks that have occurred in Lebanon.<sup>89</sup>

## **E. Syrian Investigation**

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<sup>83</sup> *Id.* at ¶ 156.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at ¶¶ 177-191.

<sup>86</sup> *Id.* at ¶ 186.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at ¶ 191.

<sup>89</sup> Starting with the attempted assassination of Marwan Hamadeh in October 2004 till the murder of Gebran Tuani in December 2005 there have been a number of bombings that have occurred in Lebanon. On March 19, 2005 a bomb was set off in Jdeideh wounding 11 people. On March 23, 2005 three people died and three people were wounded due to an explosion north of Beirut. On March 26, 2005 six people were injured by a suitcase bomb. On May 6, 2005 twenty-nine people are injured by a bomb. On June 2, 2005 Samir Kasir dies when his car explodes. On June 21, 2005 George Hawi, former Lebanese Communist Party leader dies when his car explodes. On July 12, 2005 Defence Minister Elias Murr is wounded and two other people die in a car bomb. On September 25, 2005 a car bomb injures May Chidiac. *Id.* at 7-9. On December 12, 2005 Tuani was killed in a car bomb blast. Transcript of Tape Recording at 9, *The Struggle for Lebanese Independence: One Year After Hariri's Assassination* (Mar. 6, 2006), available at <http://www.brookings.edu/comm/events/20060306.pdf> [reproduced in the accompanying notebook at Tab 50].

On October 29, 2005 legislation was passed creating a Syrian Judicial Commission to investigate the murder of Mr. Hariri.<sup>90</sup> However, there is doubt that the Syrian Judicial Commission is determined to conduct an independent and professional investigation of the crime.<sup>91</sup> For example, the Syrian Judicial Commission pressured one of the sources to the UN Commission, whose statements were independently verified, to appear on Syrian television and recant his prior statements to the UN Commission.<sup>92</sup> Syria has, also, shown a history of not cooperating with the UN Commission.<sup>93</sup>

## **F. Suspects**

On August 30, 2005 Lebanese authorities arrested four high-ranking Lebanese intelligence and security officials.<sup>94</sup> On October 16, 2005 Zuhir Ibn Mohamed Said Saddik was arrested in France.<sup>95</sup> As of the second report by the Commission to the UN there were 19 suspects in the murder of Mr. Hariri.<sup>96</sup>

# **III. LEGAL DISCUSSION**

## **A. Referral by the Security Council to the ICC Pursuant to Article 13(b)**

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<sup>90</sup> Second Report of IIIC, *supra* note 69, at ¶ 7.

<sup>91</sup> *Id.* at ¶ 30.

<sup>92</sup> Second Report of IIIC, *supra* note 69, at ¶ 30.

<sup>93</sup> *See* Mehlis Report, *supra* note 12.

<sup>94</sup> *Id.* at ¶ 174 (“The individuals arrested were General Jamil Al-Sayyed, former director-general of the Surete generale; General Ali Al-Hajj, former head of ISF; General Raymond Azar, former head of military intelligence; and General Mustapha Hamdan, Commander of the Republican Guard Brigade.”); Barbara Slavin, *U.S., France Consider U.N. Sanctions Against Syria*, USA TODAY, Oct. 24, 2005, [http://www.usatoday.com/news/world/2005-10-23-syriaaction\\_x.htm](http://www.usatoday.com/news/world/2005-10-23-syriaaction_x.htm) [reproduced in the accompanying notebook at Tab 39].

<sup>95</sup> Second Report of IIIC, *supra* note 69, at ¶ 27.

<sup>96</sup> Second Report of IIIC, *supra* note 69, at ¶¶ 5 & 27; *EU Will Impose Sanctions on Suspects in Hariri’s Murder*, YALIBNAN, Feb. 23, 2006, [http://yalibnan.com/site/archives/2006/02/eu\\_will\\_impose.php](http://yalibnan.com/site/archives/2006/02/eu_will_impose.php) [reproduced in the accompanying notebook at Tab 42].

The ICC can exercise jurisdiction over crimes that are within its jurisdiction according to Article 5 when “a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”<sup>97</sup> Chapter VII of the UN Charter provides the Security Council with the power to determine what measures shall be taken to “maintain or restore international peace and security.”<sup>98</sup> Pursuant to these powers the Security Council referred the situation in Darfur, Sudan to the ICC in 2005. This is the first referral that the UN has made to the ICC. The ICC accepted the referral and began an investigation.<sup>99</sup> The referral of Darfur serves as an example of the procedure the Prosecutor follows to determine whether to accept a referral and begin an investigation.

### **1. Darfur, Sudan**

On March 31, 2005 the UN Security Council adopted Resolution 1593 referring the situation in Darfur, Sudan to the ICC Prosecutor.<sup>100</sup> Resolution 1593 was adopted pursuant to Chapter VII of the UN Charter.<sup>101</sup> Sudan, however, is not a party to the Rome Statute.<sup>102</sup>

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<sup>97</sup> Rome Statute, *supra* note 1, at art. 13(b).

<sup>98</sup> U.N. Charter, *supra* note 2, at art. 39. Article 39 of the UN Charter states: “The security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” *Id.*

<sup>99</sup> Louis Moreno Ocampo, *Report of the Prosecutor of the International Criminal Court, Mr. Louis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)* 5 (June 6, 2005), available at [http://www.icc-cpi.int/library/cases/ICC\\_Darfur\\_UNSC\\_Report\\_29-06-05\\_EN.pdf](http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_Report_29-06-05_EN.pdf) [reproduced in the accompanying notebook at Tab 20]; see also Statement of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo to the Security Council on 29 June 2005 Pursuant to UNSCR 1593 (2005), available at [http://www.icc-cpi.int/library/cases/LMO\\_UNSC\\_On\\_DARFUR-EN.pdf](http://www.icc-cpi.int/library/cases/LMO_UNSC_On_DARFUR-EN.pdf) [reproduced in the accompanying notebook at Tab 22].

<sup>100</sup> Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (Mar. 31, 2005) [reproduced in the accompanying notebook at Tab 7]. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) [reproduced in the accompanying notebook at Tab 10].

<sup>101</sup> S.C. Res. 1593, *supra* note 100.

Accordingly, the UN stated in the Resolution that all parties to the conflict should cooperate with the ICC and the prosecutor, but recognized that non-State parties do not have any obligations under the Rome Statute.<sup>103</sup>

Upon receiving the referral from the Security Council, ICC Chief Prosecutor Luis Moreno-Ocampo assessed the referral under Article 53 to determine whether to commence an investigation.<sup>104</sup> After considering all of the information available to him he concluded, on June 1, 2005, that there was a reasonable basis to start an investigation.<sup>105</sup> Pursuant to Article 53, the Prosecutor considered three factors: (1) whether the crimes were within the jurisdiction of the Court, (2) whether the case is admissible under Article 17, and (3) whether the commencement of an investigation would not “serve the interests of justice.”<sup>106</sup>

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<sup>102</sup> International Criminal Court, Assembly of States Parties, <http://www.icc-cpi.int/statesparties.html> (Nov. 14, 2005) [reproduced in Tab 19].

<sup>103</sup> S.C. Res. 1593, *supra* note 100. Resolution 1593 states in part:

*Decides* that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.

*Id.* at ¶ 2. *But see* Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 789-90 (2003) [reproduced in the accompanying notebook at Tab 33] (“The Statute is intended to create a Court that will have jurisdiction over crimes committed outside the territory of states party to it and over nationals of states not party to it, whenever the Security Council refers a situation to the Court.”).

<sup>104</sup> See Press Release, International Criminal Court, Security Council Refers Situation in Darfur to ICC Prosecutor, (Apr. 1, 2005), *available at* <http://www.icc-cpi.int/press/pressreleases/98.html> [reproduced in the accompanying notebook at Tab 21].

<sup>105</sup> Luis Moreno Ocampo, *supra* note 98. See also Statement of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo to the Security Council on 29 June 2005 Pursuant to UNSCR 1593 (2005), *supra* note 98.

<sup>106</sup> Rome Statute, *supra* note 1, at art. 53. Article 53 states in part:

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and



Considering the first factor the Prosecutor determined that there were several crimes within the jurisdiction of the ICC, including the killing of thousands of civilians, the looting and destruction of villages, a pattern of sexual violence and rape, the deaths of vulnerable groups due to disease and starvation, and the targeting and intimidation of persons offering humanitarian relief.<sup>107</sup> Under the second factor the Prosecutor must determine whether the ICC has jurisdiction over the crimes. The ICC is considered to be a court of last resort. Therefore, the ICC should only intervene when: “1) there is not or has not been any national investigation or prosecution of the cases; 2) where there is or has been an investigation or prosecution, but they are vitiated by an unwillingness or inability to genuinely carry out the investigation or prosecution.”<sup>108</sup> The Prosecutor determined that there were crimes in relation to the Darfur situation that would be admissible. Because there were no criminal proceedings in Sudan for the crimes that the Prosecutor would focus on he determined that crimes were within the ICC’s jurisdiction.<sup>109</sup> Though the Prosecutor initially determined that the crimes are admissible, he stated that “the admissibility assessment is an on-going assessment that relates to the specific cases to be prosecuted by the Court. Once investigations have been carried out, and specific cases selected, the OTP will assess whether or not these cases are being, or have been, the subject of genuine national investigations or prosecutions.”<sup>110</sup> Therefore, the initial determination of admissibility, when determining to begin an investigation, is not conclusive as to the

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(c) Taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. *Id.* at art. 53(1).

<sup>107</sup> Ocampo, *supra* note 99, at 2-3.

<sup>108</sup> *Id.* at 3.

<sup>109</sup> *Id.* at 4.

<sup>110</sup> *Id.*

admissibility of the case at a later date. In addition, the Prosecutor determined that “there were no substantial reasons to believe that the investigation would not serve the interests of justice.”<sup>111</sup>

## **2. Statutory Requirements for the Prosecutor to Take the Hariri Case**

Upon receiving a referral from the UN Security Council the ICC Prosecutor will begin an investigation unless he determines that there is no reasonable basis to start an investigation.<sup>112</sup>

Considering the three factors under Article 53 there most likely is no reasonable basis for the ICC to accept the case of the murder of Mr. Hariri.

### **a. There Is No Reasonable Basis to Believe That a Crime Within the ICC’s Jurisdiction Has Occurred.**

There is no reasonable basis to believe that a crime within the jurisdiction of the ICC has occurred. Of the crimes within the ICC’s jurisdiction the murder of Mr. Hariri is best analyzed as a crime against humanity.<sup>113</sup> All, but one, of the elements for a crimes against humanity are satisfied by the murder of Mr. Hariri. Section C of this memorandum addresses this issue in more detail.

### **b. The Case May Be Admissible Under Article 17.**

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<sup>111</sup> *Id.* at 5.

<sup>112</sup> Rome Statute, *supra* note 1, at art. 53; *see also* International Criminal Court, Annex to the “Paper on some policy issues before the Office of the Prosecutor”: Referrals and Communications, [http://www.icc-cpi.int/library/organs/otp/policy\\_annex\\_final\\_210404.pdf](http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf) (last visited Apr. 11, 2006) [reproduced in the accompanying notebook at Tab 18]. *Cf. Report of the Preparatory Commission for the International Criminal Court Addendum: Finalized Draft Text of the Elements of Crimes*, *supra* note 10, at rule 48 (“In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in Article 53, paragraph 1 (a) to (c).”).

<sup>113</sup> Rome Statute, *supra* note 1, at art. 5(1)(b).

Article 17 discusses four situations in which a case is inadmissible to the Court.<sup>114</sup> The situations described in Article 17(1)(b) and (c) are not applicable because the case has not moved beyond an investigation yet. Article 17(1)(d) also does not apply because the case is of sufficient gravity to justify action by the ICC.<sup>115</sup> The only situation that may apply is that described in Article 17(1)(a). Under this Article the ICC should not accept the case if “the case is being investigated...by a State which has jurisdiction over it.”<sup>116</sup> If, however, the State investigating the case is “unwilling or unable to genuinely carry out the investigation” then the ICC may exercise jurisdiction over the case.<sup>117</sup> A State is determined to be unwilling to “genuinely carry out the investigation” if the investigation is “not being conducted independently or impartially.”<sup>118</sup>

The murder of Mr. Hariri was initially investigated only by Lebanon. This investigation was not conducted “independently or impartially” because there was a general failure by the

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<sup>114</sup> *Id.* at art 17. Article states the following:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complain, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.  
*Id.* at 53(1).

<sup>115</sup> *See infra* Section III(A)(2)(c).

<sup>116</sup> Rome Statute, *supra* note 1, at art. 17(1)(a).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at art. 17.

investigators to use proper investigative methods.<sup>119</sup> The negligence of the Lebanese investigators have made it difficult for the Commission to determine key factors about the crime, such as whether the explosion occurred above or below ground.<sup>120</sup> The Lebanese people have also expressed their mistrust of “their security and judicial authorities” to the UN Commission.<sup>121</sup> Therefore, the investigation was not carried out with the intent of bringing the perpetrators to justice.<sup>122</sup>

In April 2005 the UN began its own independent investigation of the murder of Mr. Hariri. The Lebanese authorities have been cooperating with the Commission in its investigation. The UN, however, is not considered to be a “State” and therefore its investigation is not encompassed by Article 17(1)(a).

In October 2005, Syria set up a Judicial Commission to investigate the murder of Mr. Hariri.<sup>123</sup> Article 17(1)(a) most likely applies to Syria’s investigation. Syria arguably has jurisdiction over the case because some of the suspects are Syrian officials.<sup>124</sup> The Syrian investigation, however, is not being conducted “independently or impartially.”<sup>125</sup> For example, one of the sources to the UN Commission, whose statements were independently verified,

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<sup>119</sup> See *supra* section II(C).

<sup>120</sup> Mehlis Report, *supra* note 12, at ¶ 147.

<sup>121</sup> *Id.* at ¶ 12.

<sup>122</sup> Rome Statute, *supra* note 1, at art. 17(2)(c) (“The proceedings were...being carried out in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”).

<sup>123</sup> Second Report of IIIC, *supra* note 69, at ¶ 7.

<sup>124</sup> See *supra* section II(F).

<sup>125</sup> Rome Statute, *supra* note 1, at art. 17(2)(c).

appeared on Syrian television recanting his prior statements to the UN Commission “at the behest of the Syrian Judicial Commission.”<sup>126</sup>

When the situation in Darfur was referred to the ICC the Prosecutor determined that the case was admissible under Article 17 because there were no criminal proceedings in Sudan for the crimes that had been committed.<sup>127</sup> According to this reasoning, the ICC also has jurisdiction over the murder of Mr. Hariri because no criminal proceedings are underway in Lebanon or Syria. Also, Lebanon has been meeting with the UN to set up an international forum to try the suspects involved in the murder of Mr. Hariri.<sup>128</sup> If the UN refers the situation to the ICC then presumably Lebanon has agreed to the case being tried in front of the ICC. Therefore, the case would be admissible because the ICC would be the sole venue for the criminal proceedings.

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<sup>126</sup> Second Report of IIIC, *supra* note 69, at ¶ 30.

<sup>127</sup> Ocampo, *supra* note 99, at 4.

<sup>128</sup> Detlev Mehlis, Comm’r Int’l Indep. Investigation Comm’n, United Nations Security Council Meeting to Discuss the Mehlis Report (Dec. 13, 2005) [reproduced in the accompanying notebook at Tab 41] (“Lebanese government requested today from the Security Council to establish an international court, to be held in Lebanon or outside it, and which tries everyone it finds involved in the terrorist crime which claimed the life of Prime Minister Hariri and the Representative Bassel Fleihan and their companions.”); *see also* *Brammertz Meets Syria’s Moallem on Hariri Probe*, YALIBNAN, Feb. 23, 2006, [http://yalibnan.com/site/archives/2006/02/brammertz\\_meets.php](http://yalibnan.com/site/archives/2006/02/brammertz_meets.php) [reproduced in the accompanying notebook at Tab 40] (“The UN has already begun discussions with the government in Beirut on the nature of the tribunal, the identity of the judges and the venue.”); Rym Ghazal, *Judges Visit UN to Discuss Hariri Trial*, THE DAILY STAR, Feb. 20, 2006, [http://www.dailystar.com.lb/article.asp?edition\\_id=1&categ\\_id=2&article\\_id=22342](http://www.dailystar.com.lb/article.asp?edition_id=1&categ_id=2&article_id=22342) [reproduced in the accompanying notebook at Tab 48] (“A delegation of two Lebanese judges will heading to the UN Headquarters in New York Monday or Tuesday, where they will present Lebanon’s ‘vision’ of the specifics of an international court to try those accused of the assassination of former Premier Rafik Hariri); *Lebanese Judges Head to UN for Talks on Hariri Tribunal*, LEBANONWIRE, Feb. 21, 2006, <http://www.lebanonwire.com/0602LN/06022101LWAF.asp> [reproduced in the accompanying notebook at Tab 44] (UN Security General Kofi Annan’s legal advisor Nicolas Michel “held talks in Beirut in January with Lebanese officials on how best to create a tribunal having an international character in conformity with UN Security Council resolution 1644.”); *Tribunal of Hariri Assassination to Be Set*, ARABICNEWS.COM, Jan. 26, 2006, <http://www.arabicnews.com/ansub/Daily/Day/060126/2006012618.html> [reproduced in the accompanying notebook at Tab 51] (the UN will discuss with Lebanese authorities “the nature and scope of the international assistance needed to create a tribunal to try those charged with the killing of former Prime Minister Hariri and others.”). S.C. Res. 1664, U.N. Doc. S/RES/1664 (Mar. 29, 2006) [reproduced in the accompanying notebook at Tab 14]. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1644 (2005)*, U.N. Doc. S/2006/176 (Mar. 21, 2006) [reproduced at Tab 15].

There would be no issues of complementarity of jurisdiction.<sup>129</sup> In addition, the ICC has shown a practice of accepting cases even when the specific language of Article 17 is not met.<sup>130</sup>

Therefore, the case is most likely admissible under Article 17.

**c. There Are No Substantial Reasons to Believe That an Investigation Would Not Serve the Interests of Justice.**

There are no substantial reasons to believe that an investigation of the murder of Mr. Hariri would not serve justice. The Lebanese people are insistent upon a tribunal of an international nature to ensure the impartiality of the court.<sup>131</sup> The Lebanese people do not place much trust in their judicial and security authorities.<sup>132</sup> Lebanon and the international community have displayed a strong interest in prosecuting those who murdered Mr. Hariri and the 22 others who died in the explosion.<sup>133</sup> In the wake of the death of Mr. Hariri there has been much turmoil in Lebanon.<sup>134</sup> The prosecution of the perpetrators may help to stabilize the situation in Lebanon.<sup>135</sup> There is also an interest in prosecuting perpetrators before an international court to

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<sup>129</sup> See generally Xabier Agirre et al., Informal Expert Paper: The Principle of Complementarity in Practice (2003), <http://www.icc-cpi.int/library/organs/otp/complementarity.pdf> [reproduced in the accompanying notebook at Tab 23].

<sup>130</sup> See Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385 (2005) [reproduced in the accompanying notebook at Tab 29] (discussing State referrals to the ICC that are not parties to the Rome Statute).

<sup>131</sup> Press Release, Security Council, Head Investigator into Killing of Rafik Hariri Briefs Security Council, Says Progress Made in Understanding Circumstances, Modus Operandi. Cannot Publicly Discuss Details of Current Lines of Inquiry, but Optimistic Those Responsible Will Be Identified, Held Accountable, U.N. Doc SC/8663 (Mar. 16, 2006) [reproduced in the accompanying notebook at Tab 5].

<sup>132</sup> Mehlis Report, *supra* note 12, at ¶ 12.

<sup>133</sup> See Ghazal, *supra* note 128; *Lebanese Judges Head to UN for Talks on Hariri Tribunal*, *supra* note 128; and *Tribunal of Hariri Assassination to Be Set*, *supra* note 128.

<sup>134</sup> The Secretary-General, *supra* note 128, ¶ 13 (“The attack on Mr. Hariri and the other similar bombings in Lebanon have contributed to the creation of a climate of insecurity and intimidation, which seriously affects the functioning of the country’s political institutions as well as economic and social life.”).

<sup>135</sup> *Id.*

add more reliability to the process. In addition, prosecution of the perpetrators is desired to deter future crimes of this nature and to promote security in Lebanon and in the region.<sup>136</sup> Since the assassination of Mr. Hariri, there have already been a number of other murders of political figures involved in the opposition movement, such as Gebran Tueni.<sup>137</sup>

## **B. Crimes Against Humanity**

There is most likely no reasonable basis to believe that the murder of Mr. Hariri is a crime against humanity. Crimes against humanity are within the jurisdiction of the ICC under Article 5. The Court is only able to accept crimes which are of “concern to the international community as a whole.”<sup>138</sup> The murder of Mr. Hariri can be said to be of concern to the international community. Considering the political climate in Lebanon prior to and after the death of Mr. Hariri there is reason to believe that this crime rises to the level of requiring international attention. Notably, after the death of Mr. Hariri, the UN, along with the United States and Europe, placed pressure on Syria to pull out of Lebanon, finally putting into effect the UN resolution requiring the withdrawal of Syria from Lebanon.<sup>139</sup> A crime against humanity, however, requires that it be committed against a civilian population and this requirement cannot be fulfilled, even if the murder of Mr. Hariri is taken along with other acts of terrorism that have occurred in Lebanon.<sup>140</sup>

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<sup>136</sup> Press Release, Security Council, *supra* note 130.

<sup>137</sup> Mehlis Report, *supra* note 12, at 7-9.

<sup>138</sup> Rome Statute, *supra* note 1, at art. 5(1).

<sup>139</sup> Hussein Dakroub, *Syria Ending 29-Year Military Domination of Lebanon*, ASSOCIATED PRESS, Apr. 24, 2005 [reproduced in the accompanying notebook at Tab 43]; Harris, *supra* note 16, at 10 (“On April 2, Bashar bowed to the United Nations and promised full Syrian withdrawal by the end of the month. This came only after relentless U.S. and European pressure and the March 27 release of a United Nations report....”). S.C. Res. 1559, *supra* note 36, ¶ 8 (“Calls upon all remaining foreign forces to withdraw from Lebanon”).

<sup>140</sup> These crimes have been added to the scope of the UN’s investigation in Lebanon. Press Release, Security Council *supra* note 131.

## 1. Legislative History of Crimes Against Humanity and the Rome Statute

Crimes against humanity were first defined and codified in the Nuremburg Charter.<sup>141</sup> Subsequent codifications of crimes against humanity were enacted in the statutes of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”).<sup>142</sup> The ICC codified crimes against humanity during the Rome Conference, which met from July 15 to July 17, 1998.<sup>143</sup> During the Rome Conference, the discussion on crimes against humanity focused on whether there should be a nexus with armed conflict, whether the widespread or systematic elements should be comprehensive or disjunctive, and whether a discriminatory motive should be required.<sup>144</sup> A discriminatory intent was not included in the final version of the Rome Statute because France was the only country advocating for the inclusion of such a requirement.<sup>145</sup> Ultimately the Rome Statute took a disjunctive approach to the widespread and systematic requirements. The Canadian delegation submitted a proposal for the chapeau to crimes against humanity, on July 1, that was designed as a compromise to those countries who wanted widespread and systematic to be conjunctive requirements.<sup>146</sup> The proposed chapeau was based on the ICTY’s judgment in

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<sup>141</sup> Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT’L L.J. 457, 459 (1998) [reproduced in the accompanying notebook at Tab 36].

<sup>142</sup> *Id.* at 476-86.

<sup>143</sup> *Id.* at 495.

<sup>144</sup> *Id.*

<sup>145</sup> LARRY MAY, CRIMES AGAINST HUMANITY 125 (2005) [reproduced in the accompanying notebook at Tab 26]; Hwang, *supra* note 141, at 495.

<sup>146</sup> Hwang, *supra* note 141, at 497. The Canadian proposal reads as follows:

- (1) For the purpose of the present Statute a crime against humanity means any of the following acts when knowingly committed as part of a widespread or systematic attack against any civilian population...
- (2) For the purpose of paragraph 1: (a) “attack against any civilian population” means a course of conduct involving the commission of multiple acts referred to in paragraph 1 against any civilian



*Tadic* that “‘widespread’ and ‘systematic’ should be treated as alternatives and that the definition should require a showing of governmental, organizational, or group policy.”<sup>147</sup> The Bureau of the Committee issued a Discussion Paper, on July 6, that contained a compromise proposal, similar to the Canadian proposal, which was ultimately adopted as Article 7 of the Rome Statute.<sup>148</sup> The final version of the Rome Statute thus adopted the disjunctive approach to the elements of widespread and systematic and is reflective of “the position taken by most recent authorities, including the ICTY in the *Tadic* case.”<sup>149</sup> The Rome Statute also “does not require a nexus to an ‘armed conflict’”<sup>150</sup> reflecting “the current state of international law.”<sup>151</sup>

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population, pursuant to or knowingly in furtherance of a governmental or organizational policy to commit those acts.

*Id.* at 497 (quoting Canadian Delegation, Background Paper on Some Jurisprudence on Crimes Against Humanity (July 1, 1998)).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 500 (the July 6 proposal was slightly modified with the replacement of the “and” after “civilian population” in paragraph 1 with a comma; this revision can be seen in the July 10 proposal that was distributed and in Article 7 of the Rome Statute). Article 7 of the Rome Statute reads as follows:

1. For purposes of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:...
2. For the purpose of paragraph 1:
  - (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;...

Rome Statute, *supra* note 1, at art. 7.

<sup>149</sup> LEILA NADYA SADAT. THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 152 (2002) [reproduced in the accompanying notebook at Tab 27]. *See also* Prosecutor v. *Tadic*, Case No. IT-94-I-T, Opinion and Judgment, ¶¶ 646-48 (May 7, 1997) [reproduced in the accompanying notebook at Tab 25] (discussing the Report of the Secretary-General, Trial Chamber I decision in Vukovar Hospital Decision, the Report of the Ad Hoc Committee on the Establishment of a Permanent International Criminal Court, article 18 of the International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind, and the 1991 Report of the International Law Commission, Systematic or mass violations of human rights to justify the conclusion that “the acts occur on either a widespread basis or in a systematic manner.”).

<sup>150</sup> SADAT, *supra* note 149, at 149.

<sup>151</sup> Hwang, *supra* note 141, at 501.

## 2. Elements of Crimes Against Humanity<sup>152</sup>

There are three elements to a crime against humanity with the act constituting murder:

1. The perpetrator killed one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>153</sup>

The second element can be broken down further into two components: (1) the existence of a widespread or systematic attack and (2) against a civilian population. When considering whether the elements of the crime have been met the statutory language defining the crime should be read narrowly.<sup>154</sup> Article 22 states that “the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”<sup>155</sup> When considering a case, Article 21 allows the ICC to look outside the Rome Statute to other sources of international law.<sup>156</sup> The

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<sup>152</sup> See generally SADAT, *supra* note 149, at 148-60; MAY, *supra* note 145, at 119-132; THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 59-93 (Mauro Politi & Giuseppe Nesi eds., 2001) [reproduced in the accompanying notebook at Tab 28].

<sup>153</sup> ICC Elements of Crimes, *supra* note 10, at 9.

<sup>154</sup> Rome Statute, *supra* note 1, at art. 22.

<sup>155</sup> *Id.* at art. 22(2).

<sup>156</sup> *Id.* at art. 21. Article 21 states as follows:

1. The Court shall apply:
  - a. In the first place, this Statute, Elements of Crimes and its Rules of Procedures and Evidence;
  - b. In the second place, where appropriate, applicable treaties and the principle and rules of international law, including the established principles of the international law of armed conflict;
  - c. Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application an interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic, or social origin, wealth, birth or other status.

*Id.*

murder of Mr. Hariri meets all but one of the elements for the commission of a crime against humanity. The murder most likely does not satisfy the “population” requirement in the second element of the crime. This shall be discussed further in subsection c below.

**a. One or More Persons Killed**

The first element to be considered is whether a murder was committed.<sup>157</sup> Clearly this element has been met because Mr. Hariri along with 22 others died in the explosion that occurred on February 14, 2005.<sup>158</sup> According to the Elements of Crimes “[t]he term ‘killed’ is interchangeable with the term ‘caused death’.”<sup>159</sup> As the explosion caused the death of Mr. Hariri and 22 others, the perpetrators of the explosion committed murder.

**b. Existence of a Widespread or Systematic Attack**

The chapeau of Article 7 requires that the act committed, murder, be part of a widespread or systematic attack.<sup>160</sup> The widespread or systematic nature of an attack are jurisdictional elements of the crime.<sup>161</sup> The terms are not defined within the Rome Statute, but have come to have a common meaning when used.<sup>162</sup> Widespread means an action that occurs on a large-scale that involves “a substantial number of victims.”<sup>163</sup> A systematic attack refers to one that

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<sup>157</sup> *Id.* at art. 7(1)(a).

<sup>158</sup> Mehlis Report, *supra* note 12, at ¶ 140-141.

<sup>159</sup> ICC Elements of Crimes, *supra* note 10, at 9 n.7. The Elements of Crimes are there to “assist the Court in the interpretation application” of the defined crimes. Rome Statute, *supra* note 1, at art. 9(1).

<sup>160</sup> Rome Statute, *supra* note 1, at art. 7(1).

<sup>161</sup> SADAT, *supra* note 149, at 152.

<sup>162</sup> The definitions discussed are those expressed by the ICTY, ICTR, and the International Law Commission.

<sup>163</sup> Arsanjani, *supra* note 130, at 45.

“requires a high degree of orchestration and methodical planning.”<sup>164</sup> The murder of Mr. Hariri does not constitute a widespread attack, but may constitute a systematic attack.

Though the International Law Commission has stated that “the ‘singular effect of an inhumane act of extraordinary magnitude’” can be characterized as being widespread such a crime of that magnitude did not occur.<sup>165</sup> The murder of 23 people does not likely constitute a crime of “extraordinary magnitude.”<sup>166</sup> Similarly, the ICTR defined a widespread attack “as massive, frequent, large scale action, carried out collectively with considerable, seriousness and directed against a multiplicity of victims.”<sup>167</sup> The ICTY, also, has stated that widespreadness “refers to the number of victims.”<sup>168</sup> The murder of Mr. Hariri does not meet any of the definitions of a widespread attack.

The ICTR cited the International Law Commission in articulating the definition of systematic. The ICTR in *Akayesu* characterized a systematic attack as being “thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.”<sup>169</sup> The *Akayesu* decision was written subsequent to the adoption of the Rome Statute “and explicitly takes the ICC definition into account in formulating the

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<sup>164</sup> *Id.*

<sup>165</sup> Hwang, *supra* note 141, at 502.

<sup>166</sup> *Id.*

<sup>167</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sept. 2, 1998) [reproduced in the accompanying notebook at Tab 24]; Margaret McAuliffe deGuzman, *The Road From Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. 335, 374 (2000) [reproduced in the accompanying notebook at Tab 37] (quoting Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sept. 2, 1998). *See also* Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT’L L. 307, 315 (2000) [reproduced in the accompanying notebook at Tab 31].

<sup>168</sup> Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 648 (May 7, 1997) [reproduced in the accompanying notebook at Tab 25].

<sup>169</sup> Akayesu, Case No. ICTR-96-4-T, ¶ 580; Chesterman, *supra* note 163, at 315 (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sept. 2, 1998)); McAuliffe deGuzman, *supra* note 163, at 374.

required elements of crimes against humanity.”<sup>170</sup> The ICTY characterizes systematic as a “pattern or methodical plan.”<sup>171</sup> The Commissioner of the International Independent Investigation, Detlev Mehlis, stated in his report that a great deal of planning went into the assassination of Mr. Hariri, which required access to lots of resources.<sup>172</sup> In his report, Mehlis concluded that the assassination “was carried out by a group with...extensive organization and considerable resources and capabilities.”<sup>173</sup> Mr. Hariri was monitored for a month prior to his death, and the perpetrators went to great lengths to make the crime look as though it was committed by a suicide bomber.<sup>174</sup> Therefore, the murder of Mr. Hariri was a systematic attack.

### **c. Against a Civilian Population**

The chapeau also requires that the attack be directed against “any civilian population.”<sup>175</sup> The Rome Statute defines “attack directed against any civilian population” as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>176</sup> There are three parts to this definition: (1) that the attack be against a civilian population, (2) that there be multiple commission of acts, and (3) that the attack be “in

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<sup>170</sup> McAuliffe deGuzman, *supra* note 167, at 374 (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 577 (Sept. 2, 1998)).

<sup>171</sup> Tadic, Case No. IT-94-1-T, ¶ 648.

<sup>172</sup> See Mehlis Report, *supra* note 12, at ¶ 123.

<sup>173</sup> *Id.* at ¶ 215.

<sup>174</sup> See *id.*

<sup>175</sup> Rome Statute, *supra* note 1, at art. 7.

<sup>176</sup> *Id.* at art. 7(2).

furtherance of a State or organizational policy.”<sup>177</sup> The requirements are present to avoid the inclusion of random, isolated acts within the purview of crimes against humanity.<sup>178</sup>

The civilian population element “has been interpreted to include two elements: (1) the constituent acts must be directed against noncombatants and (2) a large number of victims must be targeted.”<sup>179</sup> The ICTY has interpreted the term civilian population to imply a course of conduct and to exclude isolated acts.<sup>180</sup> All those who died in the explosion involving Mr. Hariri’s convoy were civilians. However, a large number of victims were not targeted. The murder of 22 people does not rise to the level of expressing a “population.” If the murder of Mr. Hariri is taken in the context of the other terrorist attacks that have occurred in Lebanon, that may have been perpetrated by the same individuals, then the number of people who were targeted rises.<sup>181</sup> However, even then the number of people who were murdered does not reach the numbers present in cases that have prosecuted crimes against humanity before other courts. The attached chart shows that in all crimes against humanity cases the prosecuted crime always took place in the context of thousands of people dieing. The murder of Mr. Hariri does not take place in such a context.

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<sup>177</sup> *Id.* at art. 7.

<sup>178</sup> Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 649 (May 7, 1997).

<sup>179</sup> McAuliffe deGuzman, *supra* note 167, at 361.

<sup>180</sup> Hwang, *supra* note 141, at 503 (“the ICTY held that the term “‘directed against any civilian population’ ensures that what is to be alleged will not be one particular act but, instead, a *course of conduct*.”); Mohamed Elewa Badar, From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity, 5 SAN DIEGO INT’L L.J. 73, 104-05 (2004) [reproduced in the accompanying notebook at Tab 30] (“Trial Chamber in Tadic said “‘population’ elements is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity.”).

<sup>181</sup> Second Report of IIIC, *supra* note 69, at ¶ 72.

The ICC only takes crimes of sufficient gravity that rise to the level of an international crime.<sup>182</sup> Though there is much international attention around the murder of Mr. Hariri, the numbers of victims does not raise it to the level of sufficient gravity. The ICC is a court of last resort and the Rome Statute “places primary responsibility on states to investigate and prosecute crimes.”<sup>183</sup> Article 22, also, states that “the definition of a crime shall be strictly construed.”<sup>184</sup> In addition, when considering whether to initiate an investigation the Prosecutor should be mindful of the resources of the ICC.<sup>185</sup> Given all of the policy concerns for the ICC the murder of 22 people most likely does not rise to the level of constituting a “population.”

The second element in attacks directed against a civilian population requires there to be a multiple commission of acts. The multiple commission of acts implies that more than one attack needs to occur to establish a crime against humanity. However, as the Indian delegate to the Rome Conference stated, “‘anything more than one could be multiple.’”<sup>186</sup> In addition, the ICTY has indicated that a single act by a perpetrator can be a crime against humanity and that numerous attacks need not occur for the perpetrator to be held liable.<sup>187</sup> If the view of the Indian delegate is taken then the murder of 22 people may constitute multiple commissions. Perhaps a better argument, would be to place Mr. Hariri’s murder in the context of other terrorist attacks

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<sup>182</sup> Christopher Keith Hall, Suggestions Concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations 18 (Mar. 28, 2003), <http://www.icc-cpi.int/library/organs/otp/hall.pdf> [reproduced in the accompanying notebook at Tab 17].

<sup>183</sup> *Id.*

<sup>184</sup> Rome Statute, *supra* note 1, at art. 22.

<sup>185</sup> Hall, *supra* note 182.

<sup>186</sup> Hwang, *supra* note 141, at 502.

<sup>187</sup> Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 649 (May 7, 1997) (“Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable.”); *see also* Badar, *supra* note 178, at 104-05.

that have occurred in Lebanon and in that manner satisfy the requirement of multiple commission of acts.

**d. In Furtherance of a State or Organizational Policy to Commit Such an Attack.**

The third component to the definition of “attack directed against any civilian population” is that the attack be “in furtherance of a State or organizational policy.”<sup>188</sup> The inclusion of this requirement, as interpreted by the ICTY and the International Law Commission, is to require some degree of involvement of States or organizations in a crime against humanity.<sup>189</sup> Another reason for the inclusion of a policy requirement is to make sure that the attack is not isolated, but in furtherance of a broader policy.<sup>190</sup> Article 21 indicates that the ICC may look outside the Statute to other sources of international law in order to interpret cases.<sup>191</sup> The ICC may want to rely on the interpretation of the ICTY when considering if the murder of Mr. Hariri was “in furtherance of a State or organizational policy.”<sup>192</sup> The ICTY does not require formal proof of a policy, but is “willing to infer policy from the way acts are committed.”<sup>193</sup> This would be the best approach for the ICC because it would allow the ICC to maintain the elements of a widespread and systematic attack as alternatives.<sup>194</sup> In addition, the ICTY’s treatment of the

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<sup>188</sup> Rome Statute, *supra* note 1, at art. 7.

<sup>189</sup> Hwang, *supra* note 141, at 503.

<sup>190</sup> McAuliffe deGuzman, *supra* note 167, at 380 (“The policy element in the ICC Statute therefore represents a jurisdictional requirement: To rise to the level of a crime against humanity, an act cannot be isolated but must be linked to a broader policy.”).

<sup>191</sup> Rome Statute, *supra* note 1, at art. 21.

<sup>192</sup> *Id.* at art. 7.

<sup>193</sup> Hwang, *supra* note 141, at 503.

<sup>194</sup> *Id.*; McAuliffe deGuzman, *supra* note 167, at 372 (“The inconsistency in adopting a policy requirement alongside the disjunctive element of a widespread *or* systematic attack leads to some confusion regarding the meaning of the policy element and its relationship to the ‘systematic’ alternative.”)



policy question in *Tadic* is of particular importance because the Canadian proposal during the Rome Conference was based on the ICTY's decision in *Tadic*.<sup>195</sup>

The policy element does not require “proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy.”<sup>196</sup> This element is met if the perpetrator had the intention of furthering a policy of attacks against the civilian population.<sup>197</sup> In the case of the murder of Mr. Hariri the policy there was most likely a policy of intimidation and repression of the opposition movement in Lebanon. Evidence of the policy can be inferred from the tense political situation present in Lebanon, as well as, the threats that were made to Mr. Hariri and other political figures involved in the opposition movement. The Report of the Fact-finding Mission to Lebanon stated that Syria propagated “a culture of intimidation and impunity” within Lebanon.<sup>198</sup> The murder of Mr. Hariri was in furtherance of this policy because it eliminated Mr. Hariri as a contender in the upcoming parliamentary elections and may have been intended to intimidate other members of the opposition movement. After the attempted murder of Marwan Hemadeh, opposition leaders such as Mr. Hariri and Jumblatt feared for their lives and saw the attempted assassination as Syria's way of trying to maintain control of Lebanon.<sup>199</sup> Therefore, there was a policy of political intimidation.

#### **e. Mens Rea- Knowledge**

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<sup>195</sup> *Id.*

<sup>196</sup> ICC Elements of Crimes, *supra* note 10, at 9.

<sup>197</sup> *Id.*

<sup>198</sup> U.N. Fact-finding Mission in Lebanon, *supra* note 34, at 3.

<sup>199</sup> *Id.* at ¶ 13.

The last element in the chapeau is that of a mens rea of knowledge.<sup>200</sup> The perpetrator must know that his conduct or intend that his conduct “be part of a widespread or systematic attack against a civilian population.”<sup>201</sup> Article 30 provides guidance on the definitions of knowledge and intent.<sup>202</sup> Intention is defined in terms of conduct and consequence and knowledge is defined in terms of circumstances.<sup>203</sup> Case law from the ICTY and ICTR has indicated that knowledge of an attack can be constructive or actual.<sup>204</sup>

In his report to the UN, Mehlis stated that there was no way that the murder of Mr. Hariri could have occurred without the knowledge and approval of top-ranking Syrian and Lebanese security officials.<sup>205</sup> In addition, the intent element can be satisfied. A person has the requisite intent when he “means to engage in the conduct” and he “means to cause the consequence.” The setting up of an explosion to occur and resulting death of Mr. Hariri due to the explosion meet

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<sup>200</sup> Rome Statute, *supra* note 1, at art. 7; *see generally* Badar, *supra* note 178, at 120.

<sup>201</sup> ICC Elements of Crimes, *supra* note 10, at 9.

<sup>202</sup> Rome Statute, *supra* note 1, at art. 30. Article 30 reads as follows:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purpose of this article, a person has intent where:
  - a. In relation to conduct, that person means to engage in the conduct;
  - b. In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

*Id.*

<sup>203</sup> *Id.*; *see also* McAuliffe de Guzman, *supra* note 167, at 379.

<sup>204</sup> Badar, *supra* note 180, at 120 (Knowledge of the attack “may be inferred from a concurrence of concrete facts, such as the historical and political circumstances in which the acts occurred, the scope and gravity of the acts perpetrated, or the nature of the crimes committed and the degree to which they are common knowledge.”).

<sup>205</sup> Mehlis Report, *supra* note 12, at ¶ 124 (“There is probable cause to believe that the decision to assassinate former Prime Minister Rafik Hariri could not have been taken without the approval of top-ranked Syrian security officials and could not have been further organized without the collusion of their counterparts in the Lebanese security services.”).

the intention requirements, particularly when as Mehlis states the whole crime could not have occurred without the participation of the security officials. In addition, in the Commission's second report to the UN, Mehlis states that "after the assassination of Mr. Hariri, a high-level Syrian official supplied arms and ammunition to groups and individuals in Lebanon in order to create public disorder in response to any accusations of Syrian involvement."<sup>206</sup> Though, this is circumstantial evidence, it may be used to build up the case in favor of showing that the security officials had the requisite mens rea.

#### IV. CONCLUSION

If the UN Security Council refers the murder of former Prime Minister Rafik Hariri to the ICC there most likely is no reasonable basis for the Prosecutor to begin an investigation. Three factors must be considered when determining whether to initiate an investigation. First, a crime within the jurisdiction of the ICC must have occurred. The murder of Mr. Hariri does not constitute a crime against humanity because the murder of 23 people does not satisfy the definition of "population." However, all the other elements of a crime against humanity are satisfied. Murder was committed as part of a systematic attack directed against civilians in furtherance of a policy of political intimidation. Second, the case must be admissible under Article 17 of the Rome Statute. The murder of Mr. Hariri is admissible under Article 17 because none of the situations prohibiting the exercise of jurisdiction are present. Third, there must be no substantial reasons to believe that an acceptance of the case would not serve the interests of justice. No such reasons are present in this case. There are reasons to indicate that an international trial would better further the interests of justice than if a trial were to occur in Lebanon. Despite the satisfaction of most of the factors for the initiation of an investigation the

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<sup>206</sup> Second Report of IIIC, *supra* note 69, at ¶ 35.

ICC will most likely not accept a referral from the UN Security Council of the murder of Mr. Hariri because the gravity of the crime is not sufficient to satisfy all of the elements of a crime against humanity.

**Chart 1 – Number of Victims Sufficient for Crimes Against Humanity<sup>207</sup>**

Court	Defendant	Crime	Number Directly Victimized by Defendant	Total Number of Victims	Judgment
East Timor	Benjamin Sarmiento <i>Deputy Commander of the Tim Sasarat Ablai</i>	Murder and Deportation	5 killed  Thousands deported	12,000 deported by Sarmiento's group  250,000 total victims in East Timor crisis	12 years in prison for crimes against humanity
East Timor	Lieutenant-Colonel Soedjarwo <i>Indonesian Military Chief</i>	Failing to prevent the killing of Timorese	0	Over 1,000  250,000 total victims in East Timor crisis	5 years in prison for crimes against humanity
East Timor	Mateus Lao <i>Sakunar militia member</i>	Murder	One man was killed by Lao after trying to escape from East Timor	n/a—an apparently isolated incident  250,000 total victims in East Timor crisis	8 years in prison for crimes against humanity
Florida	Armando Fernandez Larios <i>Chilean Military Officer</i>	Direct participation in an extra-judicial killing squad (the “Caravan of Death”)	One complaint, but several mentioned as part of the action	70 by Larios’ Caravan of Death  2,603 under Pinochet	Found liable for, <i>inter alia</i> , crimes against humanity and was instructed to pay \$4 million in damages
ICTR	Eliezer Niyitigeka <i>Information Minister of Rwanda</i>	Murder, extermination, rape, and inhumane acts	Around 10 people were killed or raped by Niyitigeka himself.  His most damaging actions were his incitement of genocide via propaganda on Rwandan radio	800,000 killed during entire Rwanda crisis	Life in prison for crimes against humanity and genocide
ICTR	Jean Paul Akayesu	Did not prevent murder,	One murder by Akayesu himself	2,000 killed in Taba while	Life in prison for crimes against

<sup>207</sup> Pratheep Sevanthinathan, Did the Execution of Baghdad Merchants in July of 1992 Amount to Any Crimes Within the Jurisdiction of the Iraqi Special Tribunal? 47, chart 1 (Summer 2005), [www.law.case.edu/War-Crimes-Research-Portal](http://www.law.case.edu/War-Crimes-Research-Portal).

	<i>Mayor of Taba</i>	extermination, inhumane acts, torture, and rape  Participated in a murder	11 were killed under Akayesu's orders	Akayesu was mayor  800,000 killed during entire Rwanda crisis	humanity (also convicted of genocide)
ICTY	Dario Kordic <i>Vice-president of the Bosnian Croat Republic</i>	Ordering a massacre	Ordered the massacre of hundreds	Hundreds because of his orders  200,000 killed during entire Balkan crisis	25 years in prison for, <i>inter alia</i> , crimes against humanity
ICTY	Dragoljub Kunarac <i>Commander in the Serb Army</i>	Rape, torture, and enslavement	At least 16 raped by Kunarac himself	Dozens raped by Kunarac and his platoon  200,000 killed during entire Balkan crisis	28 years in prison for, <i>inter alia</i> , crimes against humanity