SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

BEFORE THE TRIAL CHAMBER

Case No.:	**STL-11-01/PT/TC**
Before:	**Judge Robert Roth, Presiding** **Judge Micheline Braidy** **Judge David Re** **Judge Janet Nosworthy, Alternate Judge** **Judge Walid Akoum, Alternate Judge**
Registrar:	**Mr. Herman von Hebel**
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THE PROSECUTOR

v.

SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI &
ASSAD HASSAN SABRA

DECISION ON THE DEFENCE CHALLENGES TO THE JURISDICTION AND LEGALITY OF THE TRIBUNAL

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INTRODUCTION

1. Defence counsel for the four Accused, Mr. Salim Jamil Ayyash, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi, and Mr. Assad Hassan Sabra have challenged the jurisdiction and legality of the Special Tribunal for Lebanon. They have argued that the United Nations Security Council illegally established the Tribunal, that its establishment infringes the sovereignty of Lebanon and is unconstitutional under Lebanese law, and, that because it infringes the fundamental human rights of the four Accused, it is not "established by law". The Prosecution opposed the motions.

2. The Trial Chamber has dismissed the four Defence motions in their entirety, finding that the Tribunal was established by Security Council Resolution 1757 (2007) and that it cannot judicially review the Security Council's actions in establishing the Tribunal. Further, Lebanon, as a member state of the United Nations Organisation, is obliged to comply with a Security Council Resolution. The Trial Chamber has been unable to find that the Tribunal's existence violates Lebanons's sovereignty. The Trial Chamber has found that the Tribunal has been established by law because (i) it was established by a body having the power to establish a criminal tribunal, namely the United Nations, and (ii) that the Tribunal's Statute and Rules of Procedure and Evidence provide the four Accused with all the necessary rights to a fair trial mandated by international human rights law.

PROCEDURAL HISTORY TO THE MOTIONS

3. On 10 June 2011, the Prosecutor filed an amended indictment against Mr. Ayyash, Mr. Badreddine, Mr. Oneissi, and Mr. Sabra in respect of events in Beirut on 14 February 2005.[1] The indictment was confirmed by the Pre–Trial Judge on 28 June 2011.[2] On 1 February 2012, the Trial Chamber issued a decision to proceed to trial against Mr. Ayyash, Mr. Badreddine, Mr. Oneissi and Mr. Sabra *in absentia*.[3]

[1] Having initially submitted an indictment and supporting materials to the Pre–Trial Judge on 17 January 2011.
[2] STL, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, Case No. STL–11–01/I/PTJ, Decision relating to the Examination of the Indictment of 10 June 2011 issued Against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi, & Mr Assad Hassan Sabra, 28 June 2011.
[3] STL–11–01/I/TC, Decision to Hold Trial *In Absentia*, 1 February 2012.

4. Defence counsel for the four Accused filed their motions challenging the Tribunal's jurisdiction and legality on 4, 9, and 10 May 2012.[4] The Legal Representative for Victims filed his observations on the Defence motions,[5] and the Prosecution filed a consolidated response to the four motions, on 6 June 2012.[6] The Trial Chamber held a hearing on 13 and 14 June 2012 to allow the Parties and the Legal Representative for Victims to develop their arguments, and to respond to the opposing submissions, and to answer questions from the bench.[7]

CHRONOLOGY OF EVENTS ESTABLISHING THE TRIBUNAL

5. On 14 February 2005, a large explosion occurred near the St George Hotel in downtown Beirut, Lebanon, killing the former Lebanese Prime Minister Rafik Hariri and other people. Many others were injured. The following day, the President of the Security Council condemned the attack and requested the Secretary–General to closely follow the situation in Lebanon.[8]

6. The legal events between February 2005 and the adoption of Security Council Resolution 1757 in May 2007 can be briefly summarised; in March 2005, the Secretary–General of the United Nations authorised a fact–finding mission to Beirut to inquire into the 14 February 2005 attack. On 24 March 2005, the Secretary–General forwarded to the Security Council the report of the fact–finding mission, endorsing its conclusion that an independent international investigation should be established.[9] Subsequently, and after receiving an expression of support from the Lebanese Government, the Security Council, on 7 April 2005, adopted Resolution 1595 (2005)

[4] STL–11–01/PT/TC, Motion on Behalf of Salim Ayyash Challenging the Legality of the Special Tribunal for Lebanon, 4 May 2012 (Ayyash motion); STL–11–01/PT/TC, Sabra's Preliminary Motion Challenging the Jurisdiction of the Special Tribunal for Lebanon, 9 May 2012 (Sabra motion); STL–11–01/PT/TC, The Defence for Mr. Hussein Hassan Oneissi's Motion Challenging the Legality of the Tribunal, 10 May 2012 (Oneissi motion); STL–11–01/PT/TC, Exception préjudicielle d'incompétence du Tribunal spécial pour le Liban déposée par la Défense de M. Badreddine, 10 mai 2012 (Badreddine motion). At a status conference, the Pre–Trial Judge set the deadline for the submission of Rule 90 preliminary motions challenging jurisdiction as 4 May 2012 (see, Case No. STL–11–01, Transcript of proceedings, 12 April 2012, pp. 47–48.).

[5] STL–11–01/PT/TC, Observations of Legal Representative for Victims on Illegality Motions, 6 June 2012 (Legal Representative for Victims' observations).

[6] STL–11–01/PT/TC, Prosecution Consolidated Response to Defence Preliminary Motions Challenging the Legality of the Special Tribunal for Lebanon, 6 June 2012 (Prosecution response).

[7] See, STL–11–01/PT/TC, Procedural Decision on Defence Motions Challenging Jurisdiction, 18 May 2012; STL–11–01/PT/TC, Scheduling Order for Hearing, 6 June 2012; and, the transcripts of the hearings, 13–14 June 2012.

[8] S/PRST/2005/4 (2005).

[9] S/2005/203 (2005).

establishing the United Nations International Independent Investigation Commission (IIIC) to assist the Lebanese authorities in investigating the attack.[10]

7. On 13 December 2005, the Prime Minister of Lebanon wrote to the Secretary–General requesting the Security Council to establish "a tribunal of an international character to convene in or outside Lebanon, to try all those who are found responsible for the terrorist crime perpetrated against Prime Minister Hariri".[11]

8. On 15 December 2005, through Resolution 1644 (2005), the Security Council requested the Secretary–General to assist the Lebanese Government in identifying the nature and scope of the international assistance required to establish such a tribunal. In March 2006, the Security Council passed Resolution 1664 (2006), asking the Secretary–General to negotiate an agreement with the Lebanese Government on establishing a tribunal.

9. Between then and September 2006, negotiations and consultations occurred between authorised representatives of the Government of Lebanon and the United Nation's Legal Counsel at the United Nations Headquarters in New York, in The Hague, and in Beirut, resulting in a draft Agreement and a draft Statute for a Special Tribunal. On 21 November 2006, the President of the Security Council expressed the Council's satisfaction with the draft Agreement and the proposed Statute.[12] The Agreement on the Tribunal was then signed by a representative of the Government of Lebanon and the United Nations, respectively, in January and February 2007. The Lebanese Parliament, however, failed to approve the Agreement. Thereafter, on 4 April 2007, a majority of the members of the Lebanese Parliament signed a letter requesting the Secretary–General to assist in establishing the tribunal.

10. On 14 May 2007, as a result of a continuing Parliamentary impasse in approving the Agreement, the Lebanese Prime Minister wrote to the Secretary–General requesting the Security Council to establish the tribunal by a "binding decision".[13] The next day, however, Lebanese President

[10] S/RES/1595 (2005).
[11] S/2005/783 (2005).
[12] S/2006/911 (2006).
[13] S/2007/281 (2007).

Émile Lahoud wrote to the Secretary–General urging the Security Council to refrain from taking this unilateral action.[14]

11. On 30 May 2007, acting pursuant to Chapter VII of The Charter of the United Nations (entitled "Action with respect to threats to the peace, breaches of the peace, and acts of aggression"), the Security Council passed Resolution 1757. The resolution contained as an annex the intended Agreement between the United Nations and the Lebanese Republic to establish the Tribunal. Article 1.2 of the annexed Agreement states "The Special Tribunal shall function in accordance with the Statute of the Special Tribunal for Lebanon. The Statute is attached to this Agreement and forms an integral part thereof". And, attached to the intended Agreement was the Statute of the Tribunal.

12. The Resolution, however, also envisaged a situation in which the intended Agreement was not signed by the Lebanese Republic in a timely manner and provided for its provisions to enter into force on 10 June 2007. It was aimed at operating–under Chapter VII–with or without the signature of the Lebanese Republic. The dispositive part of Resolution 1757 reads;

> *Reaffirming* its determination that this terrorist act and its implications constitute a threat to international peace and security,
>
> 1. *Decides*, acting under Chapter VII of the Charter of the United Nations, that:
>
> (a) The provisions of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19 (1) of the annexed document before that date;
>
> (b) If the Secretary–General reports that the Headquarters Agreement has not been concluded as envisioned under Article 8 of the annexed document, the location of the seat of the Tribunal shall be determined in consultation with the Government of Lebanon and be subject to the conclusion of a Headquarters Agreement between the United Nations and the State that hosts the Tribunal;
>
> (c) If the Secretary–General reports that contributions from the Government of Lebanon are not sufficient to bear the expenses described in Article 5 (b) of the annexed document, he may accept or

[14] S/2007/286 (2007).

use voluntary contributions from States to cover any shortfall;

1. *Notes* that, pursuant to Article 19 (2) of the annexed document, the Special Tribunal shall commence functioning on a date to be determined by the Secretary–General in consultation with the Government of Lebanon, taking into account the progress of the work of the International Independent Investigation Commission;

2. *Requests* the Secretary–General, in coordination, when appropriate, with the Government of Lebanon, to undertake the steps and measures necessary to establish the Special Tribunal in a timely manner and to report to the Council within 90 days and thereafter periodically on the implementation of this resolution;

3. *Decides* to remain actively seized of the matter.

13. All things necessary for the establishment of the Tribunal–according to the terms of the Resolution–occurred. On 21 December 2007, a Headquarters Agreement between the United Nations and the Kingdom of The Netherlands, establishing The Netherlands as the seat of the Tribunal, was signed in New York. The Tribunal opened on 1 March 2009.

14. The Lebanese Republic has acknowledged its obligation to comply with Resolution 1757 and its annex comprising the Agreement and its attached Statute, by acts which include:

a) after receiving a proposal of the Lebanese Supreme Council of the Judiciary, presenting a list of twelve judges to the Secretary–General, who then appointed four Lebanese judges to the Tribunal (Article 2 (5) (a) of the Agreement);
b) appointing a Deputy Prosecutor, in consultation with the Secretary–General and the Prosecutor (Article 3);
c) contributing to financing the Tribunal (Article 5);
d) concluding Memoranda of Understanding with the Tribunal (Article 7);
e) facilitating establishing the Tribunal's Beirut Field Office (Article 8 (3));
f) complying with Requests for Assistance from the Tribunal (Article 15 (2)); and
g) deferring the cases related to the 14 February 2005 attack to the jurisdiction of the Tribunal (Article 4 (2) of the Statute).

THE FOUR DEFENCE MOTIONS: THE RELIEF AND ORDERS SOUGHT

15. The four Defence motions seek the termination of the process against the four Accused, but for partially different reasons and asking for different orders. Sequentially;

Counsel for Mr. Ayyash requests the Trial Chamber to find that:

i) the Tribunal violates Lebanese sovereignty and was created illegally; and

ii) the Tribunal is not legitimate and does not have jurisdiction in this case, while authority in this regard remains vested in the Lebanese judiciary.[15]

Counsel for Mr. Badreddine requests the Trial Chamber to determine that:

i) an insufficient threat to international peace and security existed to justify recourse to a Resolution under Chapter VII of the United Nations Charter;

ii) the establishment of an international tribunal was inappropriate;

iii) Resolution 1757 was aimed at imposing the "Draft Agreement" on Lebanon;

iv) the United Nations did not respect the Lebanese Constitution, despite the Secretary–General being informed of this;

v) the will of the Lebanese people was misrepresented in negotiations; and

vi) Resolution 1757 is an invalid abuse of authority, and discriminatory towards the Accused.[16]

For these reasons, they request the Trial Chamber to find that:

a) Resolution 1757 was adopted in violation of the United Nations Charter and the fundamental rights of the Accused;

b) it must therefore be considered invalid;

c) consequently, the Tribunal's establishment was likewise invalid; and

d) the indictment and arrest warrants are null and void.[17]

Counsel for Mr. Oneissi requests the Trial Chamber to find that:

i) the Tribunal lacks legal basis and thus has no judicial power;

[15] Ayyash motion, para. 64; Transcript, 13 June 2012, p. 48.
[16] Badreddine motion, pp. 27–28.
[17] Badreddine motion, pp. 27–28.

ii) the Security Council misused its powers in adopting Resolution 1757. It is therefore illegal and has no effect; and

iii) due to its illegal establishment, the Tribunal has no primary jurisdiction.[18]

Counsel for Mr. Sabra requests the Trial Chamber to:

i) decline to exercise its jurisdiction; and

ii) dismiss the charges against the Accused (this was modified in the hearing by their conceding that the charges should "fall away" as a natural consequence of declining to exercise jurisdiction rather than the Trial Chamber actually "dismissing" charges in a case that it is not yet seised of).[19]

THE ARGUMENTS SUPPORTING THE FOUR MOTIONS

16. The arguments of the four Defence motions may thus be divided into five general themes, namely:

i) the legal basis of their challenges (which goes to the issue of the admissibility of the motions as challenges to jurisdiction);[20]

ii) the alleged unconstitutionality of the establishment of the Tribunal under Lebanese law;[21]

iii) the power and scope of the Trial Chamber to review Security Council Resolution 1757;[22]

iv) Resolution 1757's alleged violation of Lebanese sovereignty;[23] and

v) the alleged violation of the fundamental rights of the Accused by the Tribunal's establishment, e.g., in breaching international law and the United Nations Charter.[24]

17. The Trial Chamber will examine thematically these arguments, starting with the preliminary issue of whether the motions are admissible as preliminary motions under Rule 90 of the Tribunal's Rules of Procedure and Evidence, as challenges to the Tribunal's jurisdiction.

[18] Oneissi motion, para. 111.
[19] Sabra motion, para. 73; Transcript, 13 June 2012, pp. 82–83.
[20] Ayyash motion, paras 4–5; Badreddine motion, paras 2–9, 14–15; Oneissi motion, paras 3, 25; Sabra motion, paras 1, 4–9; Transcript, 13 June 2012, pp. 5–7, 21, 28, 76–79, 88; Transcript, 14 June 2012, pp. 8–9.
[21] Ayyash motion, paras 23–32; Badreddine motion, paras 89–92; Oneissi motion, paras 39–51; Sabra motion, paras 14–22.
[22] Ayyash motion, paras 4–7; Badreddine motion, paras 7–24, 30–31, 61–66; Oneissi motion, paras 84, 104–105; Sabra motion, paras 4–9, 22.
[23] Ayyash motion, paras 33–46; Sabra motion, paras 28–39, 44–45.
[24] Ayyash motion, paras 47–63; Badreddine motion, paras 25–49, 50–88, 93–99; Oneissi Motion, paras 52–79, 80–110; Sabra motion, paras 24–27, 46–71.

I. PRELIMINARY DECISION: THE LEGAL BASIS OF THE CHALLENGES AND THEIR ADMISSIBILITY UNDER RULE 90 OF THE RULES

18. The Trial Chamber must determine, as a preliminary point, whether the four motions are admissible as challenges to jurisdiction under Rule 90. Rules 90 (A) and (E) (motions which challenge jurisdiction or, *exceptions préjudicielles d'incompétence*) provide:

> (A) Preliminary motions, being motions which:
>
> (i) challenge jurisdiction;
>
> (ii) allege defects in the form of the indictment;
>
> (iii) seek the severance of counts joined in one indictment under Rule 70 or seek separate trials under Rule 141; or
>
> (iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 59(A)
>
> shall be in writing and shall be brought not later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 110(A) (i). Such motions shall be disposed of by the Trial Chamber or, in the case under (iv), by the Pre–Trial Judge.
>
> (E) For the purpose of paragraphs (A) (i) and (B) (i), a motion challenging jurisdiction refers exclusively to a motion that challenges an indictment on the ground that it does not relate to the subject–matter, temporal or territorial jurisdiction of the Tribunal, including that it does not relate to the Hariri Attack or an attack of a similar nature and gravity that is connected to it in accordance with the principles of criminal justice.

19. The four Defence motions, as is apparent from the relief and orders sought, challenge the validity and existence of the Tribunal, but define their challenges as a "challenge to jurisdiction". Relying upon the decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case, they assert that a challenge to legality is jurisdictional in nature.[25]

[25] ICTY, *Prosecutor v. Duško Tadić a/k/a "Dule"*, IT-94-1-AR72, Decision on the Defence Motion For Interlocutory Appeal on Jurisdiction, 2 October 1995 (*Tadić* Appeals Chamber decision); Ayyash motion, para. 5; Badreddine motion, para. 2; Oneissi motion, para. 25; Sabra motion, paras 4–5; Transcript, 13 June 2012, pp. 5–6.

20. The Ayyash motion posits its challenge, not as "as under Rule *90 per se*", but rather as one under Rule 126, which provides,[26]

> After a case is assigned to the Trial Chamber, either Party may apply by motion for appropriate ruling or relief. Such a motion shall be oral unless decided otherwise by the Trial Chamber.

21. The Badreddine motion relies upon both Rule 90 (E) and Rule 126, arguing that the issue can be an "undefined preliminary motion" implicitly permissible under Rule 90 (but also as subject-matter jurisdiction).[27] It also argues that the situation is identical to that in the *Tadić* case, meaning that an objection to the illegal establishment of the Tribunal is a challenge to its jurisdiction.[28] Further, it argues the existence of a general principle in special criminal jurisdictions allowing for challenges to legality, unlimited in scope.[29]

22. The Oneissi motion bases its challenge exclusively on the principle of *Kompetenz-Kompetenz* (or *compétence de la compétence*), arguing that the lack of an alternative forum mandates the Tribunal to adjudicate the issue and asks the Trial Chamber to circumvent Rule 90 (E) by deciding that it can review the issue of legality, by using a combination of two sources of law.[30] The first derives from the *Tadić* decision–under the doctrine of *compétence de la compétence*–arguing that "the legality of the creation of a Tribunal is an inseparable component of jurisdiction".[31] The second is a decision of the Appeals Chamber of this Tribunal in *El Sayed* endorsing the *Tadić* methodology in holding that a review of jurisdiction was possible through a court using an "inherent" power "to determine its own jurisdiction (so called *compétence de la compétence*)".[32]

23. The Sabra motion mounts its challenge under Article 1 of the Statute and Rules 77, 90 (A) (i) and 126,[33] contending that precluding a challenge to legality would be *ultra vires* the Statute.[34] (Article 1 sets out the general jurisdiction of the Tribunal, while Rule 77 concerns the power of

[26] Ayyash motion, para. 4.
[27] Badreddine motion, paras 3–9; Transcript, 13 June 2012, pp. 6–7.
[28] Badreddine motion, paras 10–12.
[29] Transcript, 13 June 2012, p. 21; 14 June 2012, pp. 8–9.
[30] Oneissi motion, paras 3, 25.
[31] Oneissi motion, para. 25.
[32] STL, *In the matter of El Sayed*, CH/AC/2012/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, (*El Sayed* decision), 10 November 2010, para. 43
[33] Sabra motion, paras 1, 9; Transcript, 13 June 2012, p. 79.
[34] Transcript, 13 June 2012, pp. 76–77, 79, 88.

the Pre–Trial Judge to issue orders, requests and warrants). It argues that the Tribunal has the incidental and inherent jurisdiction as part of its *compétence de la compétence* jurisdiction to determine the issue because Rule 90 (E) could not bar such a challenge.[35]

24. The Prosecution responds by arguing that the motions are inadmissible as challenges to the Tribunal's jurisdiction under Rule 90, submitting that Rule 90 (E) prevents a challenge to jurisdiction not falling strictly within that Rule. Rule 90 (E) is exhaustive, reflecting the determination of the plenary of Judges to limit the scope of acceptable jurisdictional challenges, while maintaining the highest standards of international criminal justice. The Prosecution argues that the Trial Chamber may dismiss the four Defence motions on this procedural basis alone.[36]

25. Further, the Prosecution argues that, while a challenge to legality may have been reasonable at the ICTY as the first international criminal tribunal since the Nuremberg and Tokyo trials, such institutions are now "common" and similar challenges to legality should not permitted. And, moreover, a challenge to legality cannot properly be brought under another Rule such as Rule 77 or Rule 126.[37]

DISCUSSION AND FINDINGS

26. The Trial Chamber has first to decide whether the motions are admissible as challenges to the jurisdiction of the Tribunal, under Rule 90 (A) (i), and then if not, whether they are otherwise admissible.

27. Rule 90 (E) uses the word "exclusively" to define a challenge to "jurisdiction" under the Tribunal's Rules. It defines a challenge to jurisdiction by confining it to a motion that challenges an indictment on subject–matter, temporality and territoriality. It neither includes nor expressly excludes a challenge attacking the legality of the Tribunal or the validity of its creation. No other Rule expressly permits or prohibits such a challenge.

28. The *Tadić* Appeals Chamber decision held that *any* court or arbitral tribunal can review its own legality (its right to exist) using an inherent or incidental jurisdiction.[38] In its view, this power

[35] Sabra motion, paras 5–6.
[36] Prosecution response, paras 5, 13–16; Transcript of 13 June 2012, pp. 89–91, 95–96, 107–109.
[37] Transcript, 13 June 2012, pp. 92–95.
[38] Which it termed *compétence de la compétence* or *Kompetenz–Kompetenz*. See, *Tadić* Appeals Chamber decision, para. 18.

permitted the Appeals Chamber to review and determine the Tribunal's own legality. The *Tadić* Trial Chamber decision,[39] on the other hand, and one dissenting judge on appeal in the same case,[40] held that legality and jurisdiction are in fact separate legal concepts and that this was not possible.

29. The Trial Chamber considers that the latter approach is the correct one. This is because a challenge to the legality of the Tribunal attacks its legal basis or foundation, for example, Security Council Resolution 1757, or the purported agreement between the Lebanese Republic and the United Nations. Jurisdiction, conversely, is a judicial body's power or right to adjudicate a matter before that judicial body.

30. The Defence motions generally raise three arguments aimed at circumventing the restrictive definition of "jurisdiction" in Rule 90 (E) but by attempting to expand its natural meaning.[41]

31. The first argument relies on distinguishing the rationale of Rule 90 (E) of this Tribunal's Rules from that of Rule 72 (D) of the ICTY's Rules. Rule 90 (E) is almost identical to Rule 72 (D) of the Rules of Procedure and Evidence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR), introduced in 2000 to prevent challenges to what was termed "jurisdiction", but challenging the legality of those Tribunals. The amendments followed the 1995 *Tadić* decision finding that it could review the *legality* of that Tribunal as a challenge to "jurisdiction". The drafters of these amendments considered that a challenge to legality challenged the jurisdiction of those Tribunals, so the new Rules 72 (D) were intended to prevent further similar challenges. Two of the Defence motions argue that while the ICTY Rule was intended to avoid re-litigation of settled issues at that tribunal, this is not the case at the Tribunal, thus Rule 90 (E) should not exclude a challenge to jurisdiction based on legality.[42]

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[39] *Prosecutor v. Duško Tadić a/k/a "Dule"*, IT-94-01-PT, Decision on the Defence Motion on Jurisdiction, 10 August 1995 (*Tadić* Trial Chamber decision), paras 8–9.

[40] Separate Opinion of Judge Li on The Defence Motion for Interlocutory Appeal on Jurisdiction, para. 2. The Prosecutor endorsed this, submitting that: "The position of the Prosecution is that the *Tadić* Appeals Chamber rationale is not persuasive; and therefore, you should decide based on the *Tadić* Trial Chamber decision", Transcript, 14 June 2012, p. 43.

[41] Or alternatively to consider a motion challenging legality as an undefined motion as argued by the Badreddine Defence (see, Badreddine motion, paras 3–9; Transcript, 13 June 2012, pp. 6–7.).

[42] Badreddine motion, paras 14–15; Sabra motion, para. 7. The Sabra Defence also argues that, despite Rule 72 (D), the ICTY entertained challenges to jurisdiction after its adoption (Transcript, 13 June 2012, pp. 78–79.). Further, the Badreddine Defence contends that, even if Rule 72 (D) existed at the ICTY in 1995, the Defence still would have maintained the right to file a challenge to legality as it is a universal principle of law (Transcript, 13 June 2012, p. 28.).

32. Rule 90 (E), however, must be interpreted according to its clear wording; it specifies an exhaustive list of admissible challenges to jurisdiction before *this* Tribunal. And, as legality and jurisdiction are separate legal concepts, a challenge to legality does not fall within a challenge to "jurisdiction" in Rule 90 (A) (i).

33. The second argument relies on the so–called doctrine of "*compétence de la compétence*" (but as defined by the *Tadić* Appeals Chamber) which confers on a court the right to determine its own "jurisdiction".[43] The *Tadić* Appeals Chamber reasoned that (i) no integrated judicial system exists at the international level, and that no external international judicial body has the power to determine jurisdictional issues, and (ii) the ICTY's constituting documents did not expressly grant the Tribunal the power to decide its own jurisdiction.[44] The Tribunal's Appeals Chamber in *El Sayed* adopted this reasoning in relation to *compétence de la compétence*.[45]

34. It is self-evident that no such integrated international judicial system exists, but that fact alone cannot justify a tribunal assuming the power to determine its own legality. Further, and in relation to the second *Tadić* finding, the issue before this Trial Chamber differs from the situations in both *Tadić* and in *El Sayed*. In 1995 when *Tadić* was decided, the ICTY Rules did not have an equivalent to the Tribunal's Rule 90 (E), as its Rule 72 (D) was introduced only five years later. And, as for *El Sayed*, it concerned the right of access of a non–accused to documents in the possession of the Tribunal.

35. The third argument relies on the notion of "inherent jurisdiction" (also described as "incidental jurisdiction"), characterized by the *Tadić* Appeals Chamber as "the power of a Chamber of the Tribunal to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction".[46] One motion argues that the Tribunal has this inherent or incidental power, ancillary to its primary jurisdiction, to review its legality.[47]

36. The finding of the *El Sayed* decision on the existence of inherent powers, however, related–not to challenging the legality of the Tribunal–but rather to a court's power to determine the *locus*

[43] *Tadić* Appeals Chamber decision, para. 18; *El Sayed* decision, para. 43
[44] *Tadić* Appeals Chamber decision, paras 11, 18; *El Sayed* decision, paras 41–42.
[45] *El Sayed* decision, paras 38–43.
[46] *El Sayed* decision, para. 45, see also *Tadić* Appeals Chamber decision, para. 20.
[47] Oneissi motion, paras 23–25.

standi (standing) of a non–accused to receive these documents. Further, it held that this inherent jurisdiction is only necessary, where the exercise of a court's jurisdiction would be hampered by an inability to rule on "ancillary" matters such as making interim orders to preserve the rights of parties, staying proceedings, or ordering the discontinuing of a wrongful act or omission.[48] This situation is distinguishable from that in the four Defence motions. As such, the Trial Chamber does not believe that inherent powers, ancillary to those specified in a court's Statute or Rules, can be used to allow it to determine its own legality. And any inherent powers–for the reasons below in paragraphs 53–55–cannot extend to reviewing a Security Council resolution.[49]

37. The arguments raised by the Defence motions against a strict application of Rule 90 (E) are unpersuasive. The Trial Chamber finds that the defence motions are not challenges to jurisdiction–as exclusively and correctly defined in Rules 90 (A) (i) and 90 (E)–but rather are challenges to legality.

38. The motions therefore do not fall within the definition of a "Preliminary motion" under Rule 90 (A). The Statute of the Tribunal, however, provides the Accused with the right to a trial conducted according to "the highest standards of international criminal procedure",[50] and the Tribunal must comply with international human rights law, which guarantees the right to be tried by a court "established by law".[51]

39. Because the Defence motions argue that the Tribunal was not "established by law", the Trial Chamber must determine whether it was and if so, whether its procedures comply with the basic procedures of international human rights law. A negative finding on this question could lead the Trial Chamber to decline to exercise all or part of its jurisdiction.

40. The Trial Chamber thus finds that the four motions are admissible. In these circumstances, it considers that having been seised of the motions it is in the interests of justice and the expeditious disposition of the matter to deal with this fundamental question of international human rights law to do justice to the Parties now (*in limine litis*), rather than at a later point.

[48] *El Sayed* decision, paras 45–46 and fn 76–83.
[49] See *Tadić* Trial Chamber decision, para. 9, "There is, however, no analogy to be drawn between the inherent authority of a Chamber to control its own proceedings and any suggested power to review the authority of the Security Council".
[50] Article 28 (2).
[51] As required by Article 14 (1) International Covenant on Civil and Political Rights (ICCPR), Article 6 (1) European Convention on Human Rights (ECHR) and Article 8 (1) American Convention of Human Rights (ACHR). See also, Article 20, Lebanese Constitution.

41. In dealing with this question, the Trial Chamber will address the four main arguments raised in the motions; that the establishment of the Tribunal violates Lebanese constitutional law, that the Trial Chamber should examine the validity of the Security Council Resolution, that the establishment of the Tribunal violates Lebanese sovereignty, international law and the United Nations Charter, and that the Tribunal's procedures violate the fundamental human rights of the four Accused.

II. THE TRIBUNAL'S ALLEGED UNCONSTITUTIONALITY UNDER LEBANESE LAW

42. The Defence motions challenge the Tribunal's legality on the basis that the Agreement annexed to Resolution 1757 has not validly entered into force in Lebanon, arguing that it is invalid under both Lebanese and international law. They argue that the Lebanese Constitution was violated because the procedure for ratification and negotiation of treaties was not respected,[52] and that because one confessional group withdrew from the Lebanese Council of Ministers, it was no longer possible to fulfil the requirements of the Lebanese National Pact of Mutual Existence.[53] Furthermore, the Lebanese Government has never acquiesced to Resolution 1757's validity or to its annexed Agreement.[54]
43. Alternatively, the Badreddine motion concedes that Resolution 1757 did establish the Tribunal but that;
    - the Security Council used suspect manoeuvres to navigate around the procedure originally envisioned to establish the Tribunal by an agreement,[55] and

[52] Ayyash motion, paras 27–30, 32; Badreddine motion, paras 82, 89–92; Oneissi motion, paras 39–47; Sabra motion, paras 14–16; Transcript, 13 June 2012, pp. 12–13, 68–69, 72–74.
[53] Ayyash motion, paras 24–26; Badreddine Motion, para. 93; Oneissi motion, paras 42–47; Sabra motion, paras 20–21; Transcript, 13 June 2012, pp. 13–14, 40, 48–49, 54, 71–72.
The National Pact of Mutual Existence comes from the Taif Agreement of 1989, is intended to ensure the participation of all religious communities in the democratic process, and is a fundamental aspect of the Lebanese system of representation.
Paragraph (J) of the Preamble to the Lebanese Constitution provides: "There shall be no constitutional legitimacy for any authority which contradicts the pact of mutual existence." Article 95 (a) states: "The sectarian groups shall be represented in a just and equitable manner in the formation of the Cabinet."
[54] Ayyash motion, para. 31; Transcript, 13 June 2012, p. 40.
[55] Transcript, 14 June 2012, pp. 7–8.

- the Lebanese Government's manner of negotiating the draft Agreement attempted to fraudulently mislead the United Nations, contrary to Article 49 of the Vienna Convention on the Law of Treaties (1969).[56]

44. The Prosecution responds by arguing, primarily, that the Tribunal was established by the Security Council in passing Resolution 1757 under Chapter VII of the United Nations Charter. The draft Agreement itself did not enter into force, and hence no issue of constitutional violation arises. Moreover, an individual would have no standing to raise a breach of Article 49 even if the draft Agreement had entered into force.[57] And, specifically, in relation to the issue of alleged unconstitutionality, the Prosecution counters that:

- the request to establish the Tribunal was approved by the Lebanese Council of Ministers, and did not reflect unilateral action by the former Prime Minister,[58]
- the former Lebanese President Lahoud was involved in some negotiations establishing the Tribunal, initially supported the creation of a tribunal of an international character, attended the extraordinary session where the request to the United Nations to set up such a Tribunal was approved, and he also engaged in appointing the Lebanese negotiators,[59]
- the approval of the draft Agreement by the Council of Ministers accorded with Article 52 of the Lebanese Constitution,[60] and
- the issue of fraud cannot arise anyway because the draft Agreement was superseded by Resolution 1757.[61]

DISCUSSION AND FINDINGS

45. The intended "Agreement" between the United Nations and the Lebanese Republic was not adopted under Lebanese constitutional law; legally, this is indisputable. The "Agreement", in reality, therefore has the status only of a "draft Agreement". Thus, if the draft Agreement stood alone, any competent judicial body charged with interpreting its status would have to determine

[56] Badreddine motion, paras 94–99, Transcript, 13 June 2012, pp. 29–30.
[57] Prosecution response, paras 4, 7, 21–33. Transcript, 13 June 2012, pp. 112–113. See also, Legal Representative for Victims' observations, paras 16–22, supporting the proposition that the Tribunal was lawfully created under Chapter VII of the United Nations Charter by Resolution 1757.
[58] Prosecution response, para. 59.
[59] Prosecution response, paras 60–61.
[60] Prosecution response, paras 62–66.
[61] Transcript, 13 June 2012, pp. 112–113.

whether the Lebanese Republic was legally bound by its own actions in taking the numerous steps (listed in paragraph 14 above) consistent with its obligations under the draft Agreement.

46. The Trial Chamber, however, finds that Security Council Resolution 1757 is the sole legal basis of establishing the Tribunal.

47. Resolution 1757 provided for two alternative means of establishing the Tribunal. The first was the draft Agreement, which could be ratified by Lebanon within eleven days of passing the Resolution.[62] Article 19 (1) of the draft Agreement provided that, "This Agreement shall enter into force on the day after the Government has notified the United Nations in writing that the legal requirements for entry into force have been complied with". However, as an alternative method for entry into force, in the event that this did not occur, the Resolution provided that the *provisions* of the draft Agreement would enter into force, rather than the draft Agreement itself. This seemingly semantic difference, however, is essential in understanding and interpreting the foundational basis of the Tribunal.

48. The legal requirements for its entry into force under Lebanese law did not occur by the time specified. Hence, with the passing of time specified in the Resolution–that is, on 10 June 2007– the provisions of the draft Agreement were integrated into the Resolution as an annex. Their binding effect therefore derives from their incorporation into the Chapter VII resolution.

49. Lebanon's complying acts and decisions, which coincide with its obligations under the draft Agreement, are based on its obligation to abide by Security Council resolutions, as specified in Article 25 of the United Nations Charter, and also the obligations specified in the Preamble to the Lebanese Constitution.[63] Its actions in complying with the provisions of the draft Agreement derive, not from the draft Agreement but rather from the binding effect of a Security Council Resolution. This is reinforced by the totality of the Lebanese Government's complying acts and decisions after the Resolution entered into force.

50. As the Trial Chamber has found that the Tribunal exists solely as a result of the passing of Security Council Resolution 1757 it is not necessary to examine any issues in the Defence

[62] S/RES/1757 (2007), para. 1 (a).
[63] Part B of the Preamble to the Lebanese Consitution reads, "Lebanon is also a founding and active member of the United Nations Organization and abides by its covenants and by the Universal Declaration of Human Rights. The Government shall embody these principles in all fields and areas without exception".

motions alleging violations of Lebanese domestic law (including its Constitution) going to the issue of the Tribunal's foundation.

III. THE TRIAL CHAMBER'S POWER TO REVIEW A SECURITY COUNCIL RESOLUTION

51. All four Defence motions ask the Trial Chamber to review the actions of the Security Council in passing Resolution 1757 and establishing the Tribunal and to find that it acted illegally, or *ultra vires* in doing so. The arguments are based on the ICTY's *Tadić* Appeals Chamber decision,[64] this Tribunal's Appeals Chamber's decision in *El Sayed*,[65] and on the case-law of the European Court of Justice.[66]

52. According to the Prosecution, the Trial Chamber lacks the competence to review Resolution 1757;[67] it may not review or determine the correctness of the Security Council's actions in passing the resolution. Additionally, the Prosecution argues, the Security Council determining that the Hariri attack amounted to terrorism–reflecting a threat to international peace and security–was an acceptable exercise under Chapter VII of the United Nations Charter.[68]

DISCUSSION AND FINDINGS

53. The Tribunal did not exist before Security Council Resolution 1757 of 30 May 2007 came into force on 10 June 2007, and it will cease to exist at the cessation of its mandate, as specified in the annex to the Resolution, or if the Security Council resolves to abolish it. The Tribunal is purely a creature of a Security Council Resolution.

54. The Defence motions effectively ask the Trial Chamber to perform an exercise of judicial review on the Security Council. Judicial review involves a court examining the steps taken by another body acting administratively–such as whether it acted reasonably, took irrelevant matters into account and afforded natural justice to the parties–but with the objective of making a declaration

[64] Badreddine motion, paras 19–24; Ayyash motion, para. 6 ; Oneissi motion, para. 23; Sabra motion, para. 6.
[65] Badreddine motion, paras 19–24; Oneissi motion, para. 23; Transcript, 13 June 2012, p. 6.
[66] Transcript, 13 June 2012, pp. 61–62, 65.
[67] Transcript, 14 June 2012, pp. 34–37, 43–44.
[68] Transcript, 13 June 2012, pp. 124–129.

of rights, or a binding order. Here, such a review would entail reviewing and determining whether the Security Council, as the Defence motions ask, validly assessed a threat to international peace and security under Chapter VII of the United Nations Charter, and then, whether it acted within its powers in creating the Tribunal.

55. This Tribunal, however, is not vested with any power to review the actions taken by the Security Council.[69] The Statute of the Tribunal–enacted by the Security Council–provides no explicit source of power authorising the Tribunal to judicially review the actions of the Security Council and make either a binding order or a declaration carrying legal weight in respect of its actions. Possibly only the International Court of Justice, in adjudicating an advisory opinion referred to it by the United Nations, could *potentially* judicially review the actions of an organ of the United Nations, although it has held that "it does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned".[70] No other judicial body possesses such a power of potential judicial review of the Security Council. The Trial Chamber therefore finds that it cannot review the actions of the Security Council in passing Resolution 1757.

IV. THE ALLEGED VIOLATION OF LEBANESE SOVEREIGNTY

56. The Defence motions also allege that Resolution 1757 violates the sovereignty of the Lebanese Republic. They assert that an individual Accused person–rather than only an affected State–may raise, in his or her own defence, a claim of the violation of State sovereignty. The motions argue that:

- the Security Council acted unilaterally in enforcing the draft Agreement through Resolution 1757 thereby violating Lebanon's sovereignty,[71]
- the Tribunal is a treaty–based institution adopted only as a result of coercive threats by the Security Council,[72]

[69] See, for example, *Tadić* Appeals Chamber decision, para. 20

[70] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports [1972] 16 at 33, para. 89. The ICJ went on, "The question of the validity or conformity with the Charter of General Assembly Resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion."

[71] Ayyash motion, paras 3, 33, 39; Badreddine motion, paras 48, 79; Sabra motion, para. 23; Transcript, 13 June 2012, pp. 10, 18–19.

- because the Tribunal was not established by an agreement between the United Nations and Lebanon, the Tribunal's application of Lebanese domestic law (and not international criminal law) violates Lebanese sovereignty,[73] and
- no valid basis exists to displace the competence of the Lebanese judiciary to try any of the cases in Lebanon.[74]

57. The Prosecution responds by arguing that individuals lack the standing to raise violations of State sovereignty,[75] and that allowing this, as a bar to prosecution, flies in the face of the international goal to end impunity.[76] Article 2 (7) of the United Nations Charter,[77] as an exception to the general principle of non–intervention in the domestic affairs of a sovereign state,[78] precludes United Nations member states from claiming that their sovereignty has been violated by the "application of enforcement measures" for the maintenance of international peace and security inherent in a Chapter VII resolution. Accordingly, in the context of a Chapter VII resolution, Lebanon's consent to the alleged imposition of the Agreement is not a relevant consideration.[79]

58. The Legal Representative for Victims suggests that the claim to displacement of the Lebanese judiciary is "disingenuous" because the Lebanese authorities are incapable and unwilling to investigate and prosecute the 14 February 2005 attack.[80]

DISCUSSION AND FINDINGS

59. The *Tadić* Appeals Chamber decision, departing from the prevailing legal precedents in 1995–and in the context of determining the legality of the ICTY–decided that an individual could raise a violation of State sovereignty in his or her own case. *Tadić* held,[81]

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[72] Ayyash motion, para. 46; Transcript, 13 June 2012, pp. 38–39, 58–59. Inherent in the Security Council's alleged coercion is the notion that Lebanon did not consent to be bound by the draft Agreement (see, Ayyash motion, para. 31; Oneissi motion, paras 33, 52–66; Sabra motion, paras 24–27; Transcript, 13 June 2012, pp. 40, 72.).
[73] Ayyash motion, paras 43–44; Sabra motion, paras 28–30;
[74] Sabra motion, paras 32–33.
[75] Prosecution response, paras 6, 17; Transcript, 13 June 2012, pp. 96–97, 105.
[76] Prosecution response, para. 19; Transcript, 13 June 2012, pp. 97–98.
[77] Article 2(7) of the United Nations Charter reads, Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement. under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.
[78] Transcript, 13 June 2012, pp. 98–99, 114–116.
[79] Transcript, 13 June 2012, pp. 99, 114–116. The Legal Representative for Victims endorsed this view stating that, "the consent of the Lebanese government to the creation of the STL is immaterial" as the Tribunal was established by a Resolution (see, Legal Representative for Victims' observations, paras 23–26.).
[80] Legal Representative for Victims' observations, paras 9–15.

Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.

60. Since then, individual accused have raised a violation of State sovereignty in several international cases, for example, at the ICTY,[82] and the European Court of Human Rights.[83] However, none of these claims related to the issue of legality. No court, it appears, has explicitly accepted or rejected that an individual may raise such a claim, although the European Court of Human Rights appears to have implicitly allowed it in *Öcalan v. Turkey*. The Trial Chamber, however, is not persuaded that it must decide whether customary law has evolved to allow an individual to raise such a claim in relation to the issue of the legality of the institution trying him or her.

61. Moreover, even if the Trial Chamber were prepared to find that an individual accused person could raise a violation of State sovereignty as part of the entitlement to a "full defence"[84] it would not find that Lebanon's sovereignty had been violated here. The Security Council did not, as alleged in the motions, unilaterally put into force an international agreement; rather it took another route and integrated the provisions of the intended Agreement into Resolution 1757. And Lebanon, as the Prosecution correctly responds, has never claimed a violation of its sovereignty. To the contrary, as a member state of the United Nations, Lebanon has honoured its obligations specified in the annex to the Resolution by taking all required steps, including; presenting a list of twelve persons to be appointed as judges by the Secretary–General, appointing a Deputy Prosecutor, recognising the juridical capacity of the Tribunal to enter into agreements with States by concluding Memoranda of Understanding with the Tribunal, contributing significantly to financing the Tribunal, facilitating establishing the Tribunal's Beirut Field Office, complying with Requests for Assistance from the Tribunal, and deferring to the Tribunal's jurisdiction the cases related to the 14 February 2005 attack. Moreover, Lebanon has never claimed a violation of its sovereignty. Lebanon has fully accepted the existence and competence of the Tribunal, as

[81] *Tadić* Appeals Chamber decision, para. 55.
[82] *Prosecutor v. Dragan Nikolić*, IT–94–2–AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, Appeals Chamber, 5 June 2003, paras 20–24; *Prosecutor v Mile Mrkšić, Miroslav Radić, Veselin Šljivančanin and Slavko Dokmanović*, IT–95–13a–PT, Decision on the motion for release by the Accused Slavko Dokmanović, 22 October 1997, paras 13, 18.
[83] For example, ECtHR *Öcalan v. Turkey* (Grand Chamber), 12 May 2005, Rec. 2005-IV, paras 85, 90; *Stocké v. Germany*, 19 March 1991, Series A n° 199, opinion of the Commission, p. 24, § 167.
[84] *Tadić* Appeals Chamber decision, para. 55.

defined in Articles 1 and 4 of the Statute. The Trial Chamber thus cannot make a finding of any violation of Lebanese sovereignty.

V. THE ALLEGED VIOLATION OF THE FUNDAMENTAL HUMAN RIGHTS OF THE ACCUSED

62. The four Defence motions allege that the Tribunal's establishment violated the fundamental human rights of the Accused. The motions contend generally that the Tribunal has not been "established by law".[85] They also argue that the Tribunal's limited jurisdiction violates the fundamental principles of fairness and equality, and, due to a perception of selective justice, undermines its legitimacy.[86]

63. One motion mounts a challenge on the basis of an alleged breach of the principle of *jus de non evocando*, and of an alleged violation of the right to a "*juge naturel*" though the Tribunal's "displacement" of the Lebanese judiciary.[87]

64. Another motion contrasts what it terms "jurisdictional selectivity" with the "lack" of an international response to those killed during and after the Lebanese civil war, and with the generally wider jurisdiction of other international courts, arguing that the limited mandate of the Tribunal is a "political choice" not serving international justice.[88] Further, it is argued that the Tribunal's mandate may increase tensions and unrest, rather than benefiting Lebanon, thus, to attain legitimacy the Tribunal should investigate *all* crimes in Lebanon, both before and after the Hariri attack.[89] Another motion argues that the Security Council should not adopt measures that inflame rather than resolve the crisis by adopting a Resolution.[90]

65. The Prosecution's response is that the arguments regarding alleged selectivity and legitimacy are not jurisdictional, and that the Tribunal is required to observe internationally recognised human

[85] Badreddine motion, paras 50–53; Sabra motion, paras 10–45.
[86] Ayyash motion, paras 3, 47–48; Badreddine motion, paras 54–57; Sabra motion, para. 47; Transcript, 13 June 2012, pp. 32, 45–49.
[87] Sabra motion, paras 46–49.
[88] Ayyash motion, paras 50–51, 56–62; Transcript, 13 June 2012, pp. 32, 45–48
[89] Ayyash motion, para. 62; Transcript, 13 June 2012, pp. 42–47.
[90] Badreddine motion, para. 62.

rights standards in its trials.[91] The limited jurisdiction of all international tribunals is unproblematic as they are not intended to replace *all* domestic prosecutions.[92] Those arguments challenging the scope of the Tribunal's mandate and the sufficiency of its due process guarantees should therefore be dismissed.[93]

DISCUSSION AND FINDINGS

A. *The right of an accused person to be tried by a court "established by law"*

66. International human rights law affords every person accused of committing a crime the right to be tried by a court "established by law"–this right is enshrined, for example, in Articles 14 (1) of the ICCPR and in Article 6 (1) of the ECHR. This right is non–derogable and "absolute",[94] and must be respected for all criminal offences without distinction, from the simplest to the most complex cases, including terrorism.[95]

67. To determine whether a court is one "established by law" it is necessary to examine both how the court or tribunal was created and the judicial powers given to the court. The Trial Chamber endorses the finding of the Special Court for Sierra Leone (SCSL) in *Kallon* where it held,[96]

> it is a norm of international law that for it to be 'established by law', its establishment must accord with the rule of law. This means that it must be established according to proper international criteria; it must have the mechanisms and facilities to dispense even–handed justice, providing at the same time all the guarantees of fairness and it must be in tune with international human rights instruments.

68. Accordingly, the Tribunal would be entitled to decline to exercise some or all of its jurisdiction if satisfied that it had not been established by law or that it could not provide all necessary fair trial

[91] Transcript, 13 June 2012, pp. 102–104.
[92] Transcript, 13 June 2012, p. 103. The Legal Representative for Victims endorsed this, stating that the Tribunal's limited temporal scope does not affect the institution's legality; Legal Representative for Victims' observations, paras 24–26.
[93] Prosecution response, paras 8, 74–85.
[94] See, for example, Human Rights Committee, *Miguel Gonzalez del Rio v. Peru*, Communication No 263/1987, 28 October 1992, U.N. Doc. CCPR/C/46/D/263/1987 (1992), para. 5.2.
[95] ECtHR, *Quinn v. Ireland*, no. 36887/97, 21 December 2000, para. 58. See also, the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 11 July 2002, Article IX. 1: "A person accused of terrorist activities has a right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law".
[96] SCSL, *Prosecutor v. Norman, Kallon and Kamara*, SCSL–2004–14–PT, SCSL–2004–15–PT, and SCSL–2004–16–PT, Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, para. 55. See also, *Tadić* Appeals Chamber decision, paras 45–47.

guarantees, or if the Statute mandated the Chambers or organs of the Tribunal to perform an unlawful act or one contrary to international human rights law.

69. The Trial Chamber has already held that the Tribunal is a creation of Security Council Resolution 1757. So, taking the first step, that of determining how the Tribunal was created; it is indisputable that the United Nations may create judicial bodies. The Security Council created the *ad hoc* international criminal tribunals of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, in 1993 and 1994, respectively, and the General Assembly established first, the United Nations Arbitral Tribunal, and then as its successor the United Nations Appeal Tribunal.

70. Each of these judicial bodies (like the International Criminal Court with its own clearly defined jurisdiction) has its own statute, rules of procedure and evidence and clearly specified powers. As an example, the *ad hoc* international criminal tribunals may try individuals accused of committing international crimes and sentence those found guilty to terms of imprisonment, including a life sentence. For the establishment of the Special Tribunal, the relevant "law" (in the sense of being "established by law") is thus the Resolution itself and its annexes. Conformity with the purposes and principles of the United Nations Charter is hence equivalent to conformity with Article 14 (1) of the ICCPR.

71. It suffices merely to note, without attempting to review the manner in which the Security Council exercised its powers, that the Security Council determined the existence of a threat to international peace and security under Article 39 of the United Nations Charter.[97] Then, applying Article 41 of the Charter, it decided that establishing a tribunal of an international character would be an appropriate measure to maintain international peace and security. As only a judicial body empowered to review the Security Council's actions could do so, and the Trial Chamber is not one, it lacks the competence to scrutinize whether this determination was well-founded.

72. The measures establishing the Special Tribunal are essentially similar to those establishing the ICTY and the ICTR, and, to a certain extent Resolution 1315 (2000) in relation to creating the

[97] See, Resolution 1757, para. 13, which reads: "*Reaffirming* its determination that this terrorist act and its implications constitute a threat to international peace and security".

SCSL.[98] The Trial Chamber finds that the United Nations Organisation, like any national or domestic Parliament, may establish a court or tribunal with specified functions. A court or tribunal established by the United Nations or the Security Council is thus one "established by law" in the sense that the body creating the court or tribunal had the constitutional authority to establish it.

73. To determine the second consideration, namely, whether the procedures of the court comply with the basic requirements of international human rights law, the Trial Chamber must therefore turn to the Statute itself.

74. Using the test in *Tadić*,[99] one motion alleges that the Tribunal's Statute and Rules do not guarantee the four Accused treatment "equally fair" to that of a Lebanese criminal court.[100] That, however, is not the correct test because the Tribunal's procedures must correspond with all relevant international human rights standards protecting the rights of accused persons, rather than simply those under Lebanese law. These include those laid down by specialist courts and institutions dedicated to the protection of human rights, like the United Nations Human Rights Committee, the European Court of Human Rights, the Inter–American Court of Human Rights, and the African Court of Human Rights.

75. The Trial Chamber therefore need assess only whether–on the points raised by the Defence motions–the Tribunal's procedures, as specified in its Statute and Rules, meet all relevant international human rights standards. These are met if the specified procedures *can* conform with the relevant standards. The mere *possibility* of an infringement–that could occur in any court–cannot of itself make the rules incompatible with these standards. To illustrate by example, even if the Statute seemingly permitted the admission of evidence obtained contrary to say, Article 1 of the Torture Convention,[101] the Tribunal could still strictly apply international human rights law to exclude the evidence.

[98] In which the Security Council requested the Secretary–General to negotiate an agreement with the Government of Sierra Leone to create an independent special court, consistent with the resolution.
[99] Sabra motion, para. 49, quoting the *Tadić* Appeals Chamber decision, paras 61–62.
[100] Sabra motion, para. 71.
[101] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 1 states in part: "... torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third

B. Jus de non evocando

76. Invoking the principle of *jus de non evocando*,[102] the Sabra motion argues that (i) certain categories of information which *might* be relevant to its case and for which it *might* otherwise have had access will be unavailable as a result of the "displacement" of the Lebanese judiciary, (ii) the Tribunal may, to the detriment of the Accused, use evidence that would be inadmissible in a Lebanese court, (iii) the Lebanese legal order offers greater legal certainty than the Tribunal, (iv) the Statute of the Tribunal provides no right to amnesty or pardon, and (v) the Tribunal cannot effectively protect the rights of the Accused.[103]

77. The motion also criticizes the Tribunal's evidentiary and exclusionary rules, arguing (i) that certain categories of information (lacking a statutory basis) are beyond the reach of the Defence,[104] (ii) it permits the redacting of material supporting the confirmation of the indictment, and allows delays in disclosing material,[105] and (iii) it authorizes witnesses to testify anonymously.[106]

78. However, strictly comparing the Tribunal's Statute and Rules with domestic Lebanese law is misplaced. The Tribunal's Statute and Rules provide accused persons with all relevant rights under international human rights law. These include, in Article 16 (4) of the Statute giving "full equality of arms" to the Parties, and in Article 21 (2) the right of a Chamber to "exclude…evidence if its probative value is substantially outweighed by the need to ensure a fair trial".[107] The Rules also allow a Chamber to order "counterbalancing" measures if the Prosecutor fails to disclose information to the Defence.[108] Rule 164, giving privileged status to material in possession of the International Committee of the Red Cross, applies equally to the Prosecution. Redactions and delays in disclosure are strictly regulated, in a manner similar to the other

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person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

[102] Loosely translated as "no one can be kept from the competent court".

[103] Sabra motion, paras 50–68.

[104] Sabra motion, para. 51, citing material in possession of the International Committee of the Red Cross and the Red Crescent Movement (Rule 164), memoranda and other internal documents prepared by the UNIIIC (Rule 111), and material in possession of the Prosecutor which may affect the security interests of a State or an international entity and has been provided on a confidential basis (Rules 117 and 118).

[105] Sabra motion, para. 58, referring to Rules 115 and 116 (A).

[106] Sabra motion, para. 57.

[107] Rule 149 (D) repeats this guarantee and adds that a Chamber may exclude evidence gathered in violation of the rights of the suspect or the accused. See also, Rule 155 (ii) (B).

[108] Rules 116 (C) and 118 (D).

international criminal courts and tribunals. As for anonymous witnesses, Rule 159 (B) applies the "solely or to a decisive extent" exclusionary standard of the case-law of the European Court of Human Rights.[109] Finally, the exclusionary regime of Rule 162[110] meets, if not goes beyond, the relevant requirements of the case-law of the various international courts of human rights.[111]

79. The Sabra motion also combines two further grievances that it argues should lead the Trial Chamber to consider that the Defence cannot prepare an effective defence. The first is that the Defence can, through the Tribunal's Defence Office, seek co-operation *only* from Lebanon, and second, it complains about the absence of "a full investigation *à décharge*", a feature of Lebanese criminal procedure.[112]

80. The Trial Chamber, however, finds these arguments unpersuasive; regarding the first, the situation of Defence counsel in relation to requests for international co-operation differs from the Prosecution's only in that they must address their requests through the Defence Office, which may refuse only frivolous or vexatious requests.[113] The absence of a *juge d'instruction* is not contrary to international human human rights requirements. The Prosecution is also obliged to disclose exculpatory material to the Defence, and the Defence may conduct its own investigation (with the assistance of the Defence Office).[114] The principle of equality of arms is therefore respected in a manner entirely consistent with the requirements of international human rights law.

81. The Sabra motion makes a number of other arguments; but these barely refer to international human rights standards. A complaint of "legal uncertainty"[115] refers to findings of the Appeals

[109] For example, ECtHR, *Doorson v. the Netherlands*, 26 March 1996, Rep. 1996-II, para.76; *Van Mechelen and Others v. the Netherlands*, 23 April 1997, Rep. 1997-III, para. 55; *Dzelili v Germany*, Decision on admissibility, no. 15065/05, 29 September 2009.

[110] Rule 162 titled *Exclusion of Certain Evidence* reads: "(A) No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or its admission is antithetical to, and would seriously damage, the integrity of the proceedings. (B) In particular, evidence shall be excluded if it has been obtained in violation of international standards on human rights, including the prohibition of torture."

[111] See, ECtHR, *Gäfgen v. Germany* (Grand Chamber), 1 June 2010, no. 22978/05, Partially dissenting Opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power criticising the Court's decision on Article 6 ECHR, where evidence obtained by inhuman treatment (as defined in Article 3 ECHR) was exceptionally admitted.

[112] Sabra motion, paras 52-55. In some civil law systems, an investigating judge (*juge d'instruction*) conducts an independent investigation of crimes during which he or she is also required to investigate exculpatory evidence.

[113] Rules 16 (C) and 18 (C).

[114] Rule 15.

[115] Sabra motion, paras 60-63.

Chamber in an Interlocutory Decision,[116] but fails to demonstrate its incompatibility with the guarantees of, for example, Article 15 of ICCPR or Article 7 of the ECHR. The Sabra motion also argues that international law does not prohibit amnesties for national crimes.[117] Conversely, however, this does not translate into an entitlement and no such right is found in any international human rights instrument.[118] It also asserts that the provisions of *non bis in idem*[119] in Article 5 of the Statute and Rule 23 would be ineffective. This argument, however, is unsupported and purely speculative.[120] Further, it alleges an absence of safeguards in the Tribunal's procedure regarding detention, but the allegation is directly contradicted by the Rules, including Rule 3 (2), Rule 67, and Rules 79 (C), (E) and (F).[121] Another allegation, that the Accused have no judicial remedy for a violation of a fundamental right attributable to the Tribunal, is likewise directly contradicted by the right to an appeal mandated in Article 26 of the Statute and Rule 176 (A) (i).[122]

82. The Sabra motion also argues that the principle of "*jus de non evocando*" has been violated in that the four Accused are prevented from having their case heard by the Lebanese court competent under the law applicable at the time of the alleged offences, a right guaranteed under Article 20 of the Lebanese Constitution.[123] To replace a national jurisdiction, counsel for Sabra argues, the Trial Chamber must be satisfied that the principle of *jus de non evocando* has not been breached, and the principle of a fair trial is met.[124]

83. The Prosecution correctly responds by pointing out that Article 20 of the Lebanese Constitution contains no such provision, as it only regulates judicial power, stating that it "shall be exercised by courts of various degrees and jurisdiction" and "function within the limits of an order established by law".[125] Further, the *Tadić* Appeals Chamber held that transferring jurisdiction to an international tribunal on behalf of the community of nations does not breach the right of the

[116] STL/11-01/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetrations, Cumulative Charging, 16 February 2011.
[117] Sabra motion, paras 64–65.
[118] See also, Rules 194–196 in relation to pardons and commutations.
[119] See, Article 14 (7), ICCPR: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country", see also, Article 4, Protocol No. 7, ECHR referring to *non bis in idem* (or, *ne bis in idem*).
[120] Sabra motion, para. 66.
[121] Sabra motion, para. 67.
[122] Sabra motion, para. 68.
[123] Sabra motion, para. 46.
[124] Transcript, 13 June 2012, pp. 79–81.
[125] Prosecution response, para. 81.

accused, as long as these rights are specifically spelt out and protected.[126] The Trial Chamber finds no breaches of the fundamental human rights of the Accused in this respect.

C. The Displacement of the Lebanese Judiciary and the guarantee of a "natural judge"

84. The Sabra motion argues that the Tribunal's displacement of the Lebanese judiciary effectively undermines the right of accused persons to have their cases heard by their "natural judge".[127] However, the purported guarantee of a "natural judge" is contained neither in international human rights instruments nor in the Lebanese Constitution, notwithstanding its presence in other national constitutions. It is not a non-derogable human right. For example, many national systems, including Lebanon's, allow, by treaty, the extradition of their citizens.[128]

85. The Security Council, however, may establish, on behalf of the international community, an international criminal tribunal, the functioning of which necessarily involves removing accused persons from their domestic jurisdiction to face trial elsewhere. This does not prejudice accused persons as long as the international tribunal preserves their fundamental rights and the guarantee of a fair trial. The Trial Chamber finds that the Tribunal's Statute and Rules meet all of these conditions. No breaches of the fundamental human rights of the Accused have therefore been identified.

D. Selectivity

86. The Tribunal's restricted jurisdiction is also attacked as being impermissibly "selective".[129] When the international community finds, through a Security Council Resolution under Chapter VII, that establishing an international criminal tribunal is an appropriate response to a threat to international peace and security, that measure is necessarily limited in its object and scope. This is demonstrated by the limited jurisdiction given to the United Nations *ad hoc* Tribunals (the ICTY and ICTR) as the first international tribunals since the Nuremberg and Tokyo Tribunals.[130]

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[126] Prosecution response, para. 82, quoting the *Tadić* Appeals Chamber decision, para. 62
[127] The "*garantie du juge naturel*".
[128] Article 30 of the Lebanese Criminal Code reads: "Nobody may be extradited to a foreign State in cases other than those provided for in this Code, except pursuant to a legally binding treaty".
[129] Badreddine motion, paras 54–57; Ayyash motion, paras 3, 47–48; Sabra motion, paras 47, 69; Transcript of 13 June 2012, pp. 32, 45–49.
[130] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement) and Charter of the International Military Tribunal (1945), 82 U.N.T.S. 280; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

The fact that these tribunals and their successors have primacy over national prosecuting and judicial systems necessitates their limited jurisdiction. They are intended to replace or supplement national systems but only in tightly defined circumstances. The ICTY, the ICTR and the SCSL, for example, have jurisdiction confined to specified circumstances–geographic, temporal or related to the triable crimes and classes of perpetrators. In this respect, the Statute of the Tribunal does not differ.

87. Criminal investigation and prosecution, moreover, is unavoidably selective in any system, even where prosecuting reported crimes is expressed to be legally "mandatory". In sum, "selectivity" is part of the history of international criminal jurisdictions, and an inevitable consequence of establishing an international criminal court or tribunal. Moreover, the Statute of the Tribunal contains no risk of discrimination infringing Articles 2 (1) and 26 of the ICCPR. The Tribunal's restrictive jurisdiction does not violate any fundamental human right to a fair trial.

E. Conclusion regarding the fundamental rights of the Accused

88. The Trial Chamber finds that the Tribunal's Statute and Rules guarantee to an accused person all the relevant and necessary rights to a fair trial mandated under international human rights law and take into account the case–law of institutions such as the European Court of Human Rights and the Human Rights Committee. No breach of any right guaranteed under international human rights law has been identified. The Trial Chamber is thus satisfied and finds that the Tribunal was "established by law" in that it was established by a body that was competent to establish it, namely the United Nations Security Council, and that its Statute and Rules guarantee to the Accused all fundamental human rights. The Trial Chamber therefore has no reason to decline to exercise any of its jurisdiction and dismisses the Defence motions in their entirety.

SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

DISPOSITION

FOR THESE REASONS the Trial Chamber:

DISMISSES the four Defence motions in their entirety.

Done in Arabic, English, and French, the English version being authoritative.

27 July 2012,
Leidschendam, The Netherlands

Judge Robert Roth, Presiding

Judge Micheline Braidy

Judge David Re