Leiden Journal of International Law, 21 (2008), pp. 485–512
 Printed in the United Kingdom doi:10.1017/S0922156508005062

A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice

FRÉDÉRIC MÉGRET*

Abstract

Discussions on the creation of the Special Tribunal for Lebanon have focused on its impact on Lebanese sovereignty and, specifically, the fact that a Chapter VII resolution seems to bypass Lebanese democracy. Simply relying on the idea of a 'breach of international peace and security' to overcome these arguments is not helpful. It is more useful to locate the creation of the Tribunal within evolving international criminal justice practices. These practices are increasingly constraining the Security Council's own work rather than the contrary, as international criminal justice gradually emancipates itself from the confines of 'international peace and security' and becomes a logic unto itself.

Key words

hybrid; international criminal justice; international criminal tribunals; Security Council; Special Tribunal for Lebanon; United Nations

The creation of the Special Tribunal for Lebanon (Hariri Tribunal) is a further step in what has rapidly become a polymorphous, seemingly ever-evolving international criminal justice regime. There is no longer anything particularly shocking about the UN Security Council in principle creating such tribunals. We have become used to this being one of the contemporary uses of the Council's powers, as the concept of 'international peace and security' and the means available to deal with breaches thereof are constantly being redefined. The idea that some sort of international criminal judicial dimension is, these days, an indispensable element of any crisis management has also become deeply ingrained.

Resolution 1757(2007) which created the Tribunal was adopted by ten votes in favour, with no opposition. The co-sponsors of the initial resolution were the United States, Britain, France, Belgium, Slovakia, and Italy. Other states such as Ghana and Peru also voted for the resolution. What is more interesting is the fact that five states, including two permanent members (China and Russia) and two regional powers (South Africa and Indonesia) abstained, and the reasons why they did so. Although specific formulations differed, a unifying thread running through the

* Assistant Professor of Law, McGill University; Canada Research Chair on the Law of Human Rights and Legal Pluralism and Director of the McGill Clinic for the Sierra Leone Special Court. The author is grateful to Balkees Jarrah for particularly helpful and efficient research assistance.

abstentions was a fear that Lebanese sovereignty was being unduly encroached on – a fear that was expressed resolutely at the Council.

Is the feeling that the Security Council had exceeded its authority and was interfering in Lebanese affairs warranted? Has the Council gone too far? In order to answer these questions, it is necessary simultaneously to highlight what is specific about the situation of Lebanon and to contextualize the creation of the Tribunal beyond the peculiarities of that immediate environment. In terms of specificities, as will be seen, what is specific is the fact that Lebanon was actively involved in the creation of the Tribunal, and the fact that Lebanon is a democratic state. What is common to the creation of the Hariri Tribunal and other tribunals is more complicated: it may be that it was created by the Security Council under Chapter VII of the UN Charter, or it may be more generally that it is part of a series of efforts at internationally engineering criminal justice.

Typically, the starting point in explaining why Lebanese sovereignty and democracy should not be an obstacle to the creation of the Tribunal is the existence of a threat or breach to 'international peace and security', and the extent to which that should override other factors. I shall begin, therefore, by presenting the cases both in favour of and against the creation of the Tribunal by means of a Security Council resolution from that angle (section 1). I shall suggest, however, that the debates that emerge from this interaction are, taken in isolation, inconclusive. 'International peace and security', in particular, is too broad and porous a concept to explain much in terms of the creation of international criminal tribunals. Instead, I propose that it is more useful to cast the debate as one of the evolution of a global regime of international criminal justice and the way in which it is gradually imposing itself on Security Council practice. I will argue that while 'international peace and security' may have largely shaped 'international criminal justice' in its beginnings, it is increasingly 'international criminal justice' that is shaping our understanding of the practice of 'international peace and security' (section 2).

1. The Council debate

1.1. The abstainers: *justitia contra demos*?

The heart of the abstainers' reluctance towards the Hariri Tribunal was a voiced concern about Lebanese sovereignty.[1] That stance is part of a larger resistance to erosions of sovereignty provoked by Council action, especially in the field of human rights.[2] In this case, it may well be that the abstainers were indirectly as much concerned with *their* sovereignty (and the precedential value of Resolution 1757) as with that of Lebanon, but the arguments remain the same.

Criticisms that sovereignty is being encroached on have always been made whenever the Council has created tribunals in the past – indeed whenever any

1. Indeed, even some of the states that supported the resolution were keen to emphasize that the use of Chapter VII powers should not 'constitute a precedent beyond this particular case'. See statement of Peruvian representative in Security Council Meeting Record, UN Doc. S/PV.5685 (2007), at 6.
2. See F. Mégret, 'The Security Council', in P. Alston and F. Mégret (eds.), *The Security Council and Human Rights: A Critical Appraisal* (2008).

https://doi.org/10.1017/S0922156508005062 Published online by Cambridge University Press

international tribunal has been created. In some form or other, many arguments against the creation of the Nuremberg and Tokyo tribunals were that they went against German and Japanese sovereignty; defendants before the International Criminal Tribunal for the former Yugoslavia (ICTY) used exactly the same sorts of argument to challenge the legality of the Tribunal's creation;[3] and states like the United States that do not want to become parties to the International Criminal Court (ICC) argue that it is a violation of their sovereignty even for other states to have created such a court.[4] There were also, in the reactions of some states to the adoption of Resolution 1757, elements of an argument that this was simply a sovereign matter,[5] and states such as Syria which were not Council members have made it known that they considered the resolution to be in violation of Lebanese sovereignty.[6] Ritual invocations of sovereignty are thus part and parcel of the reaction to the creation of international criminal tribunals, and the reaction to the Hariri court is at least superficially no different in that respect.

As manifestations of a political judgement about what it is opportune to do in a certain set of circumstances at the stage of Council deliberations, such invocations are perfectly legitimate; as arguments on the legality of the creation of the Tribunal once its principle has been decided, however, they fare less well. In the past, arguments based on sovereignty in the context of the creation of ad hoc criminal courts have been dealt with quite effectively by the Council (which by and large ignored them) and in subsequent judicial assessments. Both the ICTY[7] and the International Criminal Tribunal for Rwanda (ICTR)[8] rejected the rather simplistic notion that they were created in violation of the sovereignty of the states over which they had jurisdiction. Further, the idea that the ICC is in itself a violation of the sovereignty of non-state parties has been thoroughly discredited.[9] In the light of this, there is no doubt that to suggest that the creation of the Hariri Tribunal by the Council is a violation of Lebanese sovereignty without further arguments might be a precarious argument legally.

However, in all the above cases one could also argue that the rejection of the argument that sovereignty was violated was based on an assessment of the particular situation arising from use of that sovereignty. The argument was less that international criminal tribunals could never affect sovereignty (if the Council capriciously decided to ignore state sovereignty, for example, it would be violating it), and more that some higher-order norm (whether it be the power of the Council to

3. See *Prosecutor v. Tadić*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-I-T, T.Ch. II, 10 August 1995, at para. 2. Tadić argued that the ICTY was illegal because the Security Council had violated the sovereignty of the former Yugoslav states.
4. M. Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', (2001) 64 *Law and Contemporary Problems* 13.
5. For example, the Indonesian representative noted that '[t]here are no legal grounds for the Security Council to take over an issue that is domestic in nature'. See Security Council Meeting Record, *supra* note 1, at 3.
6. I. Black, 'Syria Brands Hariri Tribunal as Harmful Ploy by Washington', *Guardian*, 1 June 2007.
7. See *Prosecutor v. Tadić*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-I-T, T.Ch. II, 10 August 1995, at paras. 41–44.
8. See *Prosecutor v. Kanyabashi*. Decision on the Defence Motion on Jurisdiction, Case No. ICTR 96–15-T, T.Ch. II, 18 June 1997, at paras. 13–16.
9. On that issue see F. Mégret, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law', (2001) 12 EJIL 247.

restore international peace and security, or the power of states to conclude treaties *inter partes*) justified the creation of such tribunals and ensured that no violation occurred. In the case of the ICTY and the ICTR there was a clear perception that some significant abuse of sovereignty was the source of the breach of international peace and security, making it legal for the Council to override it.

The argument of the abstainers (as opposed to what appears to be the more knee-jerk reaction of the Syrian government) was more complex than simply an outright defence of sovereignty for the sake of it. In this regard, it is worth noting that none of the abstainers argued in principle against the prosecution of those involved in the murder of Rafik Hariri. Indeed, this is a testimony to changing times and to how embedded in international discourse international criminal justice has become. Overall, states were all quite keen to display their pro-international criminal justice credentials at the opening of their statements,[10] and several of the abstainers had in the past voted apparently without special difficulty in favour of the creation of some or all of the ad hoc tribunals.[11]

In order to understand why they nonetheless thought that adoption of Resolution 1757 would unduly affect the sovereignty of Lebanon, an argument made both before the creation of the Tribunal (as a reason to prevent its creation) and after (as a note of scepticism expressed through abstention), one must understand the quite peculiar circumstances of the creation and nature of the Tribunal. Three special variables come to mind: (i) the early implication of Lebanon in the creation of the Tribunal, (ii) the fact that Lebanon is a democracy which may have run into difficulties, but which (iii) was still 'functional'.

1.1.1. Initial state participation

This was not a case where the Council had judged from the start that a tribunal should be created regardless of sovereign consent, because it expected that no consent would be forthcoming. Although the Council was 'seized' of the situation in Lebanon, it by and large saw itself as helping the Lebanese authorities to deal with the crisis rather than as imposing a solution on them. The original intention had very much been that Lebanon would accept the Tribunal. Article 19 of the Statute of the Tribunal made it clear that '[t]his Agreement shall enter into force on the day after the Government [of Lebanon] has notified the United Nations in writing that the legal requirements for entry into force have been complied with.'[12] The Tribunal, therefore, was not to be imposed on Lebanon, in the way one might think the ICTY had been imposed on the Republic of Yugoslavia, Croatia, and even Bosnia and Herzegovina. If anything,

10. For example, the representative from Qatar stressed the country's 'firm, established position of advocating the need to establish justice and oppose impunity'. The Indonesian representative likewise underlined the need that '[t]hose who are found responsible for the assassination of the late Prime Minister Hariri and for other related assassinations must therefore be brought to justice.' See Security Council Meeting Record, *supra* note 1, at 2–3.
11. See UN Docs. S/RES/827 (1993) and S/RES/955 (1994). Russia cast a 'yes' vote for both the ICTY and the ICTR, while China supported the ICTY but abstained on the establishment of the ICTR. South Africa, Indonesia, and Qatar were not members of either of the Councils that established the ad hoc tribunals.
12. Report of the Secretary-General on the establishment of a special tribunal for Lebanon, UN Doc. S/2006/893, Ann. I, Art. 19(1).

the scenario more closely resembled the early stages of the ICTR, when Rwanda had requested the creation of its 'own' ad hoc tribunal.

One can see how it might clearly be desirable, all other things being equal, for states to consent to measures purportedly taken on their behalf for the sake of resolving what may be seen as a principally domestic crisis. It is desirable, in particular, that states consent to the creation of tribunals with jurisdiction over crimes over which their own courts would normally be competent. As a measure based on the need to re-establish international peace and security, the creation of tribunals is specific in that it will perforce require a much higher degree of co-operation (at least in a case of collective-security military intervention, there is no prospect of that). Imposing international criminal justice in the face of persistent sovereign obstruction has thus proved in the past to be quite problematic. The record of the ICTR and Rwanda, for example, show how difficult it is for an international criminal tribunal, whatever the authority of a Chapter VII creation, to carry out its mandate in conditions where it is being opposed by the state principally concerned.[13] The UN Secretary-General has clearly acknowledged that '[a] key lesson learned from those experiences was that the interested State should be associated in the establishment of the tribunal'.[14] The ICC Prosecutor's apparent current bias in favour of investigating as a matter of some priority cases that have been referred to it by the states concerned can be ascribed to the same phenomenon.[15]

In the case of Lebanon, where there is a clear perception that the Tribunal's chances would be hugely improved with political support in the highest spheres of the state,[16] the government and even a majority within parliament supported the creation of the Tribunal. However, this may not be enough in a country undergoing a very fractious political crisis and where the success of any such initiative will be heavily dependent on support from key political constituencies. As Nicolas Michel, the UN Under-Secretary-General for Legal Affairs, underlined, there is 'wisdom' in the idea that 'in order to advance the cause of peace, the judicial process must enjoy the necessary support' – a support ideally obtained through 'broad consultations and, ultimately, formal agreement'.[17]

13. According to a Human Rights Watch memorandum released in October 2002, the ICTR Prosecutor reported Rwanda's non-co-operation with the Tribunal to the Security Council. In her report, the Prosecutor indicated that the Rwandan government failed to facilitate the travel of witnesses and to provide access to documentary materials necessary to the work of the Tribunal. The Prosecutor also suggested in her report that the government's non-co-operation was tied to the indictment of Rwanda Patriotic Army (RPA) soldiers by the Tribunal. See Human Rights Watch, 'Action Urged Regarding Non-co-operation with ICTR and ICTY', available at http://hrw.org/press/2002/10/noncooperation-ltr.htm.
14. Report of the Secretary-General pursuant to para. 6 of Resolution 1644(2005), UN Doc. S/2006/176 (2006), at 2.
15. See ICC-OTP, Annex to the 'Paper on Some Policy Issues before the Office of the Prosecutor': Referrals and Communications (Policy Paper September 2003), at 5. ('Where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that that State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute.')
16. C. Mallat, 'Danger Still Stalks the Hariri Tribunal', *Daily Star*, 28 September 2007, available at www.dailystar.com.lb/article.asp?edition_ID=10&article_ID=85626&categ_id=5.
17. Report of the Secretary-General, *supra* note 12, at 4.

Moreover, the question of state consent is not simply a practical or policy issue, it is a normative question. It raises the question of the circumstances in which the Security Council may order the creation of a tribunal without state consent. This will not necessarily admit of any black-and-white answer, and there will be circumstances in which it is more or less legitimate for the Council to do so. At stake is the complex interaction of sovereignty and international peace and security. Presumably the higher the threat to international peace and security the more legitimate the intrusion in sovereign matters via international criminal institutions. At the same time, the existence of a threat or breach to international peace and security does not authorize *any* intrusion of sovereignty, but only that minimal intrusion compatible with the need to re-establish international peace and security (allowing obviously for a fairly ample margin of appreciation). The abstainers would seem to have a case that the Council may have resorted a little quickly to a Chapter VII imposition, when other means would have been available.

1.1.2. Democratic agreement

What makes matters more complex in the case of Lebanon is that the issue was not simply one of sovereign agreement. Behind the idea that there should be *sovereign consent* to the Hariri Tribunal was the idea that there should be *democratic agreement* expressed by Lebanese democracy. Several abstainers clearly underlined that point,[18] and those supposedly responsible for blocking Lebanese institutions also insisted on their 'desire to set up the Tribunal using authorized constitutional means in Lebanon, free from any suspicion or political agenda and without any distortion of its mandate, thus making the Tribunal legally unimpeachable'.[19]

As far as the Council is concerned, typically when matters of international peace and security are at stake it matters little what type of polity is involved (all sovereigns are equal and, thus, to an extent, treated alike as far as international law is concerned). It is of little relevance, in particular, whether the decisions or facts that prompt the Council's intervention were the emanation of a democratic regime or not. The Council has in the past adopted Chapter VII resolutions against both non-democratic and democratic states, and both seem, at least in theory, equally susceptible to being affected by, or a cause of, a breach of international peace and security requiring Council involvement.

Arguably, however, apart from the fact that they may be intrinsically less disruptive (an entire debate unto itself), democracies may warrant slightly more cautious treatment by the Council, even when threats to international peace and security are involved. This may be out of a greater trust in the ability of democracies to bring their own contribution to remedying certain breaches, although that point is bound to be contentious. It should be mostly, however, out of simple deference to

18. The Indonesian representative stated that '[i]f the draft resolution is adopted, it will bypass constitutional procedure and national processes'. See Security Council Meeting Record, *supra* note 1, at 3.

19. Letter dated 15 May 2007 from the President of Lebanon addressed to the Secretary-General, UN Doc. S/2007/286, Ann. I.

democratic arrangements and the rule of law when they are available.[20] After all, the United Nations – and the Security Council itself – is otherwise largely involved in promoting and defending democracy. The Council may be a body that is entrusted with a specific security mandate, but it is also embedded in the Charter's entire normative structure.

The idea that, at the slightest democratic decision (or as the case may be, non-decision, but the distinction may be specious) that might affect international peace and security, the Council is entitled to impose measures under Chapter VII, flies in the face of a view of democracy that may see it, for example, as a process of trial and error, experimentation, and, occasionally, the odd mistaken, even marginally dangerous, decision. The fact that such a democratic background is not always available (and the purpose of transitional justice mechanisms may be precisely to usher in a new democratic era), if anything makes it even more important to respect it when it is present. Certainly the precedential and signalling effect of the Council being seen as bypassing democratic institutions is, all other things being equal, bad for the United Nations' democracy-promotion efforts, especially in cases of breaches of international peace and security that remain relatively contained.

It thus probably should make a difference whether the withholding of consent to a measure such as the creation of a tribunal is the result of a democratic process or not. If not, it will be easier for the Council to affirm that the absence of consent is precisely part of the problem and a prolongation of a disruption of international peace and security by the state faulted for breaching it in the first place. If the withholding of consent is the expression of a democratic process, however imperfect or stalled, some more intractable tension may arise between the Council's own assessment of what is needed to restore international peace and security, and the need to defer to democratic decisions. One might consider that the normative threshold for using Chapter VII to impose a judicial institution should probably be higher when democratic arrangements are present and require a demonstration that a particular democratic decision is manifestly so unconducive to restoring international peace and security that the Council needs to step in.

1.1.3. 'Functional' democracies

The question in the case of the Hariri Tribunal was more complex than simply about the fact that a democracy was involved. Fewer problems might have arisen had that particular democracy been deemed to function normally. Either it rejected the creation of a tribunal (there is no reason, after all, to believe that democracies, especially new ones, necessarily always value the fight against impunity) and the Council was forced to assume its responsibilities, having to create it despite the absence of democratic consent; or it accepted the creation of a tribunal, and the Council was only needed as some form of loose sponsor.

20. One report of the UN Secretary-General states that '[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives'. See Report of the UN Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616 (2004), at 1.

https://doi.org/10.1017/S0922156508005062 Published online by Cambridge University Press

In practice, however, Lebanese democracy failed either to accept unambiguously or to reject the Tribunal. What made a Security Council resolution necessary for the majority, therefore, despite the initial commitment to respect both Lebanese sovereignty and democracy, was the fact that parliamentary mechanisms in Lebanon appeared to be blocked because of a refusal by the Speaker of Parliament to convene it, and more generally because of a complex power crisis linked to power-sharing agreements and involving the departure of Hizbullah cabinet ministers from the government.[21]

As a result, the Council decided that it could and should bypass that blockage by adopting a resolution creating the Tribunal as democratic institutions remained paralysed. This obviously raises the issue of what a 'functional' democracy is in general, and whether Lebanese democracy was so dysfunctional in this case as to be overridden. States such as Indonesia emphasized that what was at stake was not so much a breakdown of democracy as a lack of the right sort of support for the Hariri Tribunal, notwithstanding the initial expression of interest.[22] There is certainly wisdom in the idea that the simple failure by a democracy to adopt a position could not by itself be considered a manifestation of a breakdown (democracies fail to adopt positions regularly), unless one could point to some substantial procedural impairment (distinct, for example, from general lack of political will, genuine absence of consensus, ordinary slowness, etc.). Moreover, there is an important temporal dimension involved. We know that it is in the nature of democracy to proceed slowly, because democracy involves the careful and sometimes painful ironing out of intractable political tensions. Simply to propose to bypass it as soon as a deadline has been missed may be to hold it to unduly high standards.

Although the vision of the Siniora government as representing a democratically elected majority is technically correct, the issue of democracy in Lebanon is certainly a complex one, and the under-representation of the Shia in terms of parliamentary seats, to mention but one example, is problematic. There were several solid arguments that the creation of the Tribunal by Security Council fiat would 'lead . . . to a complete disregard, in the case of the Tribunal and its Statute, of the procedure for approval of international treaties as set forth in the Constitution'.[23] More importantly for our purposes, the whole episode raises the issue of whether it is for the Council to decide when a democracy is incapable of functioning, a concern that was strongly voiced by several states.[24]

All these arguments – the idea that a Chapter VII creation went against both Lebanese sovereignty and democracy – in the end refer not only to the grounds for the creation of the Tribunal (was there sufficient cause?), but also to the impact

21. See C. Lynch and E. Knickmeyer, 'UN Council Backs Tribunal for Lebanon', *Washington Post*, 31 May 2007.
22. The Indonesian representative stated that 'the Council should not fail to take into consideration that there is no unified voice among Lebanese leaders. The domestic political situation in Lebanon has created difficulty for the international community to act further on that request.' See Security Council Meeting Record, *supra* note 1, at 3.
23. Letter from the President of Lebanon, *supra* note 19, Ann. I, at 3.
24. For example, Indonesia emphasized that 'the Security Council should not be involved in an exercise of interpreting, let alone taking over, the constitutional requirements that a State should comply with in the conduct of its authorities'. See Security Council Meeting Record, *supra* note 1, at 3.

that such a creation might have (what will the effect of a Chapter VII creation be?). In other words, behind all of these issues is the quite practical and intensely political one of determining whether the proposed measure, even though it may on the face of it be compatible with the Council's prerogatives, will actually bring the results that it claims. Clearly, the cure should not be worse than the original illness and cause further disruptions. President Emile Lahoud, casting himself as a defender of the Tribunal and reminding the Secretary-General that he was 'the first Lebanese official to ask for an international investigation immediately upon the occurrence of the terrorist crime that took the life of Prime Minister Rafiq Hariri and his companions', emphasized that ignorance of the normal constitutional route would risk 'increasing anxiety about [the tribunal] being politicized or used for political purposes, which would ultimately rob it of its capacity to produce the juridical results expected of it, resulting in dire consequences for the stability and civil peace of the country'.[25]

Whatever one thinks of the reality of the intentions of Lahoud, even supporters of the Tribunal must have given passing thought to the possibility that 'imposition' of a tribunal without the Lebanese population having taken a part in 'establishing and reinforcing' might endanger Lebanese 'unity'.[26] The risk of the mode of creation backfiring and thus weakening the Tribunal's legitimacy, even as it served to bring it into existence, was felt by several Council members. The representative of Indonesia, for example, insisted that '[t]he search for justice should neither create new problems nor exacerbate the already intricate situation in Lebanon' and that '[t]he forceful interference by the Security Council in the national constitutional process as regards the establishment of the tribunal will not serve the greater interests of the Lebanese people, namely, reconciliation, national unity, peace and stability';[27] the Qatari delegate, meanwhile, worried that Resolution 1757 'may not promote national détente and could further complicate the situation in a country that is at present in dire need of national cohesion and political stability'.[28]

1.2. The case in favour: *justitia pro demos*?

Against these doubts, what were the arguments made by the promoters of the Court? One possibility is simply to bow to the Council majority's assessment of what was required in the situation and to the all-encompassing breadth of 'breaches to international peace and security'. If one subscribes to a largely procedural vision of what the Council does, then one can simply conclude that whatever decision the Council takes is necessarily legal.

However, for more sophisticated supporters of Resolution 1757, the question was bound to be more than a simple positivist assessment of whether the Council could subsume the decision to create the Tribunal under Chapter VII. What is necessary is a more complex normative assessment of all the interests at stake and

25. Letter from the President of Lebanon, *supra* note 19, Ann. I, at 3.
26. Ibid.
27. See Security Council Meeting Record, *supra* note 1, at 3.
28. Ibid.

https://doi.org/10.1017/S0922156508005062 Published online by Cambridge University Press

the very legitimacy of the decision, taking into account both Lebanese sovereignty and democracy, as well as the impact a Chapter VII creation might have on the Tribunal's chances.

Some arguments, like the idea that the adoption of the resolution was 'an important decision for the credibility of the United Nations – and of the Security Council in particular',[29] really do not seem to speak to much or respond to the concerns of the abstainers. That may be, but surely one would hope that something more was at stake than an issue of institutional credibility. Indeed, other arguments suggest a very different conception of the role of international criminal justice and the evolving concept of the Security Council's role than the one voiced by the sceptics. For the Slovak representative, for example, all else having failed, 'the Security Council had to *resume its responsibility* and ensure the implementation of the agreement'.[30] It is not quite clear from that statement what that responsibility is, whether it is ensuring international peace and security, securing accountability, or assisting sovereignty or democracy. In the process, however, it seems that the majority in the Council claimed that it was doing all of these things – in no particular order.

To begin with, the majority of the Council did not see itself as having done anything against Lebanese state sovereignty, and the creation of the Tribunal was adamantly portrayed as not being 'a capricious intervention or interference in the domestic political affairs of a sovereign State'.[31] Quite the contrary, Resolution 1757 is generally presented as having been adopted precisely in the name of 'the strict respect of the sovereignty, territorial integrity, unity and political independence of Lebanon under the sole and exclusive authority of the Government of Lebanon'.[32] Resolution 1748(2007), for example, portrays the Council as 'assist[ing] Lebanon in the search for the truth and in holding all those involved in this terrorist attack accountable'.[33] For the French representative, '[t]he Council can be proud that it has shouldered its responsibility by helping Lebanon to overcome the obstacles that it was facing *and to proceed along the path to recovering its independence and its sovereignty*'.[34] The idea behind the resolution according to the Italian representative is to 'demonstrate a strong support for the Government of Lebanon, *a strong support for the sovereignty and independence of Lebanon*'.[35]

States who voted for Resolution 1757, therefore, clearly present themselves as a sort of 'midwife' of Lebanese sovereignty, doing exactly the opposite of what the sceptics accuse them of.[36] These arguments also draw on the fact that the creation of the Tribunal had been urged by at least some Lebanese representatives. The early initiative for the creation of the Tribunal had indeed come from Lebanon,[37] and its

29. Ibid., at 6, statement by French representative.
30. Ibid., at 7 (emphasis added).
31. Ibid., at 6, statement by the British representative.
32. UN Doc. S/RES 1757 (2007).
33. UN Doc. S/RES/1748 (2007), preamble.
34. See Security Council Meeting Record, *supra* note 1, at 6 (emphasis added).
35. Ibid., at 7 (emphasis added).
36. Ibid., at 6, Statement by the British representative.
37. UN Doc. S/RES/1664 (2006).

government had signed an agreement with the United Nations on its establishment.[38] It was the Lebanese prime minister himself who asked the Secretary-General by letter that the matter be put before the Council and that a resolution be adopted making the Tribunal binding.[39] Indeed, those abstainers who are casting themselves as defenders of Lebanese sovereignty may have a hard case to make, to the extent that the state concerned, according to at least one reading, does not seem to be complaining that its sovereignty is being undermined.

In fact, in a more general way, one might argue that the Council's entire management of the Lebanese crisis brought about by the murder of Hariri is thoroughly and symbolically obsessed with the theme of Lebanese sovereignty.[40] The Tribunal itself is seen by its supporters in Lebanon as a way to reassert sovereignty against Syria, which was strongly suspected of involvement in the murder of Hariri after decades of meddling in Lebanese affairs. Resolutions 1595 and 1757, which led to the creation of the Tribunal, begin, following a long line of similar invocations,[41] by 'reiterating [the Council's] call for the strict respect of the sovereignty, territorial integrity, unity and political independence of Lebanon under the sole and exclusive authority of the Government of Lebanon'. Even as it seems to be overriding Lebanese sovereignty, therefore, the Council portrays itself as coming to the rescue of the flailing Lebanese authorities in the face of unwanted outside interferences. To complete that picture, the Lebanese representative invited to the Council during the deliberations 'warmly thanked' the Council for its 'constant support for the independence, sovereignty, security and freedom of Lebanon', making the argument that the Council is interfering in the affairs of Lebanon even harder to sustain.

The democratic concern is similarly turned inside out, so that Resolution 1757 is made to look as if it is, in fact, in defence of democracy. States who voted for the resolution were satisfied that the 'Lebanese parliament has given ample proof of its strong determination to approve the agreement',[42] and that the only problem was the refusal by its Speaker to convene the parliament. The US representative made it clear that 'the legitimate and democratically elected Government of Lebanon and the parliamentary majority have tried . . . to convince the Speaker of parliament to fulfill his constitutional responsibility to convene parliament so that final action on the Tribunal could be taken, but to no avail'.[43] The Lebanese representative himself outlined the circumstances that made formal approval impossible despite the fact that 'unanimity existed within Lebanon'.[44] In effect, 70 of the Lebanese parliament's 128 members had signed a memorandum presented to the United Nations, urging

38. See statement by the UN Secretary-General on the agreement between the United Nations and Lebanon regarding the Establishment of a Special Tribunal for Lebanon, UN Doc. SG/SM/10871 (2007).
39. Letter of the Prime Minister of Lebanon to the Secretary-General of 13 December 2005, UN Doc. S/2005/783 (2005).
40. See, for example, the statements of the representative of Qatar, who stated that the goal is 'to ensure the maintenance of [Lebanon's] independence, sovereignty, national unity and political stability'. Security Council Meeting Record, *supra* note 1, at 2. See also, more generally, UN Doc. S/2007/262 (2007).
41. See UN Doc. S/RES/1636 (2005).
42. See Security Council Meeting Record, *supra* note 1, at 6, statement by the Peruvian representative.
43. Ibid., at 7.
44. Ibid., at 8.

https://doi.org/10.1017/S0922156508005062 Published online by Cambridge University Press

it to take action to create the Tribunal regardless of the parliamentary stalemate. And Resolution 1757 referred to the 'demand of the Lebanese people that all those responsible for the terrorist bombing . . . be identified and brought to justice'.[45] All in all, as the president of the Security Council put it, 'No one can say that the Lebanese government, the Secretary-General or the Security Council failed to pursue every possible option short of council's action on the tribunal.'[46]

2. Beyond international peace and security? The role of ideas about international criminal justice

One of the ironies of the whole debate as it unfolded before the Security Council, is that both sides drew on the very same register (of sovereignty and democracy) to reach diametrically opposed conclusions. Everyone is, of course, at the same time in favour of sovereignty, democracy, and international peace and security, although everyone disagrees on the understanding of these ideas and their relative weight. It is precisely because the arguments are based on very similar foundations that they become very difficult to disentangle normatively. They ultimately partake in a common vision of the role of the Council, only differing in their appreciation of the particular facts of the case.

Attempts to justify the creation of the Hariri Tribunal on the basis of Chapter VII are based on a mix of expediency and principle, which probably does not do much to allay the fears of sceptics that something broader may be at work. At the heart of the division between the supporters of Resolution 1757 and its critics, are, arguably, a series of formalist/anti-formalist dichotomies. The would-be 'interveners' claim to see behind the formal democratic arrangements (which are not functioning) to interpret the 'true democratic will' of Lebanon (if only the institutions were functioning). They also claim to see behind Lebanon's formal sovereignty (which would require Lebanon to give its assent for the Tribunal to be created) to uncover its real sovereignty (which would manifest itself if it were allowed to).

The sceptics, in turn, think that Lebanon's sovereignty should be respected for what it is, and that the formal absence of agreement by Lebanese democracy is not 'formal' at all: it should be the end of the matter. The emphasis, in other words, is on democracy as a procedural regime bounded by processes which are intrinsically worth respecting. The current political crisis in Lebanon is at worst part of the occasionally bumpy functioning of democracy there – not an external threat to it, justifying some exceptional interference to 'save it'. Behind the differences regarding Resolution 1757, therefore, lie deep differences of appreciation regarding the nature of such foundational concepts as sovereignty and democracy.

One might think that 'international peace and security' would be the concept that allows one to see clearly through these dilemmas, but in fact it is rapidly becoming so pliable an idea as to offer little guidance (partly in fact because its

45. UN Doc. S/RES 1757 (2007), Preamble. The resolution referred to the 'unanimous demand of the Lebanese people that those responsible be identified and held accountable'.
46. 'Divided UN Security Council Creates Hariri Tribunal', Indo-Asian News Service, 31 May 2007.

own relationship to ideas such as sovereignty and democracy is unclear). In recent years it has seemed that so many things will affect international peace and security, and so many things can help to remedy breaches thereof, that the concept has lost substantial rigour.[47] Indeed, one striking fact is, despite some appearances, how little the whole debate leading to the adoption of Resolution 1757 was about international peace and security in any traditional way. Although the murder of Hariri had been so described as soon as Resolution 1636(2007), in other resolutions the existence of a breach of international peace and security is merely invoked ritually as the last paragraph of the preamble, almost as an afterthought.[48]

Behind the few arguments that are made either against or in favour of the Chapter VII creation of the Tribunal, there lie a number of potential arguments which were not made (at least as such) before the Council, and which might better help us think through some of the complex issues involved. Instead of simply passively tracking the endless evolution of international peace and security, therefore, it seems that the time is riper than ever to think more thoroughly about the *relationship* of international peace and security to other values promoted by the United Nations, and in particular the value(s) represented by international criminal justice. In this respect, much more striking than the use of international peace and security are various statements about the sheer importance of accountability and justice.

In many of those statements international criminal accountability is largely seen as a good in itself, and Security Council members do not particularly feel as if they need to justify the creation of the Tribunal on the grounds that it would remedy a breach of international peace and security.[49] It is almost at times as if one no longer needed to turn to international peace and security, and as if the self-evident value of accountability was such as to suffer no discussion. For example, the representative of the United States declared that '[b]y adopting this resolution, the Security Council has demonstrated its commitment to the principle that there shall be no impunity for political assassinations in Lebanon or elsewhere';[50] France said that the adoption of Resolution 1757 was mostly important for 'justice';[51] the Slovakian representative argued that his country 'supported this resolution because we believe that impunity should not be allowed and tolerated. The perpetrators of any crime have to be brought to justice. The rule of law must be respected everywhere and by everybody.'[52] It seems enough, by and large, that accountability now counts as a solid best practice, and that the Council is in a position to contribute to it. What was originally a 'means to an end' increasingly has a tendency to become an end in itself.

47. See UN Doc. S/23500 (1992), which declared economic, social, humanitarian, and ecological problems to be 'threats to international peace and security'.
48. In the last paragraph of its preamble, Resolution 1757 notes the Security Council's 'determination that this terrorist act and its implications constitute a threat to international peace and security'. UN Doc. S/RES 1757 (2007), preamble.
49. With some minor exceptions. See Peruvian statement in which justice is seen as 'essential in promoting peace and security'. Security Council Meeting Record, *supra* note 1, at 6.
50. Ibid., at 7
51. Ibid., at 6.
52. Ibid., at 7.

https://doi.org/10.1017/S0922156508005062 Published online by Cambridge University Press

Behind that sort of positioning seems to lie a very firm and striking belief that international criminal justice can never run against international peace and security. In theoretical terms, there are probably few questions in the field that have been more debated, both domestically and internationally. But in terms of Council practice, the issue at times seems all but settled. Originally, the idea seemed to be that international criminal justice was compatible with international peace and security only when and to the extent that the Security Council said so, since no tribunal could emerge without its backing. It was the Council that had first 'sold' the idea of international criminal tribunals to the international community with the creation of the ICTY, but there was little doubt at the time that the Council intended to keep control of the levers. Simply because international criminal tribunals had been presented as a means to deal with international peace and security *in some cases* did not mean they could be so used in all (similar) cases.

It is, however, as if over the years the Council had become trapped in its own powerful rhetorical logic. Once one has said that international criminal tribunals are conducive to international peace and security in certain cases at least, one opens oneself to many more hard-to-refute claims that they are in other cases. The creation of the Hariri Tribunal is, in a sense, the height of that logic. If anything, that connection is not something to be proved, but simply to be affirmed in the face of scepticism. According to the French representative, for example, '[j]ustice cannot stand in the way of stability. The rejection of impunity, shared by all Lebanese, is an essential guarantee of peace.'[53] For the Belgian ambassador, '[t]he duty of justice and the fight against impunity are essential for the stability of Lebanon.'[54] And for the Italian delegate, 'justice is a condition for the reconciliation and therefore the stability of the country'.[55] Finally, for the US representative, curiously echoing the name of one of the leading pro-ICC non-governmental organizations[56] with whose views it is otherwise at loggerheads, '[t]here can be no peace or stability without justice.'[57] All these arguments provide powerful symbolic tropes in favour of the creation of the Hariri Tribunal, regardless of arguments about sovereignty or even democracy. They seem to offer a vision of the convergence of all international values (international peace and security leads to international criminal justice which leads to international peace and security, all in turn reinforcing both sovereignty and democracy) which has already gained considerable international currency.

There are many lessons to be drawn from this. One is that the Security Council is increasingly less seeing itself as a body narrowly focused on international peace and security, and may in fact be reinventing itself as a more general 'executive' or 'enforcement arm' of the United Nations, with a burgeoning interest in certain fundamental UN values, such as accountability. Security motivations may well still be of primary importance in this context, but they have been so enriched with other considerations that the issue is less and less how to enforce security (assuming that

53. Ibid., at 6.
54. Ibid., at 7.
55. Ibid.
56. No Peace Without Justice, http://www.npwj.org/.
57. Ibid.

this term has an accepted meaning), and increasingly how to define it, as well as how to articulate its relationship to other core UN values. Another lesson is that this transformation is itself deeply embedded in and driven by values external to the Council's logic, which are gradually transforming its outlook.

The Council's fundamental stance in favour of international criminal justice can thus provide a different entry point to justify the creation of the Special Tribunal, an alternative account of why it may or may not be both legal and legitimate to have created the Hariri Tribunal under Chapter VII. What are the implications of the Council's increasingly bold stance in favour of international criminal justice? For a long time we have thought of the practice of the Security Council as shaping the fate of international criminal tribunals, whether it be in 'positive' or 'negative' ways. It was, after all, the Council which created the ad hoc international criminal tribunals and has supported them (admittedly not unwaveringly) throughout their existence. The Council has adopted countless resolutions with an impact on international criminal justice, whether it be to urge states to co-operate with international criminal tribunals, to co-operate with the United Nations in the creation of institutions of accountability,[58] or to refer situations to the ICC Prosecutor.[59] Occasionally the Council has also sought to slow down the movement that it had itself launched. For example, as part of a complex power struggle with the ICC, the Council has sought to curb the enthusiasm of international prosecutions by asking the Court to defer any investigations that might affect peacekeepers from states not party to the ICC.[60] In all these cases, the notion of 'international peace and security', pliable as it may be, can be seen as having guided the agenda of international criminal justice.

But it may well be that, as part of a broader paradigm shift, the values of international criminal justice, rather than simply being an output of evolving Council ideas, are increasingly informing the Council's own practice. International criminal justice, as an idea, has always sought to distance itself from too obvious a source of power as the Council. Although it needed the Council to become what it has become, the whole logic of international criminal justice is deeply alien to the sort of power politics at work in New York. Much of the history of international criminal tribunals since Nuremberg can thus be seen as a process of emancipation from too strong a connection with sovereignty, or too blatant an exercise of power. The creation of the ICC (a permanent, treaty-based institution) and the relationship of the ICC to the Council is in a sense the most striking illustration of this phenomenon.

The more international criminal justice becomes a 'thing in itself', no longer under the brooding presence of inter-state and geopolitical interests (a sort of 'genie out of the bottle'), the more it will tend to 'turn against its creator' in an attempt to redefine the powerful utilitarian political forces that presided over its creation.

58. See UN Doc. S/RES/1315 (2000).
59. See UN Doc. S/RES/1593 (2005).
60. See UN Docs. S/RES/1422 (2002) and S/RES/1487 (2003). Security Council Resolution 1422, which was renewed as Resolution 1487 in June 2003, granted immunity to personnel from ICC non-states parties involved in UN established or authorized missions for a renewable 12-month period. Despite US efforts to renew this resolution again in 2004, they could not secure enough votes on the Security Council to support it and it was thus withdrawn.

For example, the non-reconduction of the Council resolutions that had exempted peacekeepers from ICC jurisdiction can be seen as a sort of eventual recognition of the futility of that particular exercise, and even a form of bowing to the growing establishment and clout of international criminal justice. It helps in this context that international peace and security, as a result of losing much of its specificity and becoming quite porous, is in less and less of a position to provide some form of resistance.

It may seem strange to suggest the idea that international criminal justice is increasingly shaping Council practice, precisely when discussing a case where Chapter VII authority was required to get international criminal justice off the ground. Yet even as the Security Council has resolutely shaped the coming into existence of the Hariri Tribunal, one could argue that it has itself been shaped even more by the continuously developing and evolving idea of international criminal jurisdiction. Its association with international criminal justice, however problematic it may have been at times, may well have provided the Council with a considerable degree of legitimacy, allowing it to reinvent itself gradually in the 1990s as an ally of human rights. But this process has also had a number of symbolic and probably unforeseen costs for the Council.

If we take the Council at its words when it proclaims its principled attachment to international criminal justice, then maybe the Council should take international criminal justice seriously and, to the extent that it claims to serve as its handmaiden, abide by some of international criminal justice's evolving practices.[61] Indeed, I would argue that, beyond the old international peace and security versus sovereignty argument, even renewed through its reference to democracy, the creation of the Hariri Tribunal can above all be best explained as integral to the development of ideas about and practices of international criminal justice. Even though the Council may not acknowledge these as such, one can arguably detect six features of international criminal justice which have had more of an impact on the conditions of creation of the Hariri Tribunal than the rather limited international peace and security–sovereignty–democracy triangle.

2.1. Sovereign demand versus sovereign opposition

As has been seen, the idea that the Lebanese government was inviting the Security Council to take notice of the situation and create the special tribunal is most often used to minimize suggestions that a Chapter VII creation was an interference with Lebanese sovereignty. The decision by the government to bring international

61. In saying this, I am well aware that I am not making an orthodox positivist argument. If that were the perspective, then it would always be possible to rely simply on some ever expanding definition of international peace and security as being the last word on the matter. However, what I am proposing is a more sophisticated, legally pluralist, and constructivist rendering of what I think is increasingly going on, as 'values' surrounding Council practice increasingly transform the way its 'rules' are seen. In this context the practice of international criminal judicial creation is itself a deeply normative process, even though its own systemic internal rules may not be as clearly revealed as those that preside over Council activity. Behind the 'values' and the 'rules', I see powerful 'ideas' at work, which constrain what is seen as possible and desirable, in making the most of conflicting goals.

criminal justice to bear on its territory can also be seen, however, in the evolving context of international criminal justice.

Referrals by states of their own situation to the international community are hardly unheard of, and Lebanon's behaviour follows a long line of states soliciting international criminal justice for themselves. Rwanda – even though it subsequently withdrew its support and had a very troubled relationship with the ICTR – had in 1994 insisted on its creation before the Security Council, while Bosnia and Herzegovina had supported the creation of the ICTY. Under the ICC regime a number of states have, in addition to becoming parties to the Rome statute in circumstances where they sometimes must have suspected that they would be providing the Court with cases, actually referred their own situation to The Hague (most notably Uganda).[62]

In terms of international criminal justice's evolving set of practices, one thing that can be surmised with some certainty is that, once confronted with a relatively clear invitation to become interested in a country situation (in which the international community is generally otherwise interested for a variety of reasons), a subsequent wavering of resolve by the inviting state will tend to be ignored. This was the case with Rwanda, where that state's eventual opposition to the creation of the ICTR had no influence on that Tribunal's creation. After referring its own 'situation' to the ICC, Uganda sought to backtrack and withdraw that referral when it realized that the Court might investigate acts of government officials, but that demand was ignored.

One might argue, therefore, that there is a tendency not to let states withdraw a once expressed willingness to expose themselves to the scrutiny of international criminal justice. There is a certain international avidity for cases which, in case of doubt, tends to favour the interpretation that maximizes international jurisdiction. In the case of Lebanon, the problem is that it is that willingness which has never been expressed in a definitive way. But in a context where international criminal justice is already heavily prized for its own sake, it may be that even beginnings of manifestations of interest – essentially, imperfect invitations – will legitimize the hand of international criminal justice. Moreover, Lebanon had arguably gone further than Rwanda (which merely took a stand in favour of the ICTR in the early stages) and Uganda (which merely referred a situation) in that by the time Resolution 1757 had been adopted it had already been very heavily involved in every aspect of the creation of the Tribunal. The Council's role here in taking the Hariri Tribunal over the 'last mile' is thus comparatively less striking.

2.2. Negotiation versus compulsion

One way of conceiving the creation of international criminal tribunals is as being based on either assent or a Chapter VII imposition. Arguably, the ICTY was almost wholly an imposition; conversely, the Sierra Leone special court was almost wholly based on negotiation. But this either/or division probably does not do justice to the

62. A. Cassese, 'Is the ICC Still Having Teething Problems?', (2006) 4 *Journal of International Criminal Justice* 434, at 436.

https://doi.org/10.1017/S0922156508005062 Published online by Cambridge University Press

variety of formulas that have presided over the existence of international criminal tribunals.

Rather than an opposition between consent and imposition, it is more helpful to see international criminal justice as always based on a combination of sovereign agreement and external compulsion. The ICTR may have been created under Chapter VII, but its design was probably at least marginally informed by the views of Rwanda, and its success since has been constantly dependent on Rwandan co-operation. Both ad hoc tribunals have benefited from the fact that some of the states concerned have subsequently consented more formally to the tribunals' work (even though they were in theory obliged to co-operate with them from the start) and decided to engage them constructively.

Conversely, some tribunals have been created by agreement but have benefited from some form of international pressure, even compulsion. The Security Council had quite an important role in shaping the Special Court for Sierra Leone, asking the Secretary-General to negotiate, signalling what would be an appropriate jurisdiction.[63] In addition, a residual role is anticipated for the Council in that it can authorize the Special Court to prosecute non-Sierra Leonean peacekeepers,[64] and the Council was behind the decision to judge Charles Taylor in The Hague on the grounds of Chapter VII.[65] Although the Cambodian Extraordinary Chambers may only ultimately have been created because of Cambodian assent, that assent came after strong pressure from the United Nations, and the possibility of Security Council creation had at least been mooted.[66]

In some cases, therefore, sovereign assent will subsequently be supplemented by Council authority; in others Council resolutions will subsequently be ratified domestically; in all cases negotiations and compulsion are operating on a spectrum rather than as alternatives. The Lebanese tribunal is part of these dialectics of consent and compulsion. It is the product of negotiations between the United Nations and Lebanon, and the Tribunal was very much seen as based on an agreement; at the same time it ultimately needed that 'extra push' by the Council to come into being. Indeed, even at the time when it was contemplated that the Tribunal should be set up solely through an agreement, the Secretary-General had suggested that some sort of Chapter VII reinforcement might be necessary to secure the full co-operation of member states to 'enable the special tribunal more effectively to prosecute those responsible'.[67]

Of course, the unstated but quite transparent rationale for this is that, however desirable the creation of a tribunal to the state mostly concerned and the United Nations, the resulting agreement could not, by definition, bind states that were not parties to it. In the case of the Hariri Tribunal and in the light of strong suspicions of foreign (Syrian) implications, a Security Council resolution remains a way of

63. UN Doc. S/RES/1315 (2000).
64. See Statute of the Special Court for Sierra Leone, 16 January 2002, 2178 UNTS 145, Art. 1(3) (hereinafter Sierra Leone Statute).
65. UN Doc. S/RES/1688 (2006) 147.
66. Although this was suggested. See UN Doc. S/1999/231 (1999).
67. Report of the Secretary-General, *supra* note 12, para. 53.

https://doi.org/10.1017/S0922156508005062 Published online by Cambridge University Press

extending compulsion to other states, essentially giving some sort of global reach to what might otherwise appear as merely a 'private' affair between a particular state and the United Nations. This is something that Syria was quite keenly aware of, and one can hear a hint of the US *pacta tertii* argument against the ICC in Syria's claim that 'in the event that the statute of the tribunal is adopted, unacceptable transgressions that undermine the sovereignty of certain Member States and the rights of their subjects are likely to transpire'.[68]

There is nothing particularly shocking, therefore, about the idea that a tribunal whose creation had begun under the auspices of negotiations may subsequently require a Council intervention to tip the balance of its creation once it is apparent that the negotiations are deadlocked. Although the Council initially intervened without invoking Chapter VII, the emergence of evidence implicating Syria and the deterioration of the situation in Lebanon gradually led it to adapt its method of intervention and to invoke coercive powers. It may well be that in the future important decisions concerning the Tribunal will revert to a more negotiated mode, as the circumstances may dictate. In all cases, what is at stake is a familiar mix of both negotiation and compulsion which is not a departure from the emerging usages of international criminal justice.

2.3. Democratic ratification versus Council decision

The general argument that it is a good thing to respect democracy, and that the Council should not be too eager to resort to Chapter VII when confronted with even an indecisive form of democracy, is reinforced in the case of the international creation of criminal tribunals. Beyond sovereignty, there would seem to be a huge interest for the international community in ensuring that arrangements concluded by the United Nations with states concerning the creation of tribunals are ratified democratically. Because these arrangements will have a considerable impact on society (and not simply the state, as an excessively formalistic emphasis on sovereignty might suggest), and will test its desire to go forth with the search for accountability, major transitional justice initiatives will find succour in robust democratic debate. Indeed, democracy can also be a better way of teasing out the consequences of judicial efforts at accountability and coming to terms with the narratives that emerge from political trials, especially if it helps to create a stronger sense of local ownership. And co-operation arrangements that are ratified from below are more likely to carry weight than those imposed from above.

Despite these arguments, it should be said that the contextualization of the Hariri Tribunal in the larger development of international criminal justice suggests a rather poor role for democracy in general. In the case of the ICC, the need for ratification has at least in some cases led to more intense parliamentary and civil society involvement. But the ICC is a special case of a treaty, where participation

68. This was complemented with the thinly veiled threat that 'adoption of the statute of the "special tribunal" in such a manner will firmly establish our belief that Syria has no connection with this tribunal'. Identical letters dated 21 November 2006 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and to the President of the Security Council, UN Doc. S/2006/909.

does not make sense without ratification. Moreover, the international community has typically been more interested in ratification per se than in the nature of the regime ratifying. The relationship of permanent international criminal justice to democracy has seemed largely instrumental and accidental.

When it comes to the ad hoc tribunals, the fact that all of them have been imposed against sovereign will seemed to circumvent democratic involvement from the start. Parliaments of the states principally concerned have occasionally had a role in creating structures that are responsive to international criminal judicial mechanisms (the creation of the Bosnian War Crimes Chamber by the government of Bosnia and Herzegovina is a case in point), but this has not been based on any systematic recognition of the need to inject international criminal tribunals with democratic legitimacy. Even when circumstances changed and relevant states chose to recognize the tribunals more readily, there has been no noticeable effort to encourage a process of democratic appropriation by these states. Of course, in the case of Rwanda or the states that emerged from the former Yugoslavia this may simply have been a case of the absence or weakness of democratic arrangements in the first place. But over the decade that their existence has spanned, as democratic elements in these various countries arguably gained ground, there has been no sustained effort to enlist local democratic support.

Even though one would think that the creation of hybrid tribunals might have led to more active engagement by the international community with local democratic forces, this does not seem to have been the case. In both Cambodia[69] and Sierra Leone[70] the creation of hybrid tribunals was largely the result of government–UN direct negotiations, with very little involvement of either parliament or civil society.

The fact that international criminal justice has been disconnected from democracy may have been largely due to the fact that none of the states over whose territory previous international criminal judicial institutions had jurisdiction were democratic. Moreover, the absence of a stronger connect is not, of course, a reason why the disconnect should be maintained. But it seems relevant, for the purposes of evaluating the opportunity of Chapter VII creation that, confronted with what are seen as very good reasons to create a criminal tribunal, the international community has historically been quite willing to forego any type of democratic ratification, at least in the early stages. Indeed, what is surprising with the Hariri Tribunal is the extent to which the Council seemed concerned about this dimension, which had never previously featured prominently in its debates.

This suggests a deeper vision of international criminal justice as a good in itself, something to be imposed by the international community, regardless of democratic assent. It does not of course exclude democratic ratification in the best of cases, but neither does it make such ratification a condition of international criminal justice. If and when the relevant democracies ratify the international decision that has been

69. Asia Society, International Center for Transitional Justice, and Human Rights Watch, 'Transitional Justice for Cambodia: Challenges and Opportunities', Symposium Report, 9 September 2003.
70. T. Perriello and M. Wierda, 'The Special Court for Sierra Leone under Scrutiny', International Center for Transitional Justice, March 2006, available at http://www.ictj.org/en/news/pubs/index.html.

made for them, then so much the better; if not, democratic ratification will be seen as only having been a luxury in the first place.

All of the above would seem to suggest that however unfortunate bypassing Lebanese democracy may be politically or from the point of view of the Security Council's practice, bypassing democracy is largely the rule when it comes to internationally created criminal tribunals.

2.4. National versus international

In theory, there is no reason why the nature of a tribunal should influence its mode of creation. However, it is true that the more exclusively international a tribunal, the greater the symbolic intrusion and the denial of sovereignty, and therefore the greater the need for some element of international compulsion. All ad hoc international criminal tribunals since Nuremberg (even the ICTR, which for a while looked as if it might be created with the assent of Rwanda) have been created through some kind of international coercive decision, typically in the contemporary era in the form of a Security Council resolution.

Conversely, hybrid tribunals, which are much closer to the legal order of the sovereign state involved,[71] have so far never been created by Security Council resolution. The Hariri Tribunal is clearly a part of the family of hybrid courts, although it is more on the 'domestic' side of hybridity than any of its predecessors.[72] It will be composed of both Lebanese and international judges,[73] and draw on the Lebanese Criminal Code in the prosecution and punishment of a number of offences. In addition, 49 per cent of the costs of the Tribunal are set to be borne by Lebanon, with the rest to be paid by other states.[74]

Because they already incorporate substantial domestic features, hybrid courts are typically seen as less intrusive measures regarding the sovereignty of states than 'purely international' tribunals. As a result, they have so far always been created not only following lengthy processes of negotiation with domestic authorities, but ultimately always with the *assent* of these authorities, expressed through a formal agreement and domestic ratification. In the case of the Special Court for Sierra Leone, an agreement establishing the court was entered into in 2002 by the government and the United Nations. At various stages the president of Sierra Leone had indicated his support for its establishment. The Extraordinary Chambers in the Courts of Cambodia are also the result of an agreement between the United Nations and the government. Indeed, despite the Cambodian government's many volte-faces, the Security Council never took over in order to impose the Extraordinary Chambers in the face of Cambodian hesitation.

The assent of the authorities is all the more crucial when some institutional input or contribution is needed from domestic authorities (other than general

71. D. Cohen, '"Hybrid Justice" in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future', (2007) 43 *Stanford Journal of International Law* 2.
72. W. Schabas, 'Le Tribunal spécial pour le Liban fait-il partie de la catégorie de "certaines juridictions pénales internationales"', (2007) (hors-série) *Revue Québécoise de droit international* 119–31.
73. Establishment of a special tribunal for Lebanon, *supra* note 12, Art. 2(5(a)).
74. UN Doc. S/RES/1757 (2007).

https://doi.org/10.1017/S0922156508005062 Published online by Cambridge University Press

co-operation). Both the Sierra Leone and Cambodia structures needed governmental input to select the 'national' judges. The Special Tribunal for Lebanon shares some of these characteristics. For example, the Lebanese state is to propose a list of Lebanese judges, has to conclude arrangements for the establishment of an Office of the Prosecutor, and is to be consulted regarding the continuation of the Tribunal three years after the date of commencement of its functioning. In such cases, one can imagine how difficult it might be to get a hybrid tribunal to work if the state concerned refused to nominate judges, for example.[75]

All things being equal, therefore, the hybrid nature of the tribunal is something that militates against a creation by the Council under Chapter VII. One can see how enlisting a state's fundamental co-operation in making the court function (designation of judges, etc.) and simultaneously being seen by at least part of the political forces in that country as imposing the tribunal might be problematic.

2.5. 'Core crimes' vs. 'ordinary crimes'

Traditionally, one of the factors that militated strongly in favour of forceful international repression was the fact that international crimes of a particularly grave nature were committed. All international criminal tribunals have had jurisdiction over what have become known as 'core crimes'. Nuremberg had jurisdiction over crimes against peace, war crimes, and crimes against humanity; the ICTY and ICTR have jurisdiction over war crimes, crimes against humanity, and genocide;[76] the Sierra Leone Special Court has jurisdiction over crimes against humanity, war crimes, serious abuse of female children, and deliberate destruction of property as defined by the national laws of Sierra Leone;[77] the Extraordinary Chambers in Cambodia have jurisdiction over crimes stipulated in the 1956 Penal Code (homicide, torture, religious persecution), genocide, crimes against humanity, serious violations of the 1949 Geneva Conventions, crimes of destruction of cultural property during armed conflicts, and crimes against internationally protected persons;[78] and the ICC has jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.[79]

These are crimes that might have an international character in that they have a trans-border effect or impact (aggression, war crimes committed in international armed conflict), but increasingly 'international' has been understood more or less implicitly as meaning 'with international impact', or 'of international significance'. The emphasis today is on the sheer gravity of international crimes, their

75. See Mallat, *supra* note 16. '[T]he full support of the presidency is also essential legally, because too many of the court's actions depend on Lebanese law for the tribunal to be wholly effective.'
76. See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, (1993) 32 ILM 1159, as amended by Security Council Resolution 1660 of 28 February 2006, Arts. 2–5; Statute of the International Criminal Tribunal for Rwanda, (1994) 33 ILM 1602, as amended by Security Council Resolution 1534 of 26 March 2004, Arts. 2–4.
77. See Sierra Leone Statute, *supra* note 64, Arts. 2–5.
78. E. Skinnider, 'Experiences and Lessons from "Hybrid" Tribunals: Sierra Leone, East Timor and Cambodia', paper for Symposium on the International Criminal Court, Beijing, China, 3–4 February 2007, at 16–17.
79. See Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), Art. 5.

cosmopolitan nature, and the extent to which they may 'shock the conscience of mankind',[80] rather than the relatively anecdotal question of whether their commission involved some straddling of borders.

The Lebanon court stands oddly in that context. It does not have jurisdiction over any of the 'core crimes'. Although the idea that the series of terrorist attacks that led to and followed the killing of Hariri might constitute crimes against humanity was mooted,[81] his murder, however heinous it may have been, was eventually merely described as an 'assassination';[82] that is, all other things being equal, a factor that should militate against the overriding of sovereignty. In the case of core crimes, the Council can at least enlist the whole weight of condemnation that comes with such crimes and specifically the fact that they belong to the international legal order, forcefully to 'internationalize' their punishment. Such was the indignation at, say, the Rwandan genocide, that regardless of how such a crime affects international peace and security, it was already by its nature a crime that had been highlighted for international concern.

When it comes to a crime such as the murder of Hariri, on the one hand, there will be less of an assumption that this should be *ipso facto* an international issue, and the authority of the Council to bypass sovereignty and normal democratic procedures will be less. Normally, needless to say, the Council has no particular mission to prevent murder internationally. On the other hand, perhaps the fact that no international crime, or at least no 'core' crime, was committed as such is not conclusive. Maybe the creation of the Hariri Tribunal should be seen as part of a larger development of a very varied international criminal justice paradigm, one in which the imposition of international prosecutions can be warranted on a number of grounds, the commission of core crimes being only one of the more automatic of such cases. International criminal justice may grow increasingly separated from some direct connection with international peace and security, but it cannot do any harm that a particular crime, especially if it is not a core crime, has in fact substantially endangered international peace and security. Indeed, international criminal justice has an interest of its own in international peace and security (apart from the historically transient one of tribunals having been created on that ground), which is that breaches to it have historically provided a terrain of choice for the commission of international crimes.

In that respect, a single murder might arguably have a greater impact on international peace and security than a very territorially contained genocide, for example,

---

80. At the 15th meeting of the International Law Commission in 1949 the chairman noted 'that the expression "conscience of mankind" was currently used in international instruments and that it had been sanctioned by the second Hague Conference in 1907'. See Summary Record of the 15th Meeting, Topic: Fundamental rights and duties of States, Extract from the Yearbook of the International Law Commission, 1949, vol. I, UN Doc. A/CN.4/SR.15 (1949).

81. Report of the Secretary-General, *supra* note 12, at paras. 23–25. That possibility was dropped, despite its prima facie plausibility, because 'considering the views expressed by interested members of the Security Council, there was insufficient support for the inclusion of crimes against humanity'.

82. See UN Doc. S/RES/1757 (2007), preamble. '*Willing* to continue to assist Lebanon in the search for the truth and in holding all those involved in the terrorist attack accountable and reaffirming its determination to support Lebanon in its efforts to bring to justice perpetrators, organizers and sponsors of this and other assassinations'.

and might trigger a series of devastating criminal consequences of the utmost concern to international criminal tribunals as well. There is, of course, a long history of political assassinations and countless crimes leading to cataclysmic breaches of international peace and security, starting with the famous murder of one archduke in Sarajevo. The Council has at least one precedent, in the case of Lockerbie, of linking a crime that is not a core crime to a breach of international peace and security.[83] Without going into the details of the politics and security dynamics of the country or region, there is nothing particularly far-fetched about the Council's reiterated 'deepest concern about the destabilizing impact of political assassinations and other terrorist acts in Lebanon'.[84]

It is also possible, therefore, to see the idea of international criminal justice at work in justifying Security Council creation, despite the absence of core crimes in the court's jurisdiction. The distinction has an ambiguous impact on the issue of whether the Tribunal should be created under Chapter VII.

2.6. 'Able' versus 'unable'

One of the strongest ideas to have emerged in the last decade concerning international criminal justice – indeed, maybe the strongest – is the idea that international criminal jurisdiction should always be complementary to domestic courts. To use the terms of the ICC Statute, it is only when a state is 'unwilling or unable' to try persons suspected of international crimes that international efforts are warranted. Of course, the ICC's regime is about asserting jurisdiction in particular cases, not about when and how courts should be created internationally. In addition, the ICC's complementarity concept can be seen as merely that – a particular institution's jurisdictional regime. Indeed, there is a priori absolutely no reason to presume that this notion would apply *mutatis mutandis* to the Security Council's decisions.

By the same token, there is no doubt that the idea of complementarity highlights some deeper normative consensus about the ends of international criminal justice. In particular, the international community is keen not to be seen to displace legitimate domestic jurisdiction on capricious grounds. The role of international criminal tribunals is not to replace domestic courts, but to spur them into action. That normative consensus has become so deeply ingrained[85] that it should probably, all things being equal, be taken into account and even form a basis of Council practice, save perhaps some significant international peace and security consideration.

Indeed, as I have argued elsewhere, some form of complementarity (even though it may not have been designated that way) has almost always informed the Security Council's practice in creating criminal tribunals.[86] For example, the ICTY was created because there was an at least implicit finding by the Security Council that courts in

83. M. Plachta, 'The Lockerbie Case: The Role of the Security Council in the Enforcing of the Principle *Aut Dedere Aut Judicare*', (2001) 12 EJIL 125, at 140.
84. UN Doc. S/PRST/2005/61 (2005).
85. See B. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals', (1998) 23 *Yale Journal of International Law* 383, at 410–11.
86. F. Mégret, 'L'articulation entre tribunaux pénaux et juridictions nationales: centralité et ambiguïté dans l'ordre juridique international', doctoral thesis, Université Paris 1 and Institut universitaire de hautes etudes internationales, 2005.

the former Yugoslavia were unlikely and unfit to carry out trials for war crimes.[87] That general diagnosis of 'unwillingness' may have been too broad geographically (at least the Bosniak authorities had been prompt to launch some prosecutions) and temporally (in due course most of the states that sprang from the break-up of Yugoslavia launched domestic trials of their own). But there was no doubt that in their justifications, Council members understood the dragging of feet by states in the region, when it came to prosecutions, to be a key variable in the decision to create the Tribunal.

Although that logic was less present in the case of the ICTR, it was never totally absent, and some of the reasons that featured prominently behind the creation of the Arusha tribunal were that trials in Rwanda might not be fair or that the Rwandan government might be less successful in securing custody of the defendants.[88] Even in the case of a hybrid tribunal verging on the domestic, such as the Cambodian Extraordinary Chambers, the international community often resorted to a variant of the inability argument, namely that the Cambodian judiciary lacked the experience and independence necessary to conduct such proceedings.[89]

In the case of the Lebanon tribunal, one could suggest that some form of complementarity formed the implicit normative background behind the creation of the Tribunal and, more crucially for our purposes, the particular means used to accelerate its coming into being. It would be difficult, although maybe not impossible, to argue that Lebanon was 'unwilling' to try the Hariri case. As has been seen, it was the Lebanese government which, on several occasions, urged the Council to take action; but that 'willingness' was prevented from fully expressing itself by the 'unwillingness' of some within Lebanon to see the Tribunal created.

A case can more readily be made, however, that despite its 'willingness' the Lebanese state was 'unable' to agree to the setting up of the Tribunal. 'Inability' in the Rome Statute has sometimes been interpreted rather restrictively, as describing only instances of state collapse, with the Somali precedent often invoked. Article 17(3), in particular, describes an inability that would result from 'a total or substantial collapse or unavailability of its national judicial system [making] the State . . . unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'. It is not implausible, however, that a breakdown in the functioning of democratic institutions, itself arising during a major political crisis leading to a situation of quasi-paralysis, could also count as 'inability'. Prosecutor Moreno-Ocampo has already shown that he is quite willing to stretch the meaning of 'unable' to cases where, for example, a government cannot secure the custody of certain individuals.[90] If anything, the Lebanese situation is more dire, and 'inability' has already been interpreted quite broadly in the literature.[91]

87. See Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, UN Doc. S/25704 (1993), Section II, Art. 8(D), para. 64, at 16.
88. F. Mégret, *Le Tribunal Pénal International pour le Rwanda* (2002), 25–6.
89. Y. Beigbeder, *Judging Criminal Leaders: The Slow Erosion of Impunity* (2002), 179.
90. K. Southwick, 'Investigating War in Northern Uganda: Dilemmas for the International Criminal Court', (2005) *Yale Journal for International Affairs* 108.
91. See L. Yang, 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court', (2005) 4 *Chinese Journal of International Law* 123. See also J. Kleffner, 'The Impact of Complementarity

By and large, it is a diagnosis on this relative inability which led to calls for an international tribunal in the first place, even though the initial plan contemplated significant Lebanese participation in bringing the court formally into being. The evolution of the Council's reasoning on this matter strongly evokes a pattern of thought resembling complementarity – that is, an attempt to reconcile prima facie deferral to domestic jurisdiction with the necessities of international repression. Shortly after the killing of Hariri, the Council, through its president and in line with the spirit of complementarity, 'call[ed] on the Lebanese Government to bring to justice the perpetrators, organizers and sponsors of this heinous terrorist act'.[92] Indeed, later that year the Security Council 'welcome[d] the determination and commitment of the Government of Lebanon to bring to justice all those responsible for this assassination'.[93] The starting point was therefore clearly some largely home-grown effort at accountability and an international effort merely to encourage it.

This bias in favour of a purely domestic effort, however, was gradually abandoned when it became clear that a trial in Lebanon was becoming unlikely. By March 2005, the Secretary-General recognized that 'By mandating me to help the Lebanese Government to explore the requirements for a tribunal of an international character, the Security Council reflected *a shared assumption that a purely national tribunal would not be able to effectively fulfill the task of trying those accused of the crime*'.[94] In April 2005 the commission of inquiry had found that 'the Lebanese investigation process suffers from serious flaws and has neither the capacity nor the commitment to reach a satisfactory and credible conclusion'.[95] Indeed, according to Nicolas Michel, the Under-Secretary-General for Legal Affairs, who had conducted negotiations on behalf of the United Nations, the Lebanese authorities themselves 'were convinced that, given the circumstances, the national justice system would not be able to meet [the objective of having justice done]'.[96]

However, it is important at all times to emphasize that there was a hint of regret when Lebanese failure became apparent: 'it would have been preferable had the Lebanese parties been able to resolve this issue among themselves based on a national consensus', said UN Secretary-General Ban Ki-Moon in a letter to the Security Council, following a request from the Lebanese prime minister, Fouad Siniora, that the Council put the Tribunal into effect as a matter of urgency.[97] A substantial and probably exceptionally prolonged dysfunction, in a situation where a case of at least prima facie consent to jurisdiction could be made, and where some strong international peace and security motivation was present, may be the only circumstance where an external intervention will be justified.

It is important to note that the Council felt that its decision was all the more legitimate in that there was a 'continued impasse' accompanied by 'long and serious

on National Implementation of Substantive International Criminal Law', (2003) 1 *Journal of International Criminal Justice* 86, at 88–9.

92. UN Doc. S/PRST/2005/4 (2005).
93. UN Doc. S/PREST/2005/61 (2005).
94. UN Doc. S/2006/176, (2006), at 2 (emphasis added).
95. UN Doc. S/RES/1595 (2005), preamble.
96. Report of the Secretary-General, *supra* note 12, at 3.
97. 'Security Council Votes to Establish Hariri Assassination Tribunal', UN News Centre, 30 May 2007.

https://doi.org/10.1017/S0922156508005062 Published online by Cambridge University Press

efforts to find a solution within Lebanon'[98] and that 'all available means have unfortunately been exhausted',[99] that 'all domestic options for the ratification of the Special Tribunal now appear to be exhausted' (Secretary-General),[100] and that 'every possible means' was used 'after five months of tireless efforts to find a solution to the impasse facing' Lebanon. It is because and only because 'No one can say that the Lebanese Government, the Secretary-General or the Security Council failed to pursue every possible option'[101] that the Council saw itself as in a legitimate position to act.

Given that broad inspiration for the creation of the Tribunal, and the already largely agreed nature of the principle of international intervention, it was only a short step then to create the Tribunal under Chapter VII, on the basis of some further 'inability'. The ultimate inability actually to approve the agreement was in a sense simply an extension – an unanticipated but not very surprising one – of the more general, foundational inability to carry out fully domestic trials which had motivated the creation of a hybrid tribunal in the first place.

3. Conclusion

I have sought to argue that although on the face of it the debate about the creation of the Special Tribunal for Lebanon was dominated by a quite classic debate over the values of sovereignty and international peace and security, the dilemma was in fact more complex. The fact that Lebanon is a democracy, and that the question was whether that democracy was up to its task, arguably complicated the Council's task. But beyond these familiar tropes lies a more complex struggle between a traditional vision of the Council's role – as being mostly informed by international peace and security – and a vision that increasingly sees it in certain scenarios as a sort of facilitator of international criminal justice.

It is of course hard to know with precision what exactly the motivations for Security Council's decisions in any given case have been. I have only sought to argue that taking into account international criminal justice's own evolving set of dynamic practices can help make more sense of the creation of the Tribunal under Chapter VII than the Council's own tired framework of decision making. If one combines all the variables inherent in international criminal justice, they probably overall weigh in favour of considering that creation under Chapter VII, despite the inability of Lebanese democracy conclusively to give its agreement, was not unreasonable. This *was* a case where, all other things being equal, international criminal justice's own peculiar internal dynamics shifted the scales in favour of more, not less, international intervention.

98. Security Council Meeting Record, *supra* note 1, at 6, statement by UK representative.
99. Ibid., at 7, statement by Slovakian representative.
100. Letter dated 15 May 2007 from the Secretary-General to the President of the Security Council, UN Doc. S/2007/281 (2007).
101. Security Council Meeting Record, *supra* note 1, at 7, statement by US representative.

https://doi.org/10.1017/S0922156508005062 Published online by Cambridge University Press

Behind this development, which is of course part of a whole series, lies the idea that ultimately some form of international legality will in some cases trump not only sovereignty but also democracy. In other words, if one is serious about the idea of the international community having an interest in the repression of certain crimes (be they not core crimes), then not even democracy, functioning or not, should be allowed to stand in the way of criminal repression. If a state and/or a democratic process are at odds with a strongly manifested international demand for a criminal trial, then, from the point of view of international criminal justice, they will increasingly be seen as part of the problem.