



## "The realisation of the Special Tribunal for Lebanon"

On this topic, we will be honoured to hear the comments of:

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### *Introduction by Prof. Strijards:*

Your Excellency,

Your scientific and diplomatic carrier is quite impressive. You got your law graduate at the Lebanese University of Beirut at the Faculty of Law and Political Studies and joined directly after that the Diplomatic Corps at the Ministry of Foreign Affairs and Emigrants of Lebanon. As you flagged at the outset of this meeting, you did not yet present your diplomatic credential letter to her Majesty the Queen Beatrix. As not been accredited yet, you are not entitled to be announced as an “ambassador” in the Netherlands. Therefore you asked me to announce you as “minister plenipotentiary” and I will certainly comply with this humble request.

You managed to develop a marvellous diplomatic carrier, starting as a young Attaché affiliated with the Embassy of Lebanon to the Republic of Sudan.

You ended up with being Ambassador of Lebanon to the people’s republic of China and turned then to the more scientific field being appointed as a director of the Centre for Legal Studies, Research and Documentation at the Ministry of Foreign Affairs and Emigrants.

In this capacity you contributed to different researches and studies in the field of International and Supranational Law. In this framework you devoted special attention to jurisdictional matters prompted by international criminal tribunals.

This evening we will be pondering upon a very special modality of such a tribunal: a special tribunal to try the suspected killers of former Prime Minister Rafik Hariri, the so called Hariri tribunal.

This Hariri tribunal will be a brand new phenomenon at the level of international criminal law. This is for certain: albeit that the Security Council of the United Nations launched a resolution, stipulating that such Ad Hoc Tribunal should be established, this Hariri tribunal could not be considered as a *subsidiary organ* of the United Nations, like the Yugoslavia Tribunal and the Rwanda Tribunal. Those judiciaries have been set up entirely by the United Nations themselves. They got their statute, their mandate, and their substantive and procedural law completely from the United Nations, to which they are eventually responsible when closing their doors.

This will not go for this Hariri tribunal. This tribunal will be set up by the Lebanon as a sovereign state on one hand and by the United Nations as supranational organisation on the other. By setting up this tribunal and by recognizing its jurisdictional scope and radius of action, the Lebanon does not renounce its internal sovereignty in any respect. On the contrary, the Lebanon has expressed its firm will to recognize the tribunal as an emanation of its national judiciaries, an emanation with ad hoc jurisdiction limited *ratione materiae* and *ratione temporis*. Therefore, the establishment of the tribunal can not be considered as an intrusion on the internal territorial sovereignty of Lebanon, as could be said with respect to the ICTY and ICTR jurisdictions: the jurisdictional power of those Ad Hoc-tribunals is *superseding* the national jurisdictions of Serbia, Kosovo, Croatia and Rwanda. In case of jurisdictional conflicts, the tribunal's jurisdictional power has priority. Whereas Lebanon stands at the cradle of the Hariri tribunal, such a conflict is unthinkable.

Therefore, as Nicolas Michel, Under-Secretary-General for Legal Affairs of the United Nations, stressed, the planned tribunal will be of an "international character", the product of good cooperation between the United Nations and this sovereign State Lebanon. For sure, the state Lebanon will have its due influence on the substantive criminal law and procedural rules to be observed by this tribunal. The tribunal will be working out the factual findings of the International Independent Investigation Commission set up by the Security Council, but will have its own status of independence towards this Commission. As has been stated by the United Nations, there is still some reluctance amongst Lebanon's major political figures – who have all expressed strong support as a matter of principle in favour for the tribunal – to settle their differences. The Government, headed by Prime Minister Fuad Siniora, and the opposition have been in dispute for some months over the current composition of the Government. That composition is a precondition for ending the deadlock on the tribunal. Only after full parliamentary ratification of the agreement with the United Nations on the establishment of the tribunal the latter can wield its jurisdictional powers.

It is in the likelihood that under the supervision of the Secretariat-General of the United Nations by the year's end judges can be appointed. According to the tribunal's Statute, which took effect the 10<sup>th</sup> of June 2007, the chambers will comprise an international pre-trial judge with authority to issue arrest warrants, one Lebanese and two international trial judges, two Lebanese and three international appeals judges; and one Lebanese and one international alternate judge. The judge and appeal chambers would then each select a judge to preside over proceedings in their respective chambers. The appeal chamber judge would also be the Tribunal's president. Those judges will be working closely with the Lebanese government to appoint a prosecutor and deputy prosecutor. The same will be valid for the setting up of the statutory provisions to be observed by the Tribunal. This constant close cooperation with the Lebanese Government will make the tribunal differing even from the Sierra Leone Tribunal, which is operating completely in conformity with the Anglo Saxon criminal law tradition – the typical "adversarial system" -- in line with ICTY and ICTR. It is my hunch that this will not become true for this Hariri tribunal. Yet, it is ominous that we do not have any glance of the mean characteristics of the procedural law to be observed by this tribunal to be hosted by the Netherlands. I fancy, this law will be derived from the Lebanon's *lex loci*, that is to say: the criminal procedure common in Lebanon. There is no reason to impose on the tribunal any other procedural law. In this respect, this tribunal will be showing the same features as the *Lockerbie Tribunal*, hosted by the Netherlands as from 1999 until 2007. That Ad Hoc tribunal observed Scots procedural law and was completely managed by Scottish judges and a Scots Solicitor-General. According to the agreement with the United Nations, the United Kingdom obliged itself to consider that tribunal as an emanation of the British judiciary. As you know appeal in Edinburgh is still pending at this very juncture.

It will be with the Netherlands to *host* the Hariri-tribunal, acting as a mandatory, a *manus ministra* for the United Nations. It has to take the stand of a neutral bystander, only facilitating this entity without having any *ius standi in iudicio*, let alone having the right to act as a procedural *intervena*. The Netherlands, on invitation of the United Nations, has to provide for the premises of the tribunal and the facilitations and facilities thereof. It will do so, according to the agreement with the United Nations, on the basis of full reimbursement, just as the case was with regard to the Lockerbie Tribunal. It will take care of the internal and external security, the penitentiary provisions at Scheveningen, the transit movements, safe housing, the access to the country of witnesses, experts, victims and their next of kin and the like. In this respect, the Hoststate Agreement and the Host Arrangements concluded with the United Kingdom with a view to the Lockerbie Tribunal could offer some guidance. Yet, the Netherlands as ratifier of the European Convention on Human Rights will have some collateral responsibility for the observance by the tribunal of principles and guaranties of due process, as has been recognised in the preliminary in juncture procedures at the outset of the Milosevic-procedures before the The Hague district Court. After all, the suspects to be brought to the Netherlands will be “within the jurisdiction” of the Netherlands as a territorial state conforms article 1 of the abovementioned convention. As territorial and custodial state, the Netherlands can not circumvent that autonomous responsibility towards the other parties to that convention. I recall especially the “speedy trial” guarantee according to article 6 of that convention, given our experience with the Milosevic procedures. Therefore, the procedural law to be observed by the Tribunal is by no means irrelevant for the Host state. In this respect it is really striking that this tribunal is set up to sit over “political killings” as has been said by the United Nations Legal Counsel Nicolas Michel during his briefing as of the 2th of May 2007. It will be, in this sense, a *Sondergericht*. It will not only focus on the Hariri assassination: once it is formally established, it will be up to the tribunal to determine whether other political assassinations in Lebanon since October 2004 were connected to Mr Hariri’s assassination, as Serge Brammertz, the current head of the International Independent Investigation Commission stipulated explicitly. Therefore, there is a real risk that the procedures will be flawed by politics which could jeopardise the credibility of the tribunal’s outcomes and will open a real risk to lengthen procedures --- in the Netherlands, that is.

Therefore, this evening the Ambassador will be talking about a tribunal, the features of which have never been seen at the hemisphere of international criminal law until now, a real unprecedented entity amongst the family of international tribunals.

Your Excellency, the floor is entirely yours.

***Comments by His Excellency Ambassador Zeidan Al Saghir:***

Excellencies,  
Ladies and Gentlemen:

I am honoured to be here today as lecturer at the International Criminal Law Network (ICLN) which was founded in 2002 by the Ministry of Foreign Affairs, the Dutch Ministry of Defence and the Municipality of The Hague.

2- The suggested topic of my lecture is to give my comments on the reasons for the establishment of the Special Tribunal for Lebanon, also to indicate what expectations Lebanese people and/or the Lebanese Government might have regarding the Hariri Tribunal.

**I-The establishment of a Special Tribunal for Lebanon (or the Tribunal with an international character):**

3-To know the reasons for the establishment of this Tribunal, let us go back to the terrorist act which happened in 14 February 2005, and I will be very short; I do not want to waste your time:

4- On February 14, 2005 a huge explosion in Beirut targeting the motorcade of the former Prime Minister Rafic Hariri, which killed him and 22 other persons.

This horrible and heinous terrorist act produced a condemnation around the world and the UN Security Council, by a Presidential statement requested the Secretary-General to follow closely the situation in Lebanon and to report urgently on the circumstances, causes and consequences of this terrorist act.

5- Accordingly, the Secretary-General charged a Mission (fact-finding Mission) to inquire into the causes, circumstances and consequences of the assassination of former Prime Minister Rafic Hariri (Headed by Peter FitzGerald)

6- This mission arrived to Beirut on 25 February 2005, and met with a large number of Lebanese Officials and representatives of different political groups, performed a thorough review of the investigation and legal proceedings, examined the crime scene and the evidence collected by the local police, and interviewed some witnesses in relation to the crime.

7- The Mission concluded its inquiry in Lebanon on 16 March 2005.

In its report, the Mission recommended, among other recommendations the following: I quote

*“It became clear to the Mission that the Lebanese investigation process suffered from serious flaws. Whether caused by lack of capabilities or commitment..... It is therefore the Mission’s view that an international independent investigation would be necessary to uncover the truth. To carry out such an investigation, there would be need for a self-sufficient team, comprising the different fields of expertise that are usually involved in carrying out similarly large investigations in national systems.”*

8- The UN Secretary-General transmitted this report to the President of the Security Council and to Lebanese government and he endorsed the Mission’s recommendations. In his letter the Secretary-General mentioned that “Lebanon is passing through a difficult and sensitive period it is imperative that all concerned should behave with the utmost restraint. The future of Lebanon should be decided through peaceful means”

9- According to this letter and a letter addressed by the Chargé d’Affaires a.i. of Lebanon to the Secretary General, The Security Council adopted the Resolution 1595 which stipulates in its first operational paragraph the establishment of an International Independent Investigation Commission based in Lebanon to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices.

10- The resolution in its 8<sup>th</sup> operational paragraph: requests the commission to complete its works within three months of the date on which it commences its fully operations, and authorizes the Secretary-General to extend the Commission’s operation for a period not exceeding three months, if he deems it necessary to enable the Commission to complete its investigation.

11- Till now the Commission did not finish its investigation yet , it had issued 8 reports, and its operation had been extended in all UN Security Council resolutions related to its work and the last one 1748, dated 27 March 2007, which extends its operation till the 15<sup>th</sup> of June 2008.

12- During the operation of the Commission, Lebanon has been the theatre and the victim of many terrorist acts which cost the life of some leaders and prominent Lebanese personalities and caused serious damages in Lebanon infrastructure. An overview of some cases in chronological order:

- 1- 1 October 2004, car bomb, Marwan Hamadeh and driver wounded, body guard killed;
- 2- 23 March 2005, bomb, 3 persons killed, 7 persons wounded and serious material damage to buildings and cars;
- 3- 2 June 2005, victim’s car bomb, Samir Kassir killed; ( a journalist and professor at University)
- 4- 21 June 2005, victim’s car, Elias El-Murr, Deputy Prime Minister and Minister of the Interior, 2 other persons wounded and 1 person killed;

- 5- 25 September 2005, Victim's car, May Chidiac, journalist and TV talk-show, seriously wounded;
- 6- 12 December 2005, car bomb. Gebran Tuéni , journalist and MP and 2 other persons killed;
- 7- 13 June 2007 car bomb: victim : Walid Eido , MP and his son, and several civilians were killed, other civilians were wounded
- 8- And the last one 19 September 2007, car bomb, victim Antoine Ghanem, MP, his body-guards and 2 other civilians were killed

The targeted victims were killed or injured only for political reasons and for their thoughts, and many injured or killed civilians are innocents

13- These terrorist acts were condemned by Lebanese people and government whole the international community and especially by the UN Security Council;

14- The Lebanese Government always declared that the perpetrators must be brought to Justice, and that is why after the assassination of the prominent journalist and Member of Parliament Mr. Gibran Tuéni, the Prime Minister of Lebanon, in the name of the Lebanese Government, addressed a letter to the Security Council dated on 13 December 2005, requested this latter:

- 1- To establish a Tribunal of 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.
- 2- To expand the mandate of the International Independent Investigation Commission formed according to Security Council resolution N. 1595 (2005) or create an independent international investigation Commission to investigate the assassination attempts and assassination and explosions that took place in Lebanon starting with the attempt on the life of Minister Marwan Hamade on 1 October 2004.

15- The Security Council, by its Resolution № 1644, dated on 15 of December 2005 adopted the two requests of Lebanese Prime Minister. (Paragraphs 6 and 7 of the resolution:

16- According to this resolution, the UN Secretary-General charged Mr. Nicolas Michel, under-Secretary-General's legal Counsel to enter in discussions with Lebanese authorities concerning the nature and scope of the international assistance needed in this regard and at the same time to present recommendation to expand the mandate of the Commission to include investigation of the other attacks.

17- In his report to the Security Council on 21 March 2006, the Secretary-General asked the Security Council to adopt a resolution requesting him to initiate negotiations with the Lebanese Government aimed at establishing a Tribunal of an international character.

18- The Security Council by its resolution 1664 of 29 March 2006, welcomed the report of the Secretary-General, and requested him to negotiate an agreement with the Government of Lebanon aimed at establishing a Tribunal of an international character based on the highest international standards of criminal Justice, taking into account the recommendations of his report the views that have been expressed by Council members.

19- Since that date negotiations between Lebanon and UN legal delegation arrived at an agreement on the establishment of a Special Tribunal for Lebanon which shall function in accordance with the statute attached to the agreement. The Security Council adopted the resolution 1757 dated on 30 May 2007 under chapter seven of the Charter of the United Nations, which endorses that agreement with its attachment.

20- In his first report , dated 4 September 2007, submitted to the Security Council concerning the implementation of the Resolution 1757 of 30 May 2007. The Secretary-General mentioned that the establishment of the Special tribunal will proceed in three phases :

- Preparatory phase, which is currently under way,
- Start-up phase,
- The commencement of functioning which will be determined by the Secretary-General in consultations with the Lebanese Government, once sufficient financial means will be received.

21- Then, the establishment of a Special Tribunal for Lebanon has passed by 3 major steps:

- 1- The establishment of a Fact-Finding Mission.
- 2- The establishment of the International Independent Investigation Commission.
- 3- The establishment of the Special Tribunal for Lebanon.

## **II- The expectations that the Lebanese Government and the Lebanese people might have been regarding the Hariri Tribunal;**

22- Lebanon has been the victim and the theatre of a lot of terrorist acts which cost the life of many prominent personalities and the destruction of its economy and contributed to create a climate of insecurity and intimidation, which seriously affects the functioning of the political institutions as well as the social life and its economy.

23- The urgent need to find the truth behind the crime of killing of Prime Minister Hariri and others, and to bring those who carried out these attacks to Justice, could contribute to returning the country to stability and putting an end to the suffering of Lebanese people, who are very eager for peace.

24- To rebuild our country after a series of attacks. That deserves to have this Special Tribunal for Lebanon, that's why we have the right to ask the U.N. and all International Community to establish this special tribunal, may it bring peace, and security for us.

25- Also may this tribunal contribute to put an end to the culture of impunity of the political crimes which have been committed in Lebanon in the past years and to eliminate the feeling of intimidation among the Lebanese people

26 - And at the end why The Hague is the seat of this tribunal? The answer is very easy. By hosting the most important international courts like ICJ, ICC, PCA, and ICTY The Hague became the capital of justice in the world, and to host the Special Tribunal for Lebanon it means that the tribunal is at home. And thanks again to The Netherlands for hosting the tribunal. Thank you,

### ***Comments by Mr. Peter van der Vliet:***

I would like to focus my comments on the issue of the establishment of the seat of the Lebanon tribunal in the Netherlands.

A good starting point would be to recall the agreement between the UN and Lebanon on the establishment of a special tribunal for Lebanon, and the attached statute for the tribunal. The agreement was signed on 23 January 2007 by the government of Lebanon, and on 6 February 2007 by the UN.

Lebanese Prime Minister Siniora subsequently informed the UN that a parliamentary majority had expressed its support for the tribunal. He also noted, however, that the establishment of the tribunal through the Lebanese constitutional process was facing serious obstacles.

Ambassador Al Saghir already commented on the political circumstances in Lebanon that caused these obstacles. In view of the situation with regard to the constitutional process, the Security Council on 30 May 2007 adopted resolution 1757, deciding that the provisions of the agreement between Lebanon and the UN, including the attached statute of the tribunal, would enter into force on 10 June 2007, unless the

government of Lebanon would notify the UN that the legal requirements for entry into force had been completed with. As we know, this did not happen, and therefore the provisions of the agreement and the statute entered into force, as decided by the Security Council, on 10 June 2007.

Resolution 1757 requests the Secretary-General to undertake the steps and measures necessary to establish the tribunal in a timely manner and to report to the Council within 90 days and thereafter periodically on the implementation of the resolution.

Since then, the Secretary-General has been working actively on getting the Lebanon tribunal up and running. This process includes for instance (i) the mobilisation of sufficient funds for the Tribunal, (ii) the appointment of judges, the prosecutor, the registrar, the Head of the Defence Office and other staff and (iii) the location of a seat for the Tribunal.

As far as the seat is concerned, it is worth recalling the provision that “The Special tribunal shall have its seat outside Lebanon” [Annex, article 8, para1]. It is also stated that “the location of the seat shall be determined having due regard to considerations of justice and fairness as well as security and administrative efficiency.”

In his first report to the Security Council [S/2007/525], dated 4 September 2007, on the implementation of resolution 1757, Secretary-General Ban Ki-moon noted that “After considering possible seats and noting that locating the Special tribunal in the Netherlands would fully meet the criteria [...] I wrote to the Prime Minister of the Netherlands inviting his Government to consider hosting the Special tribunal.” The Secretary-General goes on to say that, in his letter, he emphasized that the experience and knowledge gained by the Netherlands in hosting several international courts and tribunals was invaluable. He also cited the unique and essential role of the Netherlands in the development of international justice and the rule of law.

Needless to say that the Dutch government was flattered by these kind words of the Secretary-General. For a country that has written the goal of promotion the international legal order in its constitution, it is indeed an honour to be considered the most appropriate State to host the tribunal.

After thorough consideration, Prime Minister Balkenende replied on 14 August that the Dutch government is favourably disposed to hosting the Tribunal.

Several considerations led to this positive decision. First, when called upon by the Secretary-General, you of course owe it to him to look very seriously into his request, especially if it is backed up by a Security Council resolution. Secondly, the argument of *noblesse oblige* – hosting the Lebanon tribunal further reinforces the image of The Hague as the Legal Capital of the World. Thirdly, it would also be a concrete step towards the goal laid down in our Constitution, namely to promote the international legal order. And fourthly and more specifically, it would contribute to the aim of ending impunity.

Where do we stand now? Currently, we are engaged in a process of consultations with the UN on the modalities for the establishment of the tribunal in the Netherlands. A UN delegation led by Legal Adviser Nicolas Michel visited the Netherlands at the end of August and visited possible sites for the Tribunal, identified issues for further discussion and agreed upon further steps to achieve progress in a timely manner.

Let me briefly touch on some of the issues that are being discussed between the UN and the Netherlands at the moment. As this is an ongoing process, I hope you will forgive me that I am not at liberty to go deep into the substance.

One issue is the establishment of the required legal basis for the Tribunal to function. This necessitates the conclusion of a Headquarters Agreement and national implementing legislation. We are making good progress on this issue.

A second issue, or set of issues rather, is related to costs. Of course, the UN and the Netherlands want to know what the costs are of establishing the tribunal in the Netherlands. We are working together with the

UN to get a clear picture of the start-up and investment costs of setting up the tribunal. In the meantime the UN has provided an estimate for the running or operational costs of the tribunal. These are estimated at USD 35 million for the first year of operations, USD 45 million for the second, and USD 40 million for the third. Resolution 1757 and its Annex state that 51 per cent of the expenses of the tribunal shall be borne by voluntary contributions from States, and 49 per cent by the government of Lebanon. It is understood that the Secretary-General will commence the process of establishing the tribunal when he has sufficient contributions in hand to finance the first year of operations, plus enough pledges to cover the following two years. The resolution also states that if there are insufficient voluntary contributions for the tribunal to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the tribunal. This back-up provision is not spelled out in more detail.

Thirdly and evidently, a suitable site to house the Tribunal needs to be selected. As noted before, we visited a number of possible sites together with the UN delegation, and discussed the specific requirements that a site housing this kind of tribunal should meet. Our consultations are proceeding well.

A final issue that I would like to mention in this non-exclusive list is the so-called enforcement of sentences. This is an important concern for the Netherlands. The statute of the tribunal says in this regard that imprisonment shall be served in a State designated by the President of the Special tribunal from a list of States that have indicated their willingness to accept persons convicted by the Tribunal. This means that other States will have to do their share in allowing the tribunal to function properly.

The process of consultations with the UN on the modalities of establishing the tribunal in the Netherlands will continue productively and in good spirit in the coming weeks and months. Both the UN and the Dutch side are confident that the Secretary-General will be able to report progress to the Security Council.

Thank you.