

The Co-operation of Third States with the International Tribunals

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Abstract

This paper explores the legal issues surrounding the co-operation with international tribunals, taking into consideration the fact that successful implementation of the international tribunals and the tribunals of international character rely solely upon the full co-operation of third states with these same tribunals. It is precisely because the work of these tribunals relates to other states, that the co-operation of those states with these tribunals is essential both in investigative procedures and to secure successful prosecutions. Due to the fact that the Special Tribunal for Lebanon (STL) is the first tribunal of international character in the Middle East, this paper will concentrate on the co-operation of third States with the STL and its judicial governance concerning third states. It will take into consideration how the international legal obligations that have constructed the posture of the STL have impacted upon its judicial relationship as regards third states co-operation.

While the Agreement between the United Nations (UN) and Lebanon provides a solid framework for co-operation between the STL and Lebanon, the Security Council Resolution 1757 (2007) is silent as regards the duty of third states to assist the Tribunal. As a result, the STL will be confronted with a variety of obstacles and problems in obtaining co-operation of third states-including Syria- which may seriously impede the functioning and effectiveness of the STL as a whole and undermine its legal capacity.

The importance of Syrian co-operation with the STL does not just bear upon the functioning and effectiveness of the legal capacity of the STL; but rather any failure on the part Syrian co-operation could also have serious consequences for Syria itself. Conditional or limited co-operation would benefit Syria in several ways. It would protect Syria from being placed under any threats of the UN issuing resolutions under Chapter VII of the UN Charter to oblige all states to co-operate with the STL. Such resolutions could impact negatively upon Syria as a whole. Any negative impact upon Syria as a result of its failure to co-operate with the STL could include the possibility of the UN imposing economic sanctions or even the threat of interventional force, although the latter may be unlikely but nevertheless may still exist as a possible, albeit extreme, course of action to force Syria to co-operate.

The importance of Lebanon to co-operate with the STL is also beneficial for Lebanon. Firstly, Lebanese co-operation will achieve the objective of the STL which is to enable and facilitate the full extent of justice to run its course. This is not just for the benefit of the victims and their families, but also to address and deter the political assassinations and trans-boundary terrorism which has affected Lebanon.

Therefore, this article attempts to address the co-operation issues related to the tribunals. As the STL is the first tribunal in the Middle East, it will be this tribunal which will be the subject of detailed study in this paper.

This paper will then conclude whether Syria is within its legal remit to choose whether to co-operate with the STL or not or whether it retains the right, as set out in its own Constitution, to try any potential suspects under Syrian law and within the Syrian judicial system.

Introduction:

The success of the international tribunals and the tribunals of international character to carry out their missions is dependent upon the co-operation of third states with these tribunals. As the work of these tribunals relates to other states, co-operation of those states with these tribunals is a very important factor if they are to be able to function and deliver effective justice. In fact, it is imperative that such co-operation is forthcoming. As such, the aim of this paper is to clarify the importance of co-operation measures in general and specifically for both Syria and Lebanon and to explain why such co-operation is so important. However, this could have an impact upon the relationship between Syria and Lebanon and can have specific consequences. The question is as to what is the importance of this issue in contemporary time and place and why does it matter?

The trials *in absentia* commenced before the Special Tribunal for Lebanon (STL) on 16 January of this year, 2014.¹ These trials will seek to prosecute accused persons who will not be physically present at the STL. Some of these suspects may have absconded to a third state outside their own national territory or may be in hiding within their own country. It is, under such circumstances therefore, essential that the STL will need co-operation from any state regarding these persons. This will include those states in which the suspect is a national and may be still residing within its borders, or any other state where it is suspected or reported that the individual(s) may have fled to. It is thereby extremely important to address the problems relating to the co-operation with the STL by Lebanon, and third states. This article attempts to answer the challenging question as to whether or not third states - including Syria, (which is the state most concerned with the Tribunal), - are under any obligation to co-operate with the STL both in investigative procedures and in securing successful prosecutions. This will be considered despite the silence of the Security Council Resolution 1757 (2007) as regards the duty of third states to assist the Tribunal.

Therefore, this paper will look at a number of essential aspects. Firstly, by examining the co-operation of third states with the International Tribunals which was derived from the precedent established in the International Criminal Tribunal for Yugoslavia (ICTY) concerning the obligations imposed upon states to co-operate fully with all requests relating to the investigation and prosecution of persons accused of committing serious

1- Ayyash et al. (STL-11-01) STL-11-01/PT/PTJ/F1026/A02/PRV/20130802/R242559-R242602/EN/af

violations of international humanitarian law. States were thus compelled to comply with any orders issued by the Trial Chamber. This recourse was followed by the Statute of the International Criminal Trial for Rwanda (ICTR) (Chapter I). Secondly, it will be useful to analyse the co-operation with the Tribunals of International Character using the examples of the Special Court of Sierra Leone (SCSL) and the Extraordinary Chambers of Cambodia (ECCC) (Chapter II). Thirdly, it will be important to outline the relationship between Lebanon and the Special Tribunal for Lebanon (STL) (Chapter III) by taking into account the significant Resolution of the Security Council (1757) (Section I). Fourthly, also it is important to address whether third States are obliged to co-operate with the STL (Section II). Finally, the paper looks at the position of Syria and its legal relationship with the STL and whether or not the STL can exercise the same legal binding obligations for co-operation from other states as did the former International Tribunals (Chapter IV).

Chapter One

Co-operation with the International Tribunals

The Statute of the ICTY obliged all states to co-operate with it in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. Therefore it was incumbent upon states to comply without undue delay with any request for assistance or an order issued by the Trial Chamber. Such requests included, but were not limited to: the identification and location of persons; the taking of testimony and the production of evidence; the service of documents; the arrest or detention of persons; the surrender or the transfer of the accused to the International Tribunal.² The Statute of the ICTR imposed the same obligations on states.³ Neither

2 - Article (29) of the Statute of the ICTY: **Co-operation and judicial assistance:**

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.

3 - Article (28) of the Statute of the ICTR: **Cooperation and Judicial Assistance:**

1. States shall cooperate with the International Tribunal for Rwanda 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;

statute of either the ICTY or the ICTR gives specific allowance for states to refuse co-operation in specific cases or on specific grounds, and any dispute between the tribunals and any states regarding the issues of state co-operation is settled unilaterally by a decision of the tribunals.⁴

Chapter Two

Co-operation with the Tribunals of International Character

In all of these respects, the situation is different where the co-operation of states with hybrid tribunals is concerned. Of major importance here are the differing obligations of the state on whose territory a hybrid tribunal has its seat, or who has been otherwise especially involved in its creation, on the one hand, and those of third states on the other. There is another difference between the two types of tribunals concerning issues of state co-operation. While both the ICTY and the ICTR have primacy over national courts, the same is not generally true for the hybrid tribunals. The statute of the tribunal with international character should make explicit reference to the fact that it has primacy over the national courts of the concerned state. There must be a clear distinction between the state especially involved in the creation of the said tribunal and third states. The lack of jurisdictional primacy of hybrid tribunal over national courts in third states may seriously impede the ability or willingness of these states to co-operate with the tribunal.⁵

The ideal example of the tribunals of international character is the Sierra Leone Court (SCSL), in which agreement between the U.N. and Sierra Leone's government obliged the latter to co-operate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation, and the Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to: identification and location of persons; service of documents; arrest or detention of persons; transfer of accused persons

(d) The arrest or detention of persons;

(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

4 - **BERT SWART**, Cooperation Challenges for the Special Tribunal for Lebanon, **5 (5)** Journal of International Criminal Justice, 2007, p. 1154.

5- Ibid.,

to the Court.⁶ The same obligation is mentioned in the Agreement between the U.N. and the Government of Cambodia in respect to the trial of the perpetrators of crimes during the period of the rule of the Khmer Rouge.⁷

Chapter Three

The Co-operation with the Special Tribunal for Lebanon (STL)

Section I: The Co-operation between Lebanon and the STL:

The co-operation between Lebanon and the STL is governed by the 'Agreement' between the Republic of Lebanon and the U.N. which came into force by the famous Resolution of the Security Council.⁸ This means that the obligations in this Agreement - including the co-operation with the Tribunal — are binding because they are mentioned in the Security Council Resolution which was issued under Chapter VII of the U.N. Charter.⁹ Therefore according to the Agreement, the Lebanese Government shall co-operate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall also facilitate access of the Prosecutor and defence counsel to

6- Article (16) of The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002:

Article 16: Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.
2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:
 - (a) Identification and location of persons;
 - (b) Service of documents;
 - (c) Arrest or detention of persons;
 - (d) Transfer of an indictee to the Court.

7 -Article (25) of the 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 (ECCC Agreement) Signed on 6 June 2003:

Article 25

Obligation to assist the co-investigating judges, the co-prosecutors and the Extraordinary Chambers The Royal Government of Cambodia shall comply without undue delay with any request for assistance by the co-investigating judges, the co-prosecutors and the Extraordinary Chambers or an order issued by any of them, including, but not limited to:

- a. identification and location of persons;
- b. service of documents;
- c. arrest or detention of persons;
- d. transfer of an indictee to the Extraordinary Chambers.

8 -S/RES/1757(2007) the situation in the Middle East.

9- **BERT SWART**, op. cit., p. 1154.

sites, persons and relevant documents required for the investigation. The Government shall comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to: identification and location of persons; service of documents; arrest or detention of persons; transfer of accused persons to the Tribunal.¹⁰ Thus, there is an all-encompassing and unconditional obligation for Lebanon to co-operate with the STL.¹¹ On the other hand, the STL's Statute provides that, within its jurisdiction, the STL shall have primacy over the national courts of Lebanon.¹² Thus, upon the assumption of office of the Prosecutor, as determined by the Secretary-General, and no later than two months thereafter, the Special Tribunal shall request the national judicial authority seized with the case of the attack against Prime Minister Rafik Hariri, and others, to defer to its competence. The Lebanese judicial authority shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal.¹³ In addition, at the request of the Special Tribunal, the national judicial authority seized with any of the other crimes committed between 1 October 2004 and 12 December 2005, or a later date decided pursuant to Article 1, shall refer the results of the investigation and a copy of the court's records, if

10 -Article 15(1)of theAgreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon signed in 2007:

Article 15

Cooperation with the Special Tribunal

1. The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall facilitate access of the Prosecutor and defence counsel to sites, persons and relevant documents required for the investigation.
2. The Government shall comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to:
 - (a) Identification and location of persons;
 - (b) Service of documents;
 - (c) Arrest or detention of persons;
 - (d) Transfer of an indictee to the Tribunal.

11- **BERT SWART**, op. cit., p. 1155.

12 - Article 4(1) of the Statute of the STL:

Concurrent jurisdiction:

1. The Special Tribunal and the national courts of Lebanon shall have concurrent jurisdiction. Within its jurisdiction, the Tribunal shall have primacy over the national courts of Lebanon.

13- Article 4(2) of the Statute of the STL:

2. Upon the assumption of office of the Prosecutor, as determined by the Secretary-General, and no later than two months thereafter, the Special Tribunal shall request the national judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer to its competence. The Lebanese judicial authority shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal.

any, to the Tribunal for review by the Prosecutor.¹⁴ At a further request of the Tribunal, the national authority in question shall defer to the competence of the Tribunal. It shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, and persons detained in connection with any such case shall be transferred to the custody of the Tribunal.¹⁵ Subsequently, the national judicial authorities shall regularly inform the Tribunal of the progress of their investigation. At any stage of the proceedings, the Tribunal may formally request a national judicial authority to defer to its competence.¹⁶ This will assist in the prevention of the traditional problems of international co-operation in criminal matters, deriving from the existence of concurrent jurisdictions, arising between Lebanon and the STL.¹⁷ It is relevant to note here that, over the past two years, a practice of large-scale and systematic co-operation has developed between Lebanon and the International Independent Investigation Commission (UNIIC), established in 2005,¹⁸ which is charged with the task of assisting the Lebanese authorities in investigating some of the crimes over which the STL now has jurisdiction.

Although two investigating committees were established within both of the Yugoslavia¹⁹ and Rwanda²⁰ Tribunals, the Statutes of each are silent as regards the regulation of their relations with these investigating committees. Therefore the inclusion of provisions regulating the relations between the STL and the Lebanese judicial authorities, as well as with UNIIC, is an interesting innovation. This novelty may be explained by a

14- Article 4(3) (a) of the Statute of the STL:

3. (a) At the request of the Special Tribunal, the national judicial authority seized with any of the other crimes committed between 1 October 2004 and 12 December 2005, or a later date decided pursuant to article 1, shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, for review by the Prosecutor;

15- Article 4(3) (b) of the Statute of the STL:

(b) At the further request of the Tribunal, the national authority in question shall defer to the competence of the Tribunal. It shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, and persons detained in connection with any such case shall be transferred to the custody of the Tribunal;

16- Article 4(3) (c) of the Statute of the STL:

(c) The national judicial authorities shall regularly inform the Tribunal of the progress of their investigation. At any stage of the proceedings, the Tribunal may formally request a national judicial authority to defer to its competence.

17- **BERT SWART**, *op. cit.*, p. 1155.

18- S/RES/1595 (2005) Middle East.

19- S/RES/780(1992) Former Yugoslavia.

20- René Degni-Segui was designated Special Rapporteur of the Commission on Human Rights (paragraph 20, Resolution S-3/1 of 25 May 1994) and submitted several detailed Report on the situation of human rights in Rwanda pertaining notably to the crimes documented there. See: **CECILE APTEL**, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, **5(5) Journal of International Criminal Justice**, 2007. Fn. 33.

combination of factors. First, the restriction of the subject-matter jurisdiction of the STL to offences defined under the Lebanese Penal Code moulded the activities of the international prosecutor around those of the Lebanese judicial authorities, and by the same token led to an increased need for co-operation between them. Second, the nature of the crimes, their complexity, the fact that the attack against Hariri took place years ago and the central role of forensic evidence in successfully investigating and prosecuting terrorist attacks, all probably lead to a clear need for co-operation among those who have already investigated these cases as well as a fresh new jurisdiction. Third, the comparatively narrow mandate of the STL seems to have encouraged the drafters and the Security Council to attempt to expedite the entire process, and to aim to ensure that the STL would not 'reinvent the wheel' but rather incorporate the work and results of others. Fourth, UNIIIC has clearly indicated that it adopted an internal procedure 'based on relevant Lebanese law and international standards,' with consideration of the Lebanese law and judicial procedures.²¹ So as to 'help ensure that any information collected or obtained by the Commission is admissible in future legal proceedings, notably before a tribunal of an international character.'²²

While the extent of the co-operation that the STL receives from both the Lebanese judicial authorities and the UNIIIC will significantly impact upon its capacity to render justice, the Tribunal may also need to be supported by other domestic jurisdictions. Some of the cases falling within its mandate may also be investigated outside of Lebanon.²³ However, the Statute does not specify that the STL has primacy over any domestic judicial system other than the Lebanese legal system. Neither the Statute nor Resolution 1757 provides an obligation for states other than Lebanon to cooperate with the STL. Despite the fact that the U.N Secretary-General had proposed in his Report on the STL that the Security

21- CECILE APTEL, op. cit., pp. 1115-6.

22- S/2006/375 Fourth report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005) and 1644 (2005), Para. 111:

111. While based on relevant international standards, the internal procedure takes into account Lebanese law and judicial procedures, as well as the practice of the Commission since its establishment. In defining the standards to be applied, the Commission considered the procedures of international criminal jurisdictions and the minimum guarantees afforded by international criminal law and international human rights law. The internal procedure will therefore help ensure that any information collected or obtained by the Commission is admissible in future legal proceedings, notably before a tribunal of an international character.

23- This is the case, for instance, concerning Samir Kassir, who had both French and Lebanese nationalities. The French judicial authorities opened an investigation into his assassination in July 2005, following a request by his family. See: CECILE APTEL, op. cit., fn 28.

Council should consider obliging all states to co-operate, Resolution 1757 (2005) does not actually create such an obligation. As the U.N. Secretary-General had proposed that the Security Council should only *consider* (emphasis added) obliging all states to co-operate this leaves the choice open for the Security Council as to whether they feel any obligations should be imposed or not. This lack of enforcement may cause problems for the STL, especially when coercive measures, such as arrests or seizures, are concerned. It may become particularly difficult depending, notably, on the nationality of those accused of the crimes, and whether they benefit from the support of a state, for instance of which they are a national or a resident. This is especially true if those accused have the nationality of a country whose laws protects its nationals from extradition, or where they hold positions granting them immunity under their national laws. States may even refuse to co-operate with the STL on the basis of the principle of concurrent jurisdiction.²⁴

Section II— The cooperation of Third States with the STL:

Despite the Security Council issuing its Resolution (1757) under Chapter VII of the U.N. Charter, this Resolution was void of any signal as regards the commitment of other states to co-operate with the Special Tribunal. It does not include an invitation or a suggestion to these states to co-operate with the tribunal.²⁵ This made it a unique Resolution of the Security Council in comparison with its previous Resolutions which repeated its demand upon all states to co-operate with the UNIIIC particularly in providing it with any information relevant to the terrorist attack that killed the ex-Lebanese Prime Minister and others.²⁶ The U.N. Secretary-General referred to the importance of maintaining the logic of other Security Council resolutions regarding Lebanon, under which Member States are obliged to co-operate fully with the Commission in its investigation of the Hariri assassination. The Council may wish, at the appropriate stages and as necessary, to consider similar measures to enable the Special Tribunal to effectively prosecute those responsible for the attack against Rafik Hariri and for other attacks falling within the jurisdiction of the tribunal.²⁷ However, the Security Council did not take this suggestion

24- CECILE APTEL, *op. cit.*, p. 1115.

25- JAMES COCKAYNE, *the Special Tribunal for Lebanon- A Cripple from Birth? Foreword*, 5(5) *Journal of International Criminal Justice* 2007, p. 1063.

26- S/RES/1595(2005) Middle East, S/RES/1636(2005) Middle East, S/RES/1644(2005) Middle East.

27- UN. Doc. S/2006/893, Report of the Secretary-General on the Establishment of the Special Tribunal for Lebanon, Para. 53:

53. In maintaining the logic of Security Council resolutions 1595 (2005), 1636 (2005) and 1644 (2005), under which Member States are obliged to cooperate fully with the Commission in its investigation of the Hariri assassination, the Council may wish, at the appropriate stages and as necessary, to consider similar measures to enable the special tribunal more effectively to prosecute

into consideration, so we can conclude that the third states are free of any obligation of co-operation with the STL. Therefore it is up to these states to decide to co-operate with the Tribunal or not, needless to say that due to the special circumstances relating to the creation of the Tribunal, and the possibility of the involvement of foreign persons in committing the crimes within the subject-matter jurisdiction of the Tribunal, the success of this Tribunal may rely considerably, if not totally, on the co-operation of third states. It is therefore imperative to impose an obligation on these states to co-operate with the Tribunal.²⁸

The Statute of the STL does not vest it with jurisdictional primacy over national courts of third states. Consequently, these states may refuse co-operation on the grounds that their national courts have concurrent jurisdiction over crimes with regard to which co-operation could be assistance to the STL.²⁹ Some jurists consider that the STL has a very close relation with the national courts of third states, because the Statute of the Tribunal provides the principle on *non bis in idem* so no person shall be tried before a national court of Lebanon for acts for which he or she has already been tried by the Special Tribunal.³⁰ Any person who has been tried by a *national court* may be subsequently tried by the Special Tribunal if the national court proceedings were not impartial or independent, were designed to shield the accused from criminal responsibility for crimes within the jurisdiction of the Tribunal or the case was not prosecuted.³¹ As this article uses the phrase "*a national court*" thereby not restricting the applicability of the *non bis in idem* rule to Lebanese trials, and so, by implication, jurists consider that the Tribunal must recognise valid trials held in another jurisdiction.³²

those responsible for the attack against Rafiq Hariri and for other attacks falling within the jurisdiction of the tribunal.

28- **WILLIAM SCHABAS**, The Special Tribunal for Lebanon: is a "tribunal of an international character" equivalent to an "international criminal court"? , **21(2)** Leiden Journal of International Law, 2008, p. 515.

29- **BERT SWART**, *op. cit.*, p. 1156.

30- Article 5(1) of the STL Statute:

Article 5: ***Non bis in idem***:

1. No person shall be tried before a national court of Lebanon for acts for which he or she has already been tried by the Special Tribunal.

31- Article 5(2) of the STL Statute:

2. A person who has been tried by a national court may be subsequently tried by the Special Tribunal if the national court proceedings were not impartial or independent, were designed to shield the accused from criminal responsibility for crimes within the jurisdiction of the Tribunal or the case was not diligently prosecuted.

32- **STEPHEN KAY**, International Terrorism: A Special Tribunal for Lebanon- Syria, Lebanon, and the Assassination of Former Premier Rafik Hariri, **13** (Supp) UCL jurisprudence Review, 2007.p. 22.

In all of these respects, the position of the STL closely resembles that of the Special Court for Sierra Leone (SCSL) and the Cambodian Extraordinary Chambers (ECCC). As far as the SCSL in particular is concerned, the Secretary-General of the U.N. has in the past equally suggested that the Security Council take measures to oblige third states to co-operate with the Court. He even made the proposal that the Council endow the SCSL with Chapter VII powers *'for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court'*.³³

However, the Security Council never adopted a resolution establishing the Court. It merely welcomed the launch of the SCSL after it had been established pursuant to the Agreement between the United Nations and Sierra Leone.³⁴ In its decision in 2004, the Appeal Chamber of the SCSL identified an obligation for all states to co-operate with the Special Court derived partly from the fact that the Agreement between the U.N. and Sierra Leone on the establishment of the SCSL *'is an agreement between all members of the United Nations and Sierra Leone'*, and partly from the fact that it had jurisdiction over international crimes.³⁵

33- S/2000/915, Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone, Para. (10):

10. The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. Consequently, it has the power to request at any stage of the proceedings that any national Sierra Leonean court defers to its jurisdiction (article 8, Para. 2 of the Statute). The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.

34S/RES/1436(2002) Sierra Leone.

35Prosecutor vs. Charles Taylor SCSL- 03- 01-1-05, 31 May 2004, Para. 38, 41:

38. Much issue had been made of the absence of Chapter VII powers in the Special Court. A proper understanding of those powers shows that the absence of the so-called Chapter VII powers does not by itself define the legal status of the Special Court. It is manifest from the first sentence of Article 41, read disjunctively, that (i) the Security Council is empowered to 'decide what measures not involving the use of armed force are to be employed to give effect to its decision;' and (ii) it may (at its discretion) call upon the members of the United Nations to apply such measures. The decisions referred to are decisions pursuant to Article 39. Where the Security Council decides to establish a court as a measure to maintain or restore the international peace and security it may or may not, at the same time, contemporaneously, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation. Its decision to do so in furtherance of Article 41 or Article 48, should subsequent events make that course prudent may be made subsequently to the establishment of the court. It is observed that in carrying out its duties under its responsibility for

While the first argument has been appropriately criticised by a majority of commentators, the second argument is irrelevant where the Special Tribunal is concerned since it solely has jurisdiction over crimes under Lebanese law.³⁶ In these circumstances, the co-operation of third states with the STL depends on three factors: the ability, the duty and the willingness of these states to provide it. The ability of third states to co-operate in the investigation of terrorist and related crimes is mainly a matter of domestic law. A general threshold in national laws that may determine the ability of states to co-operate is the dual criminality requirement. Dual criminality is often a precondition to extradition. It is also a rather common requirement for applying coercive measures for the purpose of collecting evidence. While it may probably be assumed that acts of terrorism constitute crimes in all national legal systems, the same is not necessarily true for all other offences listed in Article 2 of the Statute of The STL, or for all forms of individual criminal responsibility listed in Article 3. Meanwhile, where the dual criminality requirement will not present problems, traditional exceptions to international co-operation may well do so. One may, for instance, think of exceptions with regard to political offences, the nationality of the alleged offender, the locus of the crime concurrent jurisdiction or with regard to trails *in absentia* or other impediments aiming at the protection of fundamental individual rights. The duty of states to co-operate in the investigation of terrorist crimes is determined by international treaties, in particular those with regard to terrorism, as well as by resolutions of the Security Council, those adopted under Chapter VII in particular.³⁷

the maintenance of international peace and security, the Security Council acts in behalf of the members of the United Nations. The Agreement between the United Nations and Sierra Leone is thus an agreement between *all* members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the International Community. The Special Court established in such circumstances is truly International.

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 41. For the reasons that have been given, it is not difficult to accept and gratefully adopt the conclusions reached by Professor Sands who assisted the court as *amicus curiae* as follows:

- a) The Special Court is not part of the judiciary of Sierra Leone and is not a national court.
- b) The Special Court is established by treaty and has the characteristics associated with the classical international organisations (including legal personality; the capacity to enter into agreements with international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members).
- c) The competence and jurisdiction *ratione materiae* and *ratione personae* are broadly similar to that of ICTY, and ICTR, and the ICC, including in relation to the provisions confirming the absence of entitlement of any person to claim immunity.
- d) Accordingly, there is no reason to conclude that the Special Court should be treated as anything other than an international tribunal or court, with all that implies for the question of immunity for a serving Head of State.

³⁶BERT SWART, *op. cit.*, fn. 19.

³⁷- *Ibid.*, p. 1157.

The seventeen different events in Lebanon over which the jurisdiction of the STL potentially extends have, on various occasions, been considered by the Security Council, to amount to terrorist acts or terrorist crimes.³⁸

As far as international treaties are concerned, one may specifically consider the most important multilateral conventions on terrorism, such as The Convention on the Safety of United Nations and Associated Personnel;³⁹ The Convention for the Suppression of Terrorist Bombings;⁴⁰ The International Convention for the Suppression of Financing Terrorism,⁴¹ and The United Nations Convention against Transnational Organised Crime.⁴² As is well known, Lebanon is only a party to The Convention on the Safety of United Nations and Associated Personnel. It is relevant to note here that these conventions do not contain an unconditional obligation for parties to extradite persons. Instead, they have established an obligation either to extradite or to prosecute. In its resolution 1636, and in several presidential statements on the situation in Lebanon, the Security Council has, on a number of occasions, referred to the obligations of member states to co-operate with the Lebanese authorities under three general Security Council resolutions on terrorism.⁴³

These previously mentioned Resolutions failed to present a comprehensive definition of terrorism which was universally welcomed by all states around the world, taking into consideration that the 11 September 2001 terrorist attacks increased the differences between states regarding the definition of terrorism. However, the Resolutions concentrate on the actions commonly agreed as terrorist actions upon which these Resolutions imposed a duty on the states to criminalise such actions. It surely was not the intention of the Security Council at the time of the adoption of these Resolutions to give states a blank cheque to fight terrorism according to their own definitions. This would pave the way towards abuse and discriminatory practices allowing states to stigmatise and suppress political or other organisations they dislike under the guise of the fight against

38- SC Resolutions: 1595, 1636, 1644, 1686, 1748, 1757.

39- The United Nations Convention on the Safety of United Nations and Associated Personnel, 1994.

40- The United Nations Convention for the Suppression of Terrorism Bombings, 1997.

41- The International Convention for the Suppression of the Financing Terrorism, 1999.

42- The United Nations Convention against Transnational Organized Crime, 2000.

43- S/RES/1373(2001) Threats to international peace and security caused by terrorist acts, S/RES/1566(2004) Threats to international peace and security caused by terrorist acts, S/RES/1624(2005) Threats to international peace and security (Security Council Summit 2005), See also the statement of the president of the Security Council S/PRST/2005/4. The Security Council repeated its call to all States to co-operate in fighting terrorism in all of the following statements: S/PRST/2005/22, S/PRST/2006/46, and S/PRST/2007/18. It is important to say that the SC Resolutions: 1373, 1566 both issued under Chapter VII of the UN Charter.

terrorism.⁴⁴ Therefore, these particular Resolutions contained the main elements of a general obligation for states to either extradite or prosecute terrorist suspects. The obligation for states to ensure that persons responsible for terrorist acts are brought to justice and the request that politically-motivated claims are not recognised as admissible grounds for refusing the extradition of terrorist suspects had already been included.⁴⁵ The Resolutions facilitate international co-operation where the dual criminality requirement and the political offence exception are concerned. Moreover, like the conventions mentioned earlier they provide that states must either extradite or prosecute any person involved in terrorist acts. Finally these Resolutions contain autonomous obligations for states, the fulfilment of which does not depend on requests for co-operation from other states. Examples are the obligations to criminalise certain acts, to freeze assets and to prevent terrorist acts, including provision of early warning to other states by the mutual exchange of information.⁴⁶

Meanwhile, the basic question preceding all others is whether or not the STL is entitled to request co-operation from third states under national laws, international conventions or general Security Council resolutions? As far as national laws are concerned, the prospects of the Tribunal seem to be limited. Notwithstanding the fact that the obligation to co-operate is enshrined in the statutes of the ICTY and the ICTR has led many states to adapt their legislation to a new situation. It is probably safe to assume that, in a large majority of states, legislation is still primarily focused on co-operation in criminal matters between states. It is also equally safe to assume that most national statutes enabling the competent authorities to co-operate with the ICTY⁴⁷ and the ICTR⁴⁸ or, for that matter, the ICC do not cover co-operation with the Special Court for Sierra Leone, the Special Tribunal for Lebanon or any other hybrid tribunal that might be established in the future. The same is even truer for international conventions on co-operation in criminal matters, whether they are concerned with terrorism or with other matters. These conventions are concluded by states for their mutual benefit. The Special Tribunal cannot become a party to them. Finally, the Security Council resolutions on terrorism do not alter the situation. According to these resolutions obligations to co-operate in the investigation and the prosecution of terrorist crimes are obligations between member states, with autonomous obligations being the only exceptions.⁴⁹

44- **ANDREA BIANCHI**, Security Council's anti-terror Resolutions and their implementation by member states: an overview,4(5)Journal of International Criminal Justice, 2006, pp. 1048- 50.

45- Ibid., p. 1054.

46- **BERT SWART**, op. cit., p. 1158.

47 - Article (29) of the Statute of the ICTY.

48 - Article (28) of the Statute of the ICTR.

49 - **BERT SWART**, op. cit., pp. 1158- 9.

Two paradoxes present themselves here. The first is that an internationalised tribunal established by the Security Council for the very purpose of adjudicating terrorist crimes has fewer means of obtaining the assistance of U.N. member states than these states mutually have pursuant to national statutes, international conventions and Security Council resolutions. A second, and perhaps unforeseen unintended, paradox flows from the fact that the STL has priority of jurisdiction over the national courts of Lebanon. Once the STL has decided to investigate certain events and to prosecute certain accused persons, the Lebanese courts are prevented from exercising their jurisdiction over the same offences and the same persons. As a consequence, the competent Lebanese authorities can no longer request the assistance of other states in these matters; to request international assistance necessarily pre-supposes jurisdiction over the offences with regard to which assistance is requested. Thus, the opportunities for international co-operation have been reduced rather than enlarged by the creation of the STL.⁵⁰

It is already understood that the STL — like the SCSL — is a tribunal of international character, and not a national Lebanese court, and if it was a national one, it has the right to demand international co-operation. Where domestic law enables third states to co-operate with the STL but international law does not oblige them to do so, the crucial question becomes whether and to what extent they are willing to do so?⁵¹ Here, the various reports of the International Independent Investigations Commission provide interesting information. In its Eighth Report, the Commission remarked that it had continued to receive ‘general positive responses’ to its requests for assistance from third states.⁵²

However, some other UNIIC reports make it clear that the Commission has occasionally been confronted with difficulties *vis-à-vis* a number of states.⁵³ All reports underline the

50- Ibid., p. 1159.

51- Ibid.,

52- UN Doc. S/2007/424, UNIIC Eight Report, p. 2:

During the reporting period, the Commission continued to receive generally positive responses to its requests for assistance to Lebanon, the Syrian Arab Republic and other States. Cooperation from all States remains crucial to the Commission’s work, and the Commission calls upon all States to be forthcoming in their responses to its requests for assistance.

53- UN Doc. S/2006/962, UNIIC Sixth Report § 103:

103. Although most States have responded positively to the Commission’s requests and have actively assisted in its work, including by facilitating witness interviews and providing other support and information, some States have provided late or incomplete responses, or have not responded at all. At the end of the reporting period, responses to 22 requests sent to 10 separate Member States are overdue.

The UN Doc. S/2007/150, Seventh Report, § 102:

102. In its last report, the Commission noted that responses to requests from 10 Member States were overdue. In view of the importance of the assistance requested and the time frame in which it aims to

paramount importance of the support of third states. They also stress the fact that the Commission 'will be able to effectively carry out its mandate only if it can count on the co-operation of all states.'⁵⁴ It may be recalled here that, in its resolutions,⁵⁵ the Security Council called upon all states 'to co-operate fully' with the Commission, while at the same time it has refrained from applying the same mandate where the STL is concerned. If the STL is unable to rely on a solid general legal basis for requesting co-operation from third states, the question arises as to what alternatives are available?

One solution could be for the STL to conclude agreement with third states, as it is entitled to do pursuant to the Agreement between the United Nations and Lebanon.⁵⁶ Another solution could be for the Security Council, acting under Chapter VII of the Charter, to oblige on an ad hoc basis, an unwilling individual state to comply with a request for assistance from the Tribunal. Precedents are provided by a number of resolutions of the Council, adopted in the past under Chapter VII and demanding individual states to extradite persons suspected of having committed terrorist crimes to another state or to other states. For example, the Security Council imposed economic sanctions on Libya because it refused to admit its responsibility in relation to the explosion of the *Pan-American* plane over Lockerbie in Scotland in 1988. In addition, Libya also refused to extradite one of the suspects of this terrorist explosion.⁵⁷ Economic sanctions against Libya continued,⁵⁸ until the U.N. Secretary —General presented a report stating that Libya extradites the two suspects to the Scottish authorities to be tried under Scottish law before

complete its investigative activities, the Commission concentrated on following up on all outstanding requests for assistance. The Commission held a series of meetings with relevant ambassadors to discuss past requests. As a result of those meetings, almost all outstanding matters were resolved to the Commission's satisfaction, with responses received, and, where appropriate, mechanisms introduced to facilitate the resolution of pending issues.

54- UN Doc. S/2007/424, UNIIIC Eight Report§ 100:

100. As the Commission noted in its last report to the Council, the Commission will be able to effectively carry out its mandate only if it can count on the cooperation of all States to provide the Commission with the information requested, access to certain individuals, including current and past Government officials, and other forms of technical assistance.

55- S/RES/1595 (2005), 1636 (2005) and 1644 (2005).

56 -Article 7 of the Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon:

Article 7 Juridical capacity

The Special Tribunal shall possess the juridical capacity necessary:

.....(d) To enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Tribunal.

57- S/RES/748(1992) Libyan Arab Jamahiriya.

58- S/RES/1192(1998) On Lockerbie case.

a Scottish court.⁵⁹ On 22 December 2013, the governments of the United Kingdom (UK), United States of America (USA) and Libya stated that they would co-operate to reveal “the full facts” of the bombing.

Also, the Security Council Resolution imposed sanctions on Sudan due to its refusal to extradite the three suspects of the attempted assassination of the former Egyptian President in Ethiopia.⁶⁰ This also included its Resolution to impose an aerial embargo upon Sudan for the same reason.⁶¹ Additionally, there was also the Resolution to impose economic sanctions on the Taliban in Afghanistan in an attempt to oblige it to extradite the ex-leader of *al-Qaeda* and to cease hosting the Afghani territories to train terrorists.⁶² The Security Council adopted another Resolution increasing sanctions, and also applying previous Security Council Resolutions obliging all states to cut diplomatic relations with the Taliban.⁶³ Following this was the Security Council Resolution that mandated the U.N. mission in Liberia (UNMIL) to arrest the former President of Liberia, Charles Taylor, in the event of his return to Liberia and to transfer him to Sierra Leone for prosecution before the SCSL.⁶⁴ However, the experience of the ICTY, the ICTR and the SCSL has shown that this procedure to request the assistance of the Security Council may not always be reliable, for it is subject to the usual political manoeuvres within the Security Council.⁶⁵

⁵⁹*Abdelbaset al-Megrahi*, a Libyan Security Official, was the only person convicted over the Lockerbie bombing and given a life sentence in 2001. In 2009, he was freed by the Scottish Government due to his ill health and he died in 2012. His family continue to fight against his conviction.

⁶⁰- [S/RES/1054\(1996\)](#) Letter dated 9 January 1996 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the Security Council concerning the extradition of the suspects wanted in the assassination attempt on the life of the President of the Arab Republic of Egypt in Addis Ababa, Ethiopia, on 26 June 1995 (S/1996/10)

⁶¹- S/RES/1070(1996) Letter dated 9 January 1996 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the Security Council concerning the extradition of the suspects wanted in the assassination attempt on the life of the President of the Arab Republic of Egypt in Addis Ababa, Ethiopia, on 26 June 1995 (S/1996/10).

⁶²- S/RES/1267 (1999) Afghanistan.

⁶³- S/RES/1333 (2000)Afghanistan.

⁶⁴-S/RES/1638 (2005) Liberia.

⁶⁵-**CECILE APTEL**, op. cit., fn. 31.

Chapter Four

Syria and the Special Tribunal for Lebanon (STL)

Before we address the obligation of Syria to co-operate with the STL, it would be useful to firstly examine its co-operation with the International Independent Investigations Commission (UNIIC)

Section I – The Syrian Authorities Cooperation with the International Independent Investigations Commission (UNIIC):

The Security Council made the decision to instruct Syria to implement commitments to the UNIIC by:

- (a) - Clarifying a considerable part of the questions being asked of it and which were unresolved;⁶⁶
- (b) - Detaining Syrian officials or individuals whom the Commission considered as suspects involved in the planning, sponsoring, organising or perpetrating the terrorist act, and to make them fully available to the Commission;⁶⁷
- (c) - Giving the Commission the same full rights of access as it had in Lebanon to obtain evidence it deems relevant to the enquiry;⁶⁸ and
- (d) Giving the Commission the authority to determine the location and modalities to interview any Syrian officials and individuals it deemed relevant to the enquiry.⁶⁹

The same civil rights issues are raised by these provisions, which require Syria to detain people alleged to be suspects without even a requirement of reasonable suspicion for the exercise of the power of detention. Those suspects were also required to be handed over to the authority of the UNIIC which was able to choose the modalities for interview without any express safeguards, other than those it decided to apply. Such free-standing provisions for a criminal investigation agency — one not operating under a defined legal body — might be thought to be a potentially dangerous incursion into the human rights of

66-S/RES/1636(2005), Para. 10.

67-S/RES/1636(2005), Para. 11 (a).

68-S/RES/1636(2005), Para. 11 (b).

69-S/RES/1636(2005), Para. 11 (c).

individuals. The U.N. could potentially find itself with its own Guantanamo Bay scenario-type issues, if powers devolved to an investigating agency are not responsibly used.⁷⁰ Faced with these concerns, Syria established its own Judicial Commission to consider the requests of the UNIIC, and to provide the means for co-operation with that body.⁷¹ This was due to the unorthodox method of investigation followed by the former head of the UNIIC, Detlev Mehlis.⁷² His reports⁷³ were contrary to the basic principles of professional criminal investigation procedures and conduct, in that they named suspects and potential witnesses in the case, and were based on some rather dangerous assumptions, the publication of which will undoubtedly fuel existing controversies and also negatively impact on the political stability in Lebanon.⁷⁴ However, leaks to the press about the work of the Commission, including divulging testimonies, and names of suspects and witnesses in violation of Lebanese law and fundamental principles of criminal investigation, characterise the first phase of the work of the Commission under the leadership of Mr Mehlis.⁷⁵ Mehlis' style of irresponsible investigation also breached the Lebanese Criminal Procedures, as the Security Council in its Resolution on the establishment of the UNIIC directs the Commission to determine procedures for carrying out its investigation, taking into account the Lebanese law and judicial procedures.⁷⁶ Lebanese Criminal Procedures Law (LCP) provides that the investigation shall remain confidential until such time as the case is referred to the trial court.⁷⁷ It is not professional practice for any criminal investigator, district attorney or a special prosecutor to publicise

70- **STEPHEN KAY**, *op. cit.*, p. 16.

71-The Syrian Presidential Legislative Decree No. 96, 29 October 2005.

72-He is a German judge, headed the UNIIC from 13 May 2005 till 11 Dec 2006.

73-UN. Doc. S/2005/662, First Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005), 19 October 2005.

- UN. Doc S/2005/775, Second report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005) and 1636 (2005), 10 December 2005,

74- Lebanese Center for Human Rights (CLDH), Hariri Investigation: The Truth Jeopardized? Arbitrary detentions, "alarming" disappearances and "suspicious" deaths, Beirut, February 24, 2009, p. 6.

75- **DAOUD KHAIRALLAH**, *the Hariri and Saddam Tribunals: Two Expressions of Tortured Justice*, **1(4)** Contemporary Arab Affairs, 2008, p. 590.

76-S/RES/1595 (2005), Para. 6:

(Directs the Commission to determine procedures for carrying out its investigation, taking into account the Lebanese law and judicial procedure.)

77- Article (53) of the Lebanese Criminal Procedures:

Article 53 - The investigation shall remain confidential until such time as the case is referred to the trial court, except for matters pertaining to the indictment decision. Anyone who breaches the confidentiality of the investigation shall be liable to prosecution before the Single Judge in whose area of jurisdiction the act complained of occurred; he shall be punishable by imprisonment of between one month and one year and by a fine of between one hundred thousand and one million Lebanese pounds or by either of these two penalties.

the names and testimonies of witnesses he has heard, evidence he has collected, or strategies he is pursuing before the end of substantial part of the investigation. In fact, it is this very such content which constitutes Mehlis' first report.⁷⁸ While it is difficult to assess the damage done to the integrity of the investigation — as well as the extent to which the content of the Commission's report may constitute obstruction of justice, one is at a loss to find a single good reason which might justify such flagrant transgression of a basic principle of criminal investigation, namely that of the exposure of witness confidentiality of JebranTwaini. Mr Twaini, one of the witnesses whose name and testimony revealed in Mr Mehlis' report, was later assassinated by a car bomb.⁷⁹ On substantive grounds, the Mehlis report, even at the very early stages of the investigation, adopted serious conclusions neither substantiated nor justified by its findings. The report clearly stated that the Commission's finding do not enable it '*to establish firm ground for a potential trial of any accused individual*'.⁸⁰ In fact, many of the witnesses' testimonies detailed in the report would most probably be rejected in a fair trial as hearsay testimony. The testimony of the two key witnesses, according to the report, was later revealed to be false and unreliable.⁸¹ Nevertheless, pursuant to these flawed testimonies, arrests were made of several individuals, including four senior officers of the Lebanese security and intelligence apparatus who have continued to be incarcerated approximately four years without bail or indictment.⁸²

On 11 January 2006, Serge Brammertz⁸³ took over as the head of the U.N. probe into the killing of Rafik Hariri. The style of Serge Brammertz was undeniably different from that of his predecessor, in that it was more moderate, modest and temperate.⁸⁴ Brammertz considered that it is not deemed appropriate, at this stage, to disclose further details of any investigative work being undertaken as this may unnecessarily threaten the security of

78-**DAOUD KHAIRALLAH**, op. cit., pp. 590-1.

79-Ibid., P. 591.

80-Report of the International Independent Investigation Commission established pursuant to Security Council Resolution 1595 (2005), 19 October 2005, Doc. S/2005/662.Para. (20).

81-**DAOUD KHAIRALLAH**, op. cit., p. 591.

82-For the detainees in Harricase, see: Lebanese Center for Human Rights (CLDH), op. cit., p. 11.

83-A Belgian jurist and a former federal prosecutor of Belgium and Deputy Prosecutor of the International Criminal Court.

84-Lebanese Center for Human Rights (CLDH), op. cit., p. 6.

witnesses, compromise the collection of future evidence and undermine the outcome of the investigation as a whole.⁸⁵

While the first two reports of the UNIIC referred to a very limited co-operation from the Syrian Government, and requested more co-operation, these two reports were the basis for the Security Council to adopt a resolution under Chapter VII of the UN Charter demanding the Syrian Government to co-operate unconditionally with the UNIIC.⁸⁶ Under the presidency of Brammertz, the Commission has commanded the co-operation of Syria, as the UNIIC submitted many requests for assistance to the Syrian Arab Republic, which provided responses within the deadlines specified by the Commission.⁸⁷ The Syrian authorities have also, during this period, facilitated nine missions to the country. The UNIIC previously acknowledged the co-operation of Syria which has continued to provide responses within appropriate time frames. The Commission also acknowledged the logistical and security arrangements made by the Syrian authorities for its mission. The cooperation provided by the Syrian authorities still continues to be generally satisfactory.⁸⁸

85-UN. Doc.S/2006/161Third report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005) and 1644 (2005), , Para. 6:

(...The Commission, however, does not deem it appropriate, at this stage, to disclose further details of its work as this may unnecessarily threaten the security of witnesses, compromise the collection of future evidence and undermine the outcome of the investigation as a whole.....)

86- S/RES/1636(2005).

87-Eleventh report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006), 1748 (2007) and 1815 (2008), S/2008/752, Para. 49- 51:

49. Since its previous report, the Commission has submitted 24 requests for assistance to the Syrian Arab Republic, which provided responses within the deadlines specified by the Commission. The Syrian authorities have also, during the period, facilitated nine missions to the country.

50. The Commission acknowledges the logistical and security arrangements made by the Syrian authorities for its missions. The cooperation provided by the Syrian authorities continues to be generally satisfactory.

51. The Commission will continue to request the full cooperation of the Syrian Arab Republic in the discharge of its mandate.

88-Tenth report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007), S/2008/210, Para. 49- 51:

49. Since its previous report, the Commission has submitted eight requests for assistance to the Syrian Arab Republic, which has continued to provide responses within appropriate time frames. The Syrian authorities have also, during the period, facilitated one mission to the Syrian Arab Republic.

50. The Commission acknowledges the logistical and security arrangements made by the Syrian authorities for its mission. The cooperation provided by the Syrian authorities continues to be generally satisfactory.

51. The Commission will continue to request the full cooperation of the Syrian Arab Republic in the discharge of its mandate.

- Ninth report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007), S/2007/684, Para. 84- 86:

84. In line with the obligations of the Syrian Arab Republic under Security Council resolutions 1636 (2005) and 1644 (2005), and the common understanding reached between the Commission and the Syrian Arab Republic in 2006, the cooperation of the Syrian Arab Republic with the Commission remains generally satisfactory.

85. A total of 11 requests for assistance have been addressed by the Commission to the Syrian Arab Republic in the past four months, bringing the total number of such requests addressed to the Syrian Arab Republic since January 2006 to 68. During the reporting period, the Syrian Arab Republic has provided the Commission with assistance in response to its requests within the appropriate time frames. The Commission also acknowledges the support provided by the Syrian Arab Republic in the organization of the Commission's various investigative activities in that country, including nine missions during this reporting period.

86. The Commission will continue to request the full cooperation of the Syrian Arab Republic in the discharge of its mandate.

- Eighth report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007), S/2007/424, Para. 92- 95:

92. In line with the obligations of the Syrian Arab Republic under Security Council resolutions 1636 (2005) and 1644 (2005), and the common understanding reached between the Commission and the Syrian Arab Republic in 2006, the cooperation of the Syrian Arab Republic with the Commission remains generally satisfactory.

93. Since its last report to the Council, the Commission has submitted 11 formal requests for assistance to the Syrian Arab Republic, asking it to facilitate a number of interviews and seeking to obtain information about individuals and events of interest to the Commission. This brings the total number of requests for assistance addressed to the Syrian authorities since January 2006 to 57. The Syrian authorities were also forthcoming in making arrangements for four missions to Syria during the reporting period.

94. During the reporting period, the Syrian Arab Republic continued to provide the Commission with assistance in response to its requests within the appropriate timescales. The Commission is also grateful for the logistical and security arrangements provided by Syrian authorities for the Commission's various activities in the Syrian Arab Republic.

95. The Commission will continue to request the full cooperation of the Syrian Arab Republic, which remains crucial to the successful completion of the mandate of the Commission.

- Seventh report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005), 1644 (2005) and 1686 (2006), S/2007/150, Para. 95- 97:

Section II

– Syria's Co-operation with the Special Tribunal for Lebanon:

The U.N. Secretary-General referred to the importance of maintaining the logic of the Security Council resolutions,⁸⁹ under which Member States are obliged to co-operate fully with the Commission in its investigation of the Hariri assassination. The Council may wish, at the appropriate stages, and as necessary, to consider similar measures to enable the STL to secure more effective prosecutions of those responsible for the attack against Rafik Hariri, and for other attacks falling within the jurisdiction of the STL.⁹⁰ If the Security Council took this suggestion into consideration so that all the states, including Syria, are obliged to co-operate with the STL, under the threat of taking coercive measures against them by the Security Council. However, because the Security Council did not adopt the U.N. Secretary General's viewpoint, so Syria, like other states, is not obliged to co-operate with the STL by the Security Council Resolution (1757). Here there

95. Pursuant to the Syrian Arab Republic's obligations under Security Council resolutions 1636 (2005) and 1644 (2005), and the common understanding reached between the Commission and the Syrian Arab Republic in 2006, the cooperation of the Republic with the Commission remains generally satisfactory.

96. During the reporting period, the Commission submitted four formal requests for assistance to the Syrian Arab Republic seeking information regarding individuals, groups and issues of interest to the Commission and requesting the facilitation of interviews and other missions on Syrian territory.

97. Following the transmission of its requests for assistance, the Commission has, since December, undertaken a number of investigative activities in the Syrian Arab Republic, including conducting interviews, where, once again, responses by individuals can be characterized as variable in quality on occasion; the holding of meetings with relevant Syrian officials; the collection of samples from locations in the Syrian Arab Republic to support the geographic origin forensic project; and the collection of documents from two archive storage sites. The last three missions in particular were arranged and facilitated in a professional and timely manner by the Syrian authorities.

- Sixth report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005) and 1644 (2005), S/2006/962, Para. 98:

98. Consistent with the Syrian Arab Republic's obligations under Security Council resolutions 1636 (2005) and 1644 (2005), and the common understanding reached between the Commission and the Syrian Arab Republic earlier in the year, the cooperation of the Republic with the Commission remains timely and efficient.

89-Security Council Resolutions:1595 (2005), 1636 (2005) and 1644 (2005).

90- S/2006/893, Report of the Secretary-General on the establishment of a special tribunal for Lebanon, Para. (53).

is a contradiction, as while the Security Council Resolutions -1636 and 1644 demanded Syria to co-operate fully and unconditionally with the UNIIIC, the Security Council Resolution (1757) -which created the STL- said nothing about the co-operation with the STL. Therefore it can be concluded that the opportunities of the international co-operation regarding the assassination of the former Lebanese Premier and the other terrorist attacks have been reduced by the creation of the STL instead of increased, so we can summarise that the co-operation of Syria with the STL is basically entirely up to the ability and willingness of Syria itself whether or not it will assist the Special Tribunal. As a result, if Syria found it useful to co-operate with the Tribunal it can do so, but without any obligation imposed on it by the International Law or the Security Council resolutions. So we can conclude from the available facts that the Syrian authorities are not willing to co-operate due to their belief that Syria has no connection with this Tribunal.⁹¹

It appears evident, therefore, that Syria will not co-operate at all with the STL, or at least only to the extent that this would not jeopardise national sovereignty. Where the surrender of Syrian nationals in particular is concerned, Syria has made it clear that it will itself try persons indicted by the STL before the Syrian specialised courts, according to the Syrian laws, rather than surrender them to the STL. This approach of Syria is not contrary to international law. It may be noted here that particularly in cases where the jurisdiction of the STL concurs with that of Syria, or where a particular crime may have been committed on Syrian territory, a refusal by Syria to co-operate is entirely in conformity with established international practice in the field of international co-operation in criminal matters. As far as the surrender of Syrian nationals to the STL is concerned, as a country adhering to the civil law tradition, Syria will probably have jurisdiction over crimes under Syrian law committed by its nationals abroad and its legislation will probably bar the extradition of these nationals to other states or entities. The only general obligation incumbent upon Syria pursuant to international law in the field of international co-operation in criminal matters is the obligation to prosecute persons suspected of having committed terrorist crimes if it does not hand them over to other states.⁹² Syria's intention to prosecute its nationals rather than surrendering them to the Special Tribunal is entirely in keeping with the spirit of Security Council resolutions on terrorism,⁹³ enshrining the "*aut dedere aut judicare*" principle for terrorist crimes.

91- UN. Doc. S/2006/909, Identical letters dated 21 November 2006 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and to the President of the Security Council.

92-BERT SWART, *op. cit.*, pp. 1162-3.

93-Security Council Resolutions:1373 (2001), 1566 (2004) and 1624 (2005).

In addition, the Syrian constitution prevents the extradition of Syrian nationals to other states, or legal entities.⁹⁴ This is even if they are tribunals of international character, and the obligation of Syria to surrender its nationals depends only on the judicial co-operation Agreements with other states, and despite the fact that there exists judicial co-operation Agreements between Syria and Lebanon.⁹⁵ Any extradition will only be to the national Lebanese courts, as the STL is not part of the Lebanese judicial system but it does have priority over the Lebanese courts.

Finally, like all other states Syria will of course have to continue to comply with its obligations arising out of Security Council resolutions with regard to terrorist crimes that do not depend upon requests from other states or entities, for instance the obligation to freeze assets. What assistance the STL will need to obtain from Syria or, for that matter, will be prepared to render to Syria, how Syria will react to requests from the STL, and whether or not the Security Council will intervene all remain hidden for the foreseeable future.⁹⁶

- Conclusion:

The successful implementation of the international tribunals and the tribunals of international character rely solely upon the full co-operation of third states with these same tribunals. It is precisely because the work of these tribunals relates to other states, that the co-operation of those states with these tribunals is essential both in investigative procedures and to secure successful prosecutions.

Based on the evidence concerning the legal constructs surrounding the STL, it is apparent that co-operation from third states is not lawfully binding and as such any third states, including Syria, are therefore not compelled to surrender any potential suspects who are that state's own nationals to any other states or legal entities. Syria has already announced

94- Article 38 (2) of the Constitution of the Syrian Arab Republic, 2012.

95-The Judicial Co-operation Agreements between Syria and Lebanon:

- The Co-operation Agreement between the Syrian Ministry of Justice and the Lebanese Ministry of Justice, signed on 11/12/2003.

- The Additional Protocol of the Judicial Agreement between Lebanon and Syria, signed on 26/9/1996.

- The Judicial Co-operation Agreement between Syria and Lebanon, signed on 25/2/1951.

- The Temporary Agreement between Syria and Lebanon on Notifications of Testimonies, signed on 31/12/1927.

96-BERT SWART, op. cit., p. 1163.

and made it quite clear that it has no connection with the STL and as such has no intention of co-operation with the STL. Rather, Syria has already stated that it will try any Syrian suspected by the STL, or for that matter any foreigner found on Syrian territory, before its own Syrian national courts and according to the Syrian national laws. This approach by the Syrian Government is agreed as being compliant with the rules and principles of international law, i.e. it is the application of the famous criminal principle known as "*aut dedere aut judicare*." However, by referring to the "*aut dedere aut judicare*" principle, third states, including Syria, would be obliged to try and prosecute any of its own nationals who may be suspected of terrorist actions. This would also uphold the resolutions as established by the Security Council in relation to terrorist offences and acts. Any further assistance on the part of Syria to co-operate fully with the STL remains allusive as it would be entirely at that state's discretion whether to do so or not. Furthermore, to what extent Syria may decide to exercise assistance with the STL, to what extent such co-operation would be offered, or indeed if there is any intervention from the Security Council itself are all issues which can only be realized in the passage of time as the STL continues its legal course.

To conclude, it is of paramount importance that co-operation with the STL will be an essential ingredient for a cohesive exchange of information and in supporting any successful prosecution by the STL and to ensure its legal due process. This is especially highlighted by the fact that many of the trials before it will be trials *in absentia* where third state co-operation will be necessary if the STL is to secure any successful prosecutions of suspected persons. A lack of third state co-operation with the STL will raise serious barriers to judicial procedures and the implementation of justice. As such, it is imperative that these problems are addressed. It is my opinion that the problems concerning co-operation with the STL could be addressed by the application of various measures. Amendments could be made to the Statute of the STL itself. This would not be a new innovation as amendments were made to the Statutes of the international tribunals, ICTY and ICTR, as well as the tribunals with international character such as the ECCC. Other measures could involve the Security Council adopting a new resolution which would explicitly oblige third states to co-operate with the STL. This would enable the STL to issue a summons to those states required to assist fully in its proceedings. In addition, or alternatively, the STL could secure judicial co-operation agreements with those concerned states. This could involve those states issuing an arrest warrant on any of their citizens who are suspects, or on any suspect who has absconded into their territory from another state. However, an agreement may not necessarily be legally binding upon the state concerned; which would still leave the decision open for the state to choose whether to co-operate or not to co-operate with the STL in the long term.

As already stated, a failure on the part of the third states to offer co-operation with the STL could severely hamper the pursuit of justice and disable any expedience on the part

of the STL to secure successful prosecutions of individuals responsible for the crimes committed. Further it could potentially harm those states, leaving them exposed to the threats of economic sanctions, possible interventionary measures and could affect their relationship with the STL and its pursuit of justice.

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