

The Establishment of the Special Tribunal for Lebanon and Domestic Jurisdiction

Mario Odoni*

1. INTRODUCTION

By means of Resolution 1757 of 30 May 2007, the Security Council, “acting under Chapter VII of the Charter of the United Nations”, decided the date (10 June 2007) of the entry into force of a “document”¹ annexed to the Resolution and originally destined to form the text of an “Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon”. The purpose of this jurisdictional mechanism is to try those accused of the terrorist attack perpetrated in Beirut on 14 February 2005 in which the former Lebanese Prime Minister, Rafik Hariri and 22 other people died, as well as those accused of other terrorist acts which occurred after October 2004.

The resolution under consideration once again raises a question that scholars nowadays tend to consider ‘closed’, namely that of the Security Council’s authority to establish tribunals to judge the actions of individuals on the basis of norms of a criminal nature. More broadly, it provides new ways of looking at the ever-topical issue of what limits should circumscribe the Security Council’s activities, particularly within the framework of Chapter VII.

In reality, if one does not judge by appearances, the technique employed by the Security Council to initiate the procedure which led to the actual establishment of the Special Tribunal for Lebanon seems more related to the unilateral/authoritative method tested in the cases of the former Yugoslavia and of Rwanda, than to the bilateral/consensual method more recently employed to set up other courts of a ‘hybrid’ nature.² Nevertheless, compared with the resolutions according to which the *ad hoc* Tribunals for the former Yugoslavia and for Rwanda were established,

* Researcher in International Law at the Faculty of Political Science, University of Sassari, Italy.

¹ It does not seem to be by chance that Paragraph 1 of Resolution 1757 (2007) mentions the entry into force of the “provisions of the annexed *document*, including its attachment” (emphasis added) rather than mentioning the “Agreement”, even though both the heading and the text of the “document” have remained precisely as they were when negotiated by the Parties of the uncompleted agreement.

² Reference is made in particular to the so-called “mixed tribunals” such as the Special Court for Sierra Leone and the Extraordinary Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. On the Special Court for Sierra Leone see M. L. Padelletti, *Repressione dei crimini internazionali di individui e Tribunali internazionali: il caso della Corte Speciale per la Sierra Leone*, 88 RDI 76, at 77 *et seq.* (2005).

Resolution 1757 presents some features of more doubtful legitimacy. These are probably the result of a lack of awareness (or, at least, of a certain carelessness) on the part of the Resolution's actual sponsors regarding the legal impediments that a decision with such content encounters in the light of the Charter. In particular, it seems that the 'solution' adopted by the Security Council in 1993 and 1994 respectively to try to overcome (at least *prima facie*) some of these impediments, has now acquired – in the opinion of some Member States – such substantial weight as a 'precedent' as to make the Security Council's authority to establish criminal tribunals almost unquestionable.

Even among internationalists, it is increasingly rare to find commentators willing to question that competence of the Security Council and to resume the main points of a discussion already widely debated more than ten years ago. Nor does the present writer make any claims to question the legitimacy of the establishment of the cited *ad hoc* Tribunals. Nevertheless, reversion to some of the arguments put forward some time ago concerning the legal basis of those same Tribunals is inevitable, since the case of the Special Tribunal for Lebanon seems, on the one hand, to provide new cues for considering those theories and, on the other, to find in the latter the most appropriate interpretative key.

2. THE BACKGROUND OF SECURITY COUNCIL RESOLUTION 1757 (2007)

Even on the day after the attack, in condemning “the Beirut terrorist bombing of 14 February 2005”, the Security Council called on the Lebanese Government “to bring to justice the perpetrators, organizers and sponsors of this heinous terrorist act” and urged all States, in accordance with its resolutions 1566 (2004) and 1373 (2001), to cooperate fully in the fight against terrorism.³ On that same occasion, the Security Council requested the Secretary-General to report urgently on the circumstances, causes and consequences of the terrorist act.⁴

Besides ascribing to the Lebanese security services and to the Syrian Military Intelligence the primary responsibility for what happened, the report of the Fact-finding Mission immediately dispatched by the Secretary-General cast doubt upon the credibility of the Lebanese authorities themselves handling the investigation, a credibility that was questioned even by many in the government as well as in the opposition. For this very reason, the Mission suggested that an international independent investigation would be necessary to uncover the truth.⁵

Agreeing with this suggestion, and by means of Resolution 1595 of 7 April 2005, the Security Council decided to set up “an international independent

³ S/PRST/2005/4, 15 February 2005, fourth paragraph.

⁴ *Id.*, last paragraph.

⁵ Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri (25 February-24 March 2005), S/2005/203, p. 19 *et seq.*

investigation Commission based in Lebanon to assist the Lebanese authorities in their investigation of all aspects of [the] terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices.”⁶

In its first report, the Commission concluded that the findings of the investigations had supported the theory of Lebanese as well as Syrian involvement in the terrorist act, and stressed that the Lebanese and Syrian intelligence services had infiltrated Lebanese institutions and society to such an extent that they could not have been unaware of the assassination plot against Hariri.⁷ At the same time, the Commission also pointed out that the Syrian authorities had tried to mislead and to hinder its investigation.⁸

By means of Resolution 1636 of 31 October 2005, the Security Council, acting under Chapter VII, decided to enlarge and to support the Independent Investigation Commission’s mandate, also requiring it, in agreement with a Committee established for the purpose, to name all individuals suspected of involvement in the attack. These individuals were then to be subjected by the States to measures freezing their assets and restricting their freedom of movement, in order to ensure their availability for interview by the Commission.⁹ With regard to the obstructionist attitude assumed by Syria towards the inquiry, the Security Council decided, still under Chapter VII, that this State would have to detain the Syrian officials or individuals suspected by the Commission of involvement in the terrorist act, and to cooperate fully and unconditionally with the investigation.¹⁰

In a letter of 13 December 2005 addressed to the Secretary-General, the Lebanese Government suggested that the Security Council establish “a tribunal of an international character to convene in or outside Lebanon, to try all those who are found responsible for the terrorist crime perpetrated against Prime Minister Hariri”.¹¹ In response to this letter, the Security Council requested that the Secretary-General help the Beirut Government to identify the nature and scope of the international assistance needed in order to try those charged with the attack before such a tribunal.¹²

Welcoming the Secretary-General’s conclusions formulated in a report of 21 March 2006,¹³ the Security Council requested him “to negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice.”¹⁴ The negotiations proceeded until September 2006. On 10 November of the same year, the Secretary-General sent the Lebanese Prime Minister the

⁶ S/RES/1595 (2005), para. 1. The Commission started its work on 16 June 2005. Two days later, a “Memorandum of understanding” was concluded between the Lebanese Government and the United Nations regarding the “modalities of cooperation for the International Independent Investigation Commission” (S/2005/393, Annex).

⁷ S/2005/662, 19 October 2005, para. 216, p. 61.

⁸ *Id.*, para. 222, p. 62.

⁹ SC Res. 1636 (2005), para. 3 (a).

¹⁰ SC Res. 1636 (2005), paras. 11 (a), (b), (c).

¹¹ S/2005/783.

¹² SC Res. 1644 (2005), para. 6.

¹³ S/2006/176, para. 14.

¹⁴ SC Res. 1664 (2006), para. 1.

texts of the Draft Agreement and of a Draft Statute for the Tribunal which were approved by the Council of Ministers three days later. The Security Council also approved these texts and invited the Secretary-General to proceed “together with the Government of Lebanon, in conformity with the Constitution of Lebanon, with the final steps for the conclusion of the Agreement.”¹⁵ The “Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon” was signed by the Lebanese Government and the United Nations on 23 January and 6 February 2007 respectively.

For the Agreement to be finalized, it also needed to be approved by the Lebanese Parliament, but the Speaker refused to convene a session of the Assembly for this purpose.¹⁶ Because of this protracted impasse, Prime Minister Siniora, in a letter of 14 May 2007 addressed to the Secretary-General, requested that the Special Tribunal be “put into effect” by “[a] binding decision regarding the Tribunal on the part of the Security Council.”¹⁷

3. THE ESTABLISHMENT OF THE SPECIAL TRIBUNAL USING A SECURITY COUNCIL DECISION AS A SUBSTITUTIVE BASIS FOR THE AGREEMENT: INTRUSIVE IMPLICATIONS OF SUCH A CHOICE

Even though, in the preamble to the resolution, an attempt is made to emphasize the potential nature of a bilateral agreement between the United Nations and the Lebanese Republic, from the “document” annexed to the Resolution, the establishment of the Special Tribunal seems, technically, to be the exclusive result of a decision by the Security Council.

In the hope that the obstacles confronting the Lebanese constitutional process regarding the conclusion of the “Agreement” could be overcome *in extremis*, paragraph 1 (a) of the resolution provided (in vain) for the eventuality that the Beirut Government would notify the United Nations before the date of 10 June 2007 that the legal requirements for the entry into force of the Agreement had been complied with.¹⁸ As is now known, this event did not occur and on 11 June 2007, the Secretary-General began undertaking the steps and measures necessary for the actual coming into operation of the Tribunal.¹⁹

From the resolution itself, it does not seem possible to infer that the Security Council claimed to consider the above-mentioned Agreement as concluded. On the contrary, it is acknowledged in the resolution that this same document was

¹⁵ S/2006/911, 21 November 2006.

¹⁶ S/2007/281.

¹⁷ *Id.*

¹⁸ The Agreement itself (art. 19.1) provides that “This Agreement shall enter into force on the day after the Government has notified the United Nations in writing that the legal requirements for entry into force have been complied with”.

¹⁹ SG/SM/11035 L/3117, Statement by the Spokesperson for UN Secretary-General, 11 June 2007. On 21 December 2007, the United Nations and the Netherlands signed an agreement according to which the seat of the Special Tribunal is based in that State (SG/SM/11347).

only “signed” by the United Nations and the Government of Lebanon and that “the final steps for the conclusion of the Agreement” were proving difficult to complete because “the Constitutional process is facing serious obstacles.”²⁰ As has already been pointed out, the term “Agreement” was only used in the preamble of the resolution, whereas in its operative part, referring to the text of the failed Agreement, reference was appropriately made to an “annexed document.”²¹

In the belief (or in the presumption) that it was acting with the approval of the Lebanese Parliament’s majority and in response to the “demand of the Lebanese people that all those responsible [...] be identified and brought to justice”,²² the Security Council did not go so far as to consider the domestic procedure for the conclusion of the UN-Lebanon Agreement and for its entry into force at the international level to be accomplished. If it had claimed to consider this procedure concluded, the Security Council would have adopted a determination manifestly affecting the Lebanese State’s free exercise of the right/faculty to conclude international agreements. In other words, it would have been a question of interference in matters which are essentially within the “domestic jurisdiction” of the Lebanese State, according to paragraph 7 of article 2 of the Charter.²³ It concerns here in particular the management of the State’s so-called external affairs (precisely that sphere that pertains to the sovereign choice of undertaking international obligations).²⁴

²⁰ SC Res. 1757 (2007), seventh and tenth points of the preamble.

²¹ According to B. Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J Int Criminal Justice 1091, at 1096 (2007), the fact that the Council were careful not to speak of “the Agreement”, using instead the expression “annexed document”, would leave “undecided the legal quality of that document”. Indeed, the very choice of such a “neutral” term seems to reveal a full awareness that, failing a (vainly awaited) conclusion *in extremis* of the Agreement, the text of the same would become the subject of the Council’s *decision*. In other words, this expression sounds like a confirmation that the Council never intended “to bring into force the Agreement [...] in its quality as an international treaty between the United Nations and Lebanon” (*id.*).

²² SC Res. 1757 (2007), ninth point of the preamble.

²³ On the notion of “domestic jurisdiction” provided in paragraph 7 of Article 2 of the Charter, see the interpretation by G. Arangio-Ruiz, *Le domaine réservé. L’organisation internationale et le rapport entre droit international et droit interne*, 225 Recueil des Cours 9 (1990), *passim* and especially p. 391. Challenging the tenability of the concept of “domestic jurisdiction” as the area in which the State is not bound by international obligations (a *ratione materiae*, *horizontal* delimitation of competences between the Member States and the Organization), Arangio-Ruiz shows that paragraph 7 of Article 2 of the Charter relates to the *vertical* distinction between the domain of national law (which governs the relations of individuals and of domestic legal persons), on the one hand, and the sphere of international law (which governs just the relations between States and other independent entities), on the other hand. This *vertical* reservation is to prevent the Organization from performing, in State’s legal system, operational activities that may threaten the exclusivity of State’s relationship with their subjects, agents and territory. Essentially, this kind of *direct interference* takes place when the Organization substitutes itself for domestic organs in exercising governmental functions (normative, administrative, judiciary) in the national system of one or more States.

²⁴ For this definition of *external affairs*, see F. Lattanzi, *Assistenza umanitaria e intervento di umanità*, p. 42 (1997).

However, it is not in this respect that the resolution under consideration seems to violate Lebanese sovereignty. Indeed, as will be seen, it clearly implies interference in a number of different ways in matters which are essentially within the “domestic jurisdiction” of the Lebanese State, in the form of an intrusion into its internal affairs. An intrusion into such a sphere will be unavoidable, for instance, where the Special Tribunal claims to take the place of the judges of that same State in exercising competences which, as a rule, are attributed to them.

This particular method of interference in the domestic jurisdiction of the Lebanese State – a method that presupposes the effective functioning of the jurisdictional mechanism – will be debated further. First, it is necessary to reflect on another intrusive effect of the resolution under examination, namely the result – an immediate product of the resolution – of having deprived the Lebanese constitutional organs, or rather *some* of these, of the possibility of freely exercising their competence to decide upon the very choice of principle of establishing a special jurisdiction to try those responsible for the crimes in question. From another point of view, one has also to acknowledge that an internal organ of the Lebanese State – the Government – in fact ‘made use of’ a decision by the Security Council to have its own political will prevail in establishing the Special Tribunal thus overriding other organs which are constitutionally called upon to concur in such a choice.²⁵

This is a point that also seems to be behind the declarations of some of the Security Council’s Member States, during the debate on the text of the resolution. Indonesia, for example, in justifying its decision to abstain from voting, noted

²⁵ What is puzzling is the way in which the Security Council has intervened in a situation of conflict between the principal organs of a State, ‘embracing’ the political choice of one of these and imposing it, acting like a sort of *deus ex machina*, through the decision-making mechanism provided for by Chapter VII of the Charter. It was not by chance that, following the adoption of the Resolution, the delegate of the Beirut Government, invited to participate in the Council meeting, considered it ‘right’ to state that: “Today’s resolution does not reflect *the victory of one party over another*. Justice is the victor. Nor does it mean that *one group* of Lebanese now believe themselves to be *stronger than the others* or to enjoy *the support* of the international community *to the detriment of others*. [...]” (S/PV.5685, p. 9, emphasis added). To understand the reason for this statement, it must be remembered that, after Prime Minister Siniora’s request that the Security Council establish the Tribunal through “a binding decision”, the President of the Lebanese Republic, Lahoud, in his turn sent the Secretary General a letter of accusation against the Premier himself, maintaining that the latter had violated the Lebanese Constitution from several points of view and falsified and distorted the facts “in order to implicate the Security Council in action alien to its objectives, its role and its concerns as the supreme political authority of the United Nations” (S/2007/286, p. 2). Lahoud accused Siniora of endeavouring to secure the support of the Security Council “for one Lebanese group over the other” (*id.*) and, essentially, of leading a “ruling clique that [...] resorts to *seeking power through an outside force over its people and institutions*” (*id.*, p. 3, emphasis added). In the last part of the same letter to the Secretary General, the Head of the Lebanese State made an even more significant comment on the situation: “Yet my desire not to involve the Security Council, the highest authority within the United Nations, *in the internal affairs of my country* and its established constitutional mechanisms [...] has only been met with the insistence of the group which rules outside the bounds of the National Pact and the Constitution on entreating the Council, [...] *to involve itself in internal Lebanese affairs and favour one political grouping over another*” (*Id.*, p. 4, emphasis added).

that the initiative for the adoption by the Security Council of a “binding decision” to establish the Special Tribunal arose from a request by the Lebanese Prime Minister. Nonetheless, according to the Indonesian delegation, the Security Council should have taken into account the fact that there was “no unified voice among Lebanese leaders”²⁶ and that the resolution had “*changed the legal nature of article 19 of the agreement*”²⁷ and would “bypass constitutional procedure and national processes.”²⁸ Referring expressly to paragraph 7 of article 2 of the Charter, the same delegation maintained that there were

...no legal grounds for the Security Council to take over *an issue that is domestic in nature*. [...] [T]he 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*.²⁹

In conclusion, what is criticized is not that the Security Council unilaterally decided the entry into force of an “agreement” which no-one, not even Indonesia, claims to consider concluded at the level of international law.³⁰ Indonesia, instead, implicitly complains that the Security Council’s action was actually used by the Lebanese Government to avoid (“bypass”) national procedures for forming the will of the State, thus ‘breaking off’ a question that is typically “domestic in nature”, namely a conflict among the organs of the State concerning the constitutional requirements to be complied with in the exercise of their respective competences.³¹

These same historic events described above naturally provide a foundation for such criticism, particularly the situation where Prime Minister Siniora, in the light of the parliamentary impasse that had been preventing the ratification of the Agreement, expressly requested the Security Council to adopt a binding decision to establish the Tribunal.

²⁶ S/PV.5685, p. 3.

²⁷ *Id.*, emphasis added. The reference is to the above-mentioned Article 19 of the failed UNO/Lebanon Agreement - a rule that subordinated the entry into force of the same agreement to the notification by the Lebanese Government of the completion of the formalities required to that end under national law.

²⁸ *Id.*

²⁹ S/PV.5685, p. 3, emphasis added.

³⁰ Russia (another Country that abstained from voting) expressly declared its opinion on this point, stating that the resolution “should have focused on the implementation, under a Council decision, of the agreement between the United Nations and Lebanon, not on the entry into force of the agreement. The arrangement chosen by the sponsors is dubious from the point of view of international law. The treaty between the two entities – Lebanon and the United Nations – by definition *cannot enter into force on the basis of a decision by only one party*. The constituent documents for the Tribunal, *imposed by a unilateral decision of a United Nations body* – that is, a Security Council resolution – essentially represent an encroachment upon the sovereignty of Lebanon” (S/PV.5685, p. 5, emphasis added).

³¹ The Indonesian delegation did, in fact, also insist on the *political* risks of the action taken by the Council: “[...] the Council should fully consider the domestic situation in Lebanon. The 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” (S/PV.5685, p. 3).

However, upon reflection, the charge made against the Security Council of violating the prohibition under paragraph 7 of article 2 would still have been well-founded even if the Lebanese Government's request had not been made.

The point is that the establishment of a special jurisdiction destined to have cognizance of cases which, as a rule, from a territorial and/or personal point of view, fall under the competence of a State, must essentially be deemed a matter of "domestic jurisdiction" of that State.

China (which also abstained from voting) seems to refer to the same issue in stating that

[t]he establishment of the Special Tribunal is, *in essence*, Lebanon's own internal affair. Lebanon's domestic laws provide the legal basis for the operation. [...] by invoking Chapter VII of the Charter, the resolution will override Lebanon's legislative organs by arbitrarily deciding on the date of the entry into force of the draft statute. This move will [...] create a precedent of Security Council interference in the domestic affairs and legislative independence of a sovereign State.³²

4. THE INTERFERENCE IN THE DOMESTIC JURISDICTION OF THE LEBANESE STATE, INCLUDING BY THE DIRECT REGULATION OF RELATIONS AMONG ORGANS BELONGING TO ITS LEGAL SYSTEM

In order to better evaluate the intrusive effect described above, it is necessary to consider certain consequences for the Lebanese legal system, deriving from Resolution 1757 (or, at least, to consider the effects that this resolution was intended to have).

Putting off for the moment the evaluation of the legitimacy of the resolution under consideration, as from 10 June 2007 Lebanon, as a Member of the United Nations, should be considered *prima facie* under obligation, vis-à-vis all the other Members, to "accept and carry out" (Article 25 of the Charter) the decision adopted by the Security Council under Chapter VII.

The sole declared aim of this decision is to make "binding" the documents annexed to the resolution, namely the Statute of the Special Tribunal and, even before this, the provisions of the failed "Agreement between the United Nations and the Lebanese Republic" regarding the establishment of the Tribunal. In spite of the bilateralistic wording which is retained, the nature of these provisions is quite different from that which they would have acquired had the Agreement

³² S/PV.5685, p. 4, emphasis added. It should, incidentally, be pointed out that China speaks of "arbitrarily deciding" on the date of the entry into force "of the draft statute", not of the "Agreement". This confirms the idea that the Security Council's interference in Lebanon's "domestic jurisdiction" did not take place as an intrusion into its *external affairs*, but in the form of a *limitation of the free exercise of competences that are the concern of the national legislative organs*, in relation to the matter under consideration (i.e., the establishment of a special jurisdiction). Indeed, in this sense, the Chinese delegation goes so far as to speak of "interference in the [...] *legislative independence of a sovereign State*". The Chinese statement seems to support the above-mentioned (footnote 23) Arangio-Ruiz interpretation of "domestic jurisdiction".

been concluded. If Lebanon had been able to complete its domestic procedure for the ratification of the Agreement and if this had been finalized from the point of view of international law, the norms provided for in such an instrument would have been effective only *inter partes*, namely between Lebanon and the United Nations.

However, as has been seen, the documents under consideration now form the content of a decision adopted by the Security Council under Chapter VII, in the light of its determination that the terrorist attack in which former Prime Minister Hariri was killed, and the implications of this act, constitute “a threat to international peace and security”. Instead of articles of a bilateral agreement, the provisions of the so-called “Agreement” (and of the Statute of the Tribunal) have become the subject of a decision on measures “to maintain or restore international peace and security”. Consequently, they must be deemed binding not only for Lebanon but also for all Members of the United Nations, in that obligations (at least of cooperation) may arise from them for States not directly involved.

A logical consequence of the nature of a “measure to maintain peace”, conferred on the documents annexed to Resolution 1757, is that the Security Council could even decide further measures “to give effect to its [decision]” (Article 41 of the Charter), namely enforcement measures against States which might default on the rules of those texts, primarily, clearly, Lebanon itself.

However, it is precisely by evaluating the enforcement duties provided for in the “annexed document” (the so-called “Agreement”) and in its “attachment” (the Statute of the Special Tribunal) that one may better assess the intrusive effect on Lebanese internal affairs which was mentioned above.

The first observation to be made is that, under the “annexed document” of Resolution 1757 (the failed “Agreement”), in every key moment of the activation process of the Special Tribunal, at least a consultative or propositional role is expressly provided for the Government of Lebanon.³³ Only in a few provisions of the so-called “Agreement”, by the inappropriate use (considering the circumstances) of the term “Parties”, is mention indirectly made of the “Lebanese Republic”, namely of the international person which, as a Member of the United Nations, should be considered under obligation to accept and carry out the decision of the Security Council.

Since it is a text conceived as a draft of an international agreement, it is not surprising that the document under consideration specifies the titular organ of executive power as the national authority charged, on behalf of the State (the

³³ For example, in the procedure for the appointment of Lebanese judges, the Government is requested to present to the Secretary General a list of twelve persons “upon the proposal of the Lebanese Supreme Council of the Judiciary” (para. 5 (a) of Article 2 of the Agreement). Provision is made so that, at the expiration of their three-year period of service, Tribunal Judges (irrespective of nationality) may be reappointed for a further period, which the Secretary-General must determine “in consultation with the Government” (para. 7 of Article 2). Again after consultation with the Lebanese Government, the Secretary General may proceed to the appointment (or the reappointment) of the Prosecutor (para. 1 of Article 3). On the other hand, the (Lebanese) Deputy Prosecutor must be appointed by the Government in consultation with the Secretary General and the Prosecutor (para. 3 of Article 3).

failed “Party” in a bilateral agreement never concluded), with the task of carrying out and enforcing the rules of the same agreement. The point is that today that text must be read instead as the content of a Security Council decision: from this viewpoint, the direct textual reference to the “Government of the Lebanese Republic” rather than to the “Lebanese Republic” *tout court*, gives rise to consequences that are worth emphasizing.

In short, as regards the establishing process of the Special Tribunal and the various aspects linked with its functioning, the Security Council did not limit itself to specifying the rights and the duties of the Member State involved. It claimed to bind that State even from the point of view of the precise national organ through which it could exercise those rights and fulfil those duties,³⁴ going so far as to introduce obligations of a procedural nature, which, in turn, involve other internal organs and establish for such a purpose the relationship of these with the Government itself.³⁵

In practice, the Government is called upon (as a domestic authority) to exercise a series of operational/executive competences linked with the activation of the new jurisdictional mechanism, without even having obtained the formal approval of the other institutions which could be required to intervene in accordance with the Constitution, *in primis* the Chamber of Deputies, holder of legislative power. A parliamentary mandate to the Government to carry out the above-mentioned operational/executive role would obviously have been implicit if the “Agreement” had been approved by the Chamber, within the procedure for the ratification of the same. But precisely because no such decisive parliamentary passage took place, the ‘mandate’ (at least political) to the Beirut Government ultimately derived solely from the will of the Security Council, a situation which, once again, only confirms the intrusiveness into the Lebanese State’s internal affairs of the decided action.

From the technical point of view, perhaps one could speak of direct attribution of new competences from the Security Council to the state’s internal organ only if Resolution 1757 were automatically recognized as being legally effective

³⁴ Moreover, in the case under consideration, it would be difficult to interpret the expression “Government of Lebanon”, or that of “Government of the Lebanese Republic” as mere synonyms of the “State of Lebanon”. It is true that often, particularly among diplomats, the term “Government” is used as an alternative to “State” to mean the corresponding international person. But, as has been seen, the “annexed document” of Resolution 1757 clearly distinguishes between the “Government of the Lebanese Republic” and the “Lebanese Republic” and in the same Resolution, the Security Council repeats “its 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*” (third point of the preamble, emphasis added).

³⁵ Reference is made in particular to para. 5 (a) of Article 2 of the so-called “Agreement” between the UN and Lebanon (the “annexed document” of Resolution 1757), in which provision is made for the Lebanese judges, called (together with a majority of “international” judges) to complete the composition of the Tribunal’s Chambers, to be appointed by the Secretary General “from a list of twelve persons presented by the Government *upon the proposal of the Lebanese Supreme Council of the Judiciary*”. If this were really the provision of an “Agreement”, there would be nothing to object to. In reality, however, it must be seen as a procedural regulation decided by the Security Council within the framework of Chapter VII of the Charter and aimed at regulating the conduct of the internal organs of a State in their relationships *inter se*.

within the Lebanese legal system, without the need for *ad hoc* acts of adaptation. However, from the point of view of the practical effects of the resolution, the technical solution adopted by Lebanon concerning the issue of the internal effect of the Security Council's binding resolutions,³⁶ does not seem decisive.

The point is that, unless they are willing to violate the Charter and to determine the international responsibility of the State, also exposing it to the risk of being subjected to coercive measures by the Security Council, the Lebanese constitutional organs could not actually change much in the 'procedural scheme' incorporated into Resolution 1757. Although the Parliament's intervention,³⁷ – with the aim of regularizing from a constitutional viewpoint several aspects related to the establishment of the Special Tribunal, – may seem desirable (if not necessary) the Lebanese legislator will certainly not be able to set limits or conditions on competences already entrusted to the Executive by a detailed and 'pre-packaged' regulation adopted by the Security Council's decision. In other words, the Chamber of Deputies seems to have very little discretion, apart from adopting an act of formal reception of the resolution and its annexes. Indeed, it seems that, at the level of the domestic law, only such an act of reception could confer on the same resolution and annexes that legitimacy which at present one can doubt.

In claiming to indicate the modalities of carrying out its own decision within the domestic legal order involved – going so far as to regulate Lebanese inter-

³⁶ In general, Lebanon's tendency regarding the application of international treaties to which it is a Party, is to consider them immediately effective within the internal legal system from the time that they are duly concluded, unless they contain *non self-executing* provisions. See the report contained in HRI/CORE/1/Add.27/Rev.1, (Core Document), Office of the United Nations High Commissioner for Human Rights, <<http://www.unhcr.ch/tbs/doc.nsf>>, para. 48. Nevertheless, the tendential automatic internal applicability attributed to treaties, and so to the Charter of the United Nations itself, does not seem to be reflected in the Security Council's binding decisions, too. For example, referring to the questionnaire sent to all States on the national measures taken to implement Resolution 661 (1990) (concerning the sanctions against Iraq for its invasion of Kuwait), Lebanon replied that "1. Lebanon has declared its *adherence* to Security Council resolution 661 (1990) *as regard text and implementation*. The competent bodies in the Lebanese departments concerned have been informed of the Lebanese Government's position *so that they may comply with it*. 2. The Lebanese Customs, which is the authority responsible for monitoring exports from and imports to Lebanon, is carrying out the *instructions of the Lebanese Government* to comply with the content of resolution 661 [...] 5. *On the instructions of the Government*, the Central Bank has not effected any financial transfers to Iraq and Kuwait *since the adoption of the Security Council resolution 661 (1990) and the Lebanese Government's declaration of its adherence to that resolution*" (*Letter from the Permanent Representative of Lebanon to the United Nations addressed to the Secretary-General*, 29 November 1990, reproduced in D. L. Bethlehem (Ed.), *The Kuwait Crisis: Sanctions and Their Economic Consequences*, Cambridge International Documents Series, Vol. II, Part I, p. 578 *et seq.* (1991) (emphasis added). The "Lebanese Government's declaration of its adherence to that resolution", accompanied by the appropriate instructions, seems to have operated as an *ad hoc* act deemed necessary to attribute internal legal effect to the resolution itself.

³⁷ It should be remembered that, initially, the option of basing the establishment of the Special Tribunal on an agreement to be concluded between the United Nations and Lebanon, was preferred precisely because "[t]he conclusion of such an agreement would leave it to the Lebanese authorities to determine *whether national legislative action is needed*" (Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1644 (2005), in S/2006/176, sixth point (emphasis added).

organic relations – the Security Council has ended up overstepping the limits of state sovereignty and positioning itself at the level of national law. It is precisely to ‘protect’ Member States from this sort of intrusion that the prohibition provided for in paragraph 7 of Article 2 of the Charter was inserted.

However, the Security Council’s intervention in Lebanon’s domestic jurisdiction manifests itself in other ways, too. Indeed, it is plain that the Special Tribunal is a mechanism capable of deeply affecting the normal exercise of judicial power within that State – a power that the Lebanese Constitution itself requires to be exercised “*dans les cadres d’un statut établi par la loi*” (art. 20).³⁸ What about, for example, the impact on the Lebanese legal system of provisions such as Article 4 (“Concurrent jurisdiction”) of the Special Tribunal’s Statute, in which is established that “[...] Within its jurisdiction, the Tribunal shall have primacy over the national courts of Lebanon”? Are the obligations placed directly upon the national judicial authorities, to cooperate with the Tribunal, execute its orders and comply with its requests of assistance, consistent with the above-mentioned reservation of law? Does Lebanon’s mere membership of the United Nations and the obligation incumbent upon this State to apply the Security Council’s decisions, suffice to justify such hierarchical effects in the light of its legal system?

The simple fact that the application of Resolution 1757 gives rise to serious questions of this nature (i.e. of constitutional law) appears to provide further confirmation of the already-criticized intrusiveness of the Security Council’s action within that sphere of relations between individuals which essentially belongs to the domestic jurisdiction of the State in question.

5. PRECEDENTS: THE AD HOC TRIBUNALS FOR THE FORMER YUGOSLAVIA AND FOR RWANDA AS “ENFORCEMENT MEASURES” AGAINST INDIVIDUALS

It is now necessary to consider whether such forms of interference must, nevertheless, be deemed lawful in the light of the legal basis chosen by the Security Council for its decision. As is often the case, the Security Council has limited itself to declaring that it has been acting under Chapter VII of the Charter, without indicating which rule it has intended to apply. There is little need to point

³⁸ A French version of the text of the Lebanese Constitution, enacted on 23 May 1926 and subsequently amended, is available on the website of the Constitutional Council of the Lebanese Republic: <<http://www.conseil-constitutionnel.gov.lb/fr/constitution.htm>>. According to, C. Sader, *A Lebanese Perspective on the Special Tribunal for Lebanon*, 5 J Int Criminal Justice 1083, p. 1084 (2007), “[Article 20 of the Lebanese Constitution] does not require the courts to be Lebanese; instead, the Article merely establishes the democratic principle of separation of powers, by affirming that judicial power shall only be exercised by courts established in accordance with the law. Therefore, any court established pursuant to the law, be it foreign or Lebanese, is constitutional”. But the very point is whether the Special Tribunal, established by a Security Council decision, is a court established pursuant to the law, according to the same Article 20 of the Lebanese Constitution.

out that precise identification of the applied rule or rules of this Chapter, in the case under consideration, acquires particular importance in the light of the final sentence of paragraph 7 of Article 2 of the Charter. Derogating the principle of non-intervention by the United Nations in matters pertaining essentially to the domestic jurisdiction of the States, this establishes that: “this principle shall not prejudice the application of enforcement measures under Chapter VII”. In short, the Security Council’s intrusion into Lebanon’s “domestic jurisdiction” could theoretically be deemed lawful if such an interference turns out to be necessary in order not to prejudice the application of “enforcement measures” decided under Chapter VII.

However, before considering Resolution 1757 in this light, it is useful to define some points of reference, returning to the precedents already mentioned at the beginning of this article, with particular reference to the methods used by the Security Council to establish the two *ad hoc* Criminal Tribunals in the early 1990s. The remarks that follow will largely be related to the case of the Tribunal for the former Yugoslavia (ICTY) but they can also be applied to the Rwanda Tribunal (ICTR).

Without wishing to revive a debate that is now dormant, one need only recall the thesis supported by the Secretary-General at a time when there was much discussion as to which legal basis should be used to establish the Tribunal for the former Yugoslavia. In the report drawn up pursuant to Resolution 808 (1993), he maintained that “the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations” and that such a decision would constitute “a measure to maintain or restore international peace and security following the requisite determination of the existence of a threat to the peace [...]”³⁹. According to the Secretary-General, such a solution was called for because of its expeditiousness and immediate effectiveness, “as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII.”⁴⁰ Whether or not this argument is in accordance with the Charter (and this is precisely the subject to which the present writer does not wish to return), it is clear that it represents a widespread opinion within the United Nations and it seems also to explain the logic pursued by the Security Council at that time.

³⁹ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, reproduced in V. Morris and M. Scharf, *An Insider’s Guide to the Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Vol. 2, p. 7 (1995) (emphasis added).

⁴⁰ *Id.*, p. 8, (emphasis added). In para. 28 of the same report, the Secretary General maintained that “the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature” (*id.*, emphasis added). This approach is otherwise confirmed in the Secretary-General’s commentary to the Draft Statute. In particular, with regard to the aspect of cooperation and judicial assistance on the part of the States, it is maintained that “an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations” (*id.*, p. 27, emphasis added).

Resolution 827 (1993) which established the *ad hoc* Tribunal for the former Yugoslavia, was in accordance with the Secretary-General's proposal put forward in the above-mentioned report together with the Statute of the new judicial organ. However, in the same Resolution, apart from a generic reference to Chapter VII, the Security Council did not indicate the precise normative basis of its own action, a point which was not, in fact, explicitly dealt with by the Secretary-General either.

As is well-known, the specification of which rules of Chapter VII might have constituted the basis for the decision which established the ICTY was dealt with by the Appeals Chamber of the Tribunal itself, in its famous Decision in the *Tadic* case.⁴¹ Regarding the Security Council's determination of the existence of a "threat to the peace" under Article 39⁴² as indisputable (nor was it disputed by the accused's defence) – the Chamber ruled out the interpretation of the Tribunal's establishment as falling within the purview of Article 42, since "[o]bviously, [it] is not a measure under [this] Article [...], as these are measures of a military nature, implying the use of armed force."⁴³ Moreover, it is important to underline one of the reasons why the Appeals Chamber ruled out the Tribunal's establishment as "a provisional measure under Article 40", namely the situation whereby "*not being enforcement action*, according to the language of Article 40 itself [...], such provisional measures are *subject to the Charter limitation of Article 2, paragraph 7*."⁴⁴ After a good deal of discussion, the Appeals Chamber therefore concluded that "the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41."⁴⁵

Among the arguments put forward in support of such a conclusion, one opinion seems particularly noteworthy, namely that Article 41 does not literally exclude "institutional measures implemented directly by the United Nations through one of its organs", although all of the ("merely illustrative") examples presented in the provision are of measures "to be undertaken by Member States". This interpretation, indeed, allows to bring the Tribunal's establishment under Article 41, but the Appeals Chamber nevertheless seems to omit a point of crucial

⁴¹ Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction in the *Tadic* case, reproduced in RDI, 1995, p. 1016 *et seq.*

⁴² See para. 30 of the Decision, *id.*, p. 1030 *et seq.* The Appeals Chamber seems to have neglected to point out that the real "threat to the peace" to which the Council intended to respond (and which it had already determined in Res. 808 and reaffirmed in Res. 827) was not so much the armed conflict itself but consisted of the "widespread and flagrant violations of international humanitarian law [...] of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing" [...]" (Res. 827, third point of the preamble); "*this situation continues to constitute a threat to international peace and security*" (Res. 827, fourth point of the preamble, emphasis added).

⁴³ Para. 33 of the Decision, *id.*, p. 1032.

⁴⁴ Para. 33 of the Decision, *id.*, p. 1032 *et seq.*, emphasis added. Indeed, the comment by the Appeals Chamber seems to reveal an awareness that the decision to establish the *ad hoc* Criminal Tribunal involved aspects interfering in the "domestic jurisdiction" of States, and that the unavoidable intervention in such a reserved sphere may only be justified on condition that the Tribunal itself be considered an integral part of an *enforcement* mechanism, relevant under the *exception* provided by para. 7 of Article 2 (*last sentence*).

⁴⁵ Para. 36 of the Decision, *id.*, p. 1034.

importance. It is not enough to hold that the *ad hoc* Tribunal, established by the Security Council as its own subsidiary organ, is a case of “measures which [the Organization] can implement directly via its organs”⁴⁶ (an operational procedure implicitly admitted by Article 41). It is also necessary to recognize that the Tribunal, once physically set up, would have very little chance of exercising its function without active cooperation by the States involved on a case by case basis, particularly without their willingness to provide assistance at both the investigation and the trial stages. It would therefore be more accurate to maintain that the *ad hoc* Tribunal for the former Yugoslavia (and the same may be said for the Rwandan Tribunal) is to be considered an enforcement measure under Article 41 and that the application of such a measure is the result of the combination and coordination of the UN’s own resources with the collaboration and resources of Member States. Only by such logic can one grasp the phenomenon as a whole and understand how, after all, the action decided by the Security Council also includes the operational model typified in that provision, namely the “enforcement action by Member States”. By the same logic one can also understand the Secretary-General’s statement (previously quoted) that “an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations.”⁴⁷

Precisely because the last sentence of paragraph 7 of Article 2 establishes that the principle of non-intervention by the United Nations in the domestic jurisdiction of States “shall not prejudice the application of enforcement measures under Chapter VII”, Member States would not be allowed to raise any objections based on the prohibition of interference in their reserved domain, as regards provisions such as paragraph 4 of Resolution 827 (1993). By means of this paragraph, the Security Council

[d]ecides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.⁴⁸

As one can see, this provision is structured according to the ‘classical’ pattern of Article 41 (the Security Council decides what measures States have to apply). Moreover, the idea of considering the fulfilment by States of their obligations of cooperation and judicial assistance as the application of an enforcement measure was actually expressed by the Secretary-General in his comments on Article 29 of the Statute, precisely the rule mentioned in paragraph 4 of Resolution 827 (1993).⁴⁹

⁴⁶ Cf. para. 36 of the Decision, *id.*, p. 1034.

⁴⁷ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), cit., para. 126, p. 27, emphasis added.

⁴⁸ An analogous provision is contained in para. 2 of Res. 955 (1994), establishing the Rwanda Tribunal.

⁴⁹ The present writer maintains, as will be argued below, that the Council conceived the *ad*

Without doubt, both the Secretary-General and the Security Council were well aware that the *ad hoc* Tribunal's functioning crucially depends on the constant observance of those obligations of collaboration. After all, that was a major reason for their introduction via that kind of 'priority lane' system provided by the Charter only for the application of enforcement measures decided under Chapter VII. This does not mean, however, that the Security Council's power of decision under that Chapter is restricted to the binding prescription of enforcement measures under Article 41 (or under Article 42).

In the same Article 41 one can find an indication: "The Security Council may decide what measures not involving the use of armed force are to be employed *to give effect to its decisions* [...]" (emphasis added). Therefore, if the Tribunal established by the Security Council and the correlated obligations of cooperation incumbent upon Member Countries are an enforcement mechanism to be considered as based on Article 41, the direct purpose of the same should be "to give effect to [a Security Council decision]". To which previous Security Council decision does the *ad hoc* Tribunal's establishment mean "to give effect"? Under which rule did the Security Council adopt such a decision?

This last question is a subject that deserves a thorough, autonomous analysis, which is not possible to be made here. The present writer limits himself to pointing out that Article 39 does not at all seem formulated in such a way as to restrict the typology of measures that the Security Council can adopt, to those provided for by Articles 41 and 42. On the contrary, the text itself of Article 39 ("The Security Council shall [...] decide what measures shall be taken *in accordance* with Articles 41 and 42, to maintain or restore international peace and security", emphasis added) does not seem, in itself, to exclude the Security Council's taking measures structurally different from those exemplified in the quoted articles. The expression "in accordance with" only seems to require that, when measures of the kind provided for in Articles 41 and 42 (the so-called "enforcement measures") are decided, these are to be "taken" in compliance with those articles.⁵⁰ However,

hoc Tribunal for the former Yugoslavia (and that for Rwanda) as a measure with *coercive* effects intended against *individuals* (rather than States). As for the Secretary General's already-quoted opinion ("an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be *the application of an enforcement measure under Chapter VII of the Charter of the United Nations*", emphasis added), he does not seem to have claimed to maintain that the "order" is to be considered "coercive" *towards a State bound to carry it out*. Besides, in the sentence under consideration, the aspect of *coercion* and of the entities against whom this is directed is in no way dealt with, so that "*enforcement measure*" and not "*coercive measure*" is mentioned. The fact that the Secretary used the same expression in para.7 of Article 2 ("[...] application of an enforcement measure under Chapter VII [...]") serves instead to stress that Member States could not use the argument of interference in their "domestic jurisdiction" to evade the obligatory character ("binding", "mandatory") of the "order", which is precisely what constitutes the specific content of obligations of cooperation conceived as an integral part of an "enforcement measure". In confirmation of such an interpretation, one should note that the Secretary General has recommended that the decision be "taken as an enforcement measure under Chapter VII" on account of the fact that "all States would be under a binding obligation to take *whatever action is required* to carry out [this] decision" (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para. 23, p. 8, emphasis added).

⁵⁰ In Article 39, with regard to the "measures to maintain or restore international peace and

the same expression does not exhaustively describe the contents of the “measures” that the Security Council, according to Article 39, “shall [...] decide”, nor does it compromise the possibility that these measures assume a connotation and a structure different from those typical of the “enforcement measures”.

For reasons of brevity, the present writer refrains from referring to the arguments emerging from the preparatory works of the Charter and from the Security Council’s practice itself. But they seem to confirm the interpretation of Article 39 upheld here. It should be pointed out that the very case of the establishment of the Tribunal for the former Yugoslavia shows that the kind of measures that the Security Council can decide, under Article 39 “to maintain or restore international peace and security” does not confine itself to those provided for in Articles 41 and 42.

Indeed, from Resolution 827 (1993) and the Secretary-General’s report introducing the Draft Statute of the Tribunal, it is clear that the establishment of such a judicial organ and the correlated obligations of cooperation incumbent upon Member States constitute an “enforcement measure” adopted by the Security Council “for an effective and expeditious implementation of [its] decision [in resolution 808 (1993)].”⁵¹ To use the wording of Article 41, the enforcement measure decided by Resolution 827 is intended to “give effect” to a “decision” previously adopted by Resolution 808.⁵² It is paragraph 1 of the latter Resolution by which the Security Council “[d]ecides that an international

security”, two aspects are dealt with jointly but should, in reality be kept separate on a logical and practical level. The first is that of the *decision* concerning *what* measures should be taken - a fact that the Charter recognizes as being able to give substance to and activate the obligations provided by Article 25 vis-à-vis the Organization’s Members. The second aspect (indicated by the expression “shall be taken”) is that of the *adoption* of such measures. It refers to the application/execution phase of the same (one can grasp the distinction better in Article 48, which reads “1. *The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine*”, emphasis added). Well, if it is true that the *decision* is the concern of the Council and is the necessary condition for the *adoption* of the measures, it is less true that this latter aspect is also always the concern of the Council. Should it decide that it is necessary to use armed force, Article 42 provides that *the Council* “may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security”. However, should the decided measures, of a *coercive* nature, not involve the use of force, Article 41 provides that the Council “may call upon *the Members* of the United Nations to apply such measures” (emphasis added). One can therefore understand the meaning of the expression “in accordance with Articles 41 and 42”. It is not by chance that it is included next to the words “shall be taken” rather than next to the term “decide”. It does not have the function of circumscribing the object of the power attributed by Article 39 to “decide” *what* measures to adopt, but rather the role of specifying and indirectly regulating the aspect of the *application mechanism* of a specific category of measures, namely those provided in Articles 41 and 42. They are included in the wider *genus* of “measures to maintain or restore international peace and security”.

⁵¹ Cf. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para. 22, p. 7 and Res. 827 (1993), ninth point of the preamble.

⁵² The expression used in Article 41 of the Charter was, incidentally, employed by the United Kingdom during the debate that followed the adoption of Res. 808: “We think it is vital that an international legal mechanism be established to bring those accused of war crimes, from whatever party to the conflict, to justice. Whatever mechanism is proposed to *give effect* to this resolution

tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991". By means of this provision the Security Council decides that the setting up of a special international criminal jurisdiction is the most appropriate measure to meet the specific "threat to international peace and security" contextually "determined" (the situation "of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia"). In itself, the "determination" of the existence of a specific "threat to the peace" unequivocally places the decision provided in Resolution 808 within the ambit of Chapter VII, precisely as a "measure to maintain or restore international peace and security" according to Article 39. Although objectively unable to be immediately carried out by Member States, the decision under consideration is not devoid of any binding effect. It is not by chance that it has been defined as a "decision in principle"⁵³ by some state delegations. Essentially, its aim is to establish the competence, *ratione materiae, personae, loci* and *temporis*⁵⁴ of an *ad hoc* international criminal jurisdiction,⁵⁵ leaving open the issue of the legal basis and of the modalities by which to put it into operation.

should reflect this and should have jurisdiction over all the parties" (S/PV.3175, 22 February 1993, reproduced in Morris-Scharf, *supra* note 39, p. 167, emphasis added).

⁵³ Spain, for example, stated: "[...] We therefore support a *two-stage process*, such as the one we are *initiating today*, in which, following the adoption of a *decision in principle*, a thorough, detailed study is conducted so that the institution established will live up to the expectations of the international community and will meet all the requirements of full respect for international law" (S/PV.3175, *id.*, p. 173, emphasis added). Similarly, Morocco stated that "[i]n establishing *the principle* of a war crimes tribunal, the Council is responding to the unanimous wish of the international community [...]" (*id.*, p. 175, emphasis added). In the case of the establishment of the Criminal Tribunal for Rwanda, the precedent of the Tribunal for the former Yugoslavia has ended up simplifying the route to be followed, so that the Council did not need to initiate "[a] two-stage process" by *expressly* adopting an autonomous "decision in principle": a decision of this kind is in fact *implicit* in Res. 955 (1994) itself, whose operative part begins directly, in para. 1, with the first element of the *enforcement* mechanism (the establishment of the *ad hoc* Tribunal and the delimitation of the aspects of its competence). The second element is the obligations upon Member States concerning assistance and judicial cooperation (para. 2). Indeed, it is para. 1 of the same resolution that briefly mentions the "decision in principle" which it presupposes and to which it intends "to give effect": the "measure to maintain or restore international peace and security" consisting in the establishment of a new *ad hoc* international criminal jurisdiction, to which "persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994" would be subject. Besides, the reasons for such a "measure" are explained by the Council in the preamble to the resolution, after having indicated the specific situation of "threat to the peace" to which the measure is intended as a response.

⁵⁴ See the Secretary General's commentary on the Draft Statute of the Tribunal, in which the various aspects of the competence, quoted above, are expressly defined in pursuance of para. 1 of Res. 808 (1993) (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), paras. 33, 50, 60 and 62, p. 9 *et seq.*)

⁵⁵ The words of the French delegation are significant here: "By adopting unanimously resolution 808 (1993) [...] the Security Council has just taken a decision of major significance. For the first time in history, the United Nations will be setting up *an international criminal jurisdiction* –

The case of the establishment of the Tribunal for the former Yugoslavia also shows that under Chapter VII (particularly, in the opinion of the present writer, under Article 39 itself) the Security Council may decide measures for the maintenance of peace that are of an obligatory nature (“binding” or “mandatory”, in the terminology currently used within the Security Council) but devoid of *coercive* character, for Member States. Only the enforcement measures provided for in Articles 41 and 42 have both characteristics.⁵⁶ Moreover, as has already been stressed, only the obligations concerning the application of enforcement measures are exempt from the principle of non-intervention in State “domestic jurisdiction”. This means that, on the basis of Article 39, the Security Council can certainly oblige Member States to take certain measures to maintain or restore international peace and security, but it is not legally allowed to breach the state sovereignty barrier and place itself at the level of their domestic law, directly prescribing the internal modalities for carrying out its own decisions.

There is a final aspect that is worth clarifying here. Since the Tribunal for the former Yugoslavia (and, in the same way, the ICTR) is to be considered an “enforcement measure under Chapter VII”, *towards whom* is the coercive effect of such a “measure” directed? The answer to this question must be sought in the decision itself to which the measure is intended to “give effect”. In the case of the

one that will be competent to try those who have committed serious violations of international humanitarian law in the territory of former Yugoslavia” (S/PV.3175, *id.*, p. 164, emphasis added). An indirect confirmation of the thesis upheld here, concerning the existence of a decision-making power attributed to the Security Council by Article 39 itself and the “decision in principle” provided in Res. 808 regarded as falling under this power, may be deduced from an attractive opinion expressed within the Security Council by Argentina, on 30 September 2003, during a meeting concerning “Justice and the Rule of Law: the United Nations role”: “In the early 1990s, the Security Council, after decades of inaction, brought a significant change. *Resorting to a more creative interpretation of its powers under Article 39 of the Charter*, the Council decided to create special jurisdictions designed to try the majors perpetrators of the most heinous crimes. It thus established the international tribunals for Rwanda and Yugoslavia, the Special Court for Sierra Leone and various other jurisdictional mechanisms designed to respond to situations in Kosovo, Timor or Afghanistan. In adopting these types of measures, the Council finally addressed head-on the most complex issue in the pursuit of justice and the rule of law in all societies, namely, definitively overcoming injustice” (S/PV.4835, p. 28 *et seq.*, emphasis added).

⁵⁶ It must be noted that, as emphasized by the Appeals Chamber in the *Tadic* case (para. 31 of the Decision, *supra* note 39, p. 1031), the “enforcement measures” which the Security Council may decide under Articles 41 and 42 produce their *coercive* effect “*vis-à-vis* the culprit State or entity” whereas they are merely “mandatory” for *other* States, i.e. those called upon to cooperate in carrying them out. Indeed, the coercive measures *ex* Chapter VII, are conceived as forms of an organized and coordinated action by a group of States (the Member States) *against* one or more other States (or entities); the latter (they could also be *non*-Members of the Organization who, hence, are not legally bound by Council decisions) however, *suffer* the *coercive* effect of such means of pressure (of an economic nature, or of other kinds), carried out by the former at the demand of the Council. In other words, the *coercion* is the result of an activity that may also be carried out *against* the target State’s or entity’s will and is regardless of its collaboration. The collaboration which must be obtained is that of Member Countries which are bound to implement the *enforcement measures* since these are “mandatory” for them. These measures may well be binding for all the Member States, whereas they may be “coercive” only for certain States or entities: a *coercive* effect towards the *entire* Membership is neither feasible nor conceivable.

ICTR, the measure to maintain or restore peace decided by the previously-quoted paragraph 1 of Resolution 808 (1993) comes to the fore: the subjection to an international criminal jurisdiction of “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”⁵⁷

Here, the genuinely ‘innovative’ feature that characterizes the Security Council’s establishment of the two *ad hoc* Criminal Tribunals in the early 1990s emerges: the fact that these tribunals were conceived as an “enforcement measure under Chapter VII” *directed against individuals* and not against States or other entities endowed with international legal personality.⁵⁸ Is this to be deemed legal, in the light of the Charter? Clearly, this is a key point that logically precedes and influences the *vexata quaestio* itself of whether a political organ such as the Security Council can establish subsidiary organs endowed with judicial powers.

One could perhaps point out that the decision by the Security Council on enforcement measures against individuals or groups and entities not endowed with international legal personality is, in a certain sense, a ‘sign of new times’. Indeed, history teaches us that, precisely in the late 20th and early 21st century, the Security Council has gradually had to realize that some of the worst threats to international peace and security arise from the behaviour of individuals, rather than from the conduct of States. The now-widespread practice of so-called “targeted sanctions” or “smart sanctions” and, in particular, the drafting and updating, through special subsidiary organs, of ‘black lists’ of persons to be affected by economic/financial restrictive measures and/or measures limiting their freedom of movement, are all facts that confirm the recent tendency on the part of the Security Council to make increasing use of the coercive mechanisms provided for in Chapter VII, against individuals. It is precisely in the light of this tendency that another examination of the way the *ad hoc* Tribunals are established would be appropriate.

Here, one needs only to attempt to give an answer to the essential question posed above: is it consistent with the Charter that the Security Council decides

⁵⁷ The logical route followed by the Security Council seems to find a synthesis in the words of the French delegate, pronounced immediately after the adoption of Res. 808 (1993): “*The atrocities committed by all sides in the Yugoslav crisis have given rise to an intolerable situation which is fanning the flames of conflict and therefore constitutes a threat to international peace and security. Prosecuting the guilty is necessary if we are to do justice to the victims and to the international community. Prosecuting the guilty will also send a clear message to those who continue to commit these crimes that they will be held responsible for their acts. And finally, prosecuting the guilty is, for the United Nations and particularly for the Security Council, a matter of doing their duty to maintain and restore peace*” (S/PV.3175, *id.*, p. 163 *et seq.*, emphasis added).

⁵⁸ Besides, as already pointed out, it would not even be conceivable for the Council to adopt, *ex art. 41 or 42*, a measure to be considered as *coercive* towards *all* the Member States, since the real *coercion* may be achieved only by the coordinated action of the latter and *against* one or more *given* States. Instead, it has to be admitted that, of course, the two *ad hoc* Criminal Tribunals technically are founded on measures that are “mandatory” for all Member States, but they are “coercive” only for the *individuals* they are intended to prosecute. If anything, one could speak of *coercion* towards *States*, referring to *possible* and *further* measures that the Council might decide *against* recalcitrant Member States who refuse to fulfil their obligations of collaboration with the Tribunals themselves (on this point see Lattanzi, *La primazia del tribunale penale internazionale per la ex-Iugoslavia sulle giurisdizioni interne*, RDI 596, at. 614 *et seq.* (1996)).

enforcement measures against individuals (or other entities that are not States and not endowed with international personality)? Without doubt, the typology of measures exemplified in Article 41 (and that provided in Article 42) suggests an action directed against States, aimed at exercising a certain pressure to persuade them to behave as demanded by the Security Council.⁵⁹ However, is this sufficient to conclude that the Charter does not allow enforcement measures other than those directed against States?

Indeed, it must be acknowledged that at least one of the three conditions that justify the exercise of the powers provided for in Chapter VII – the “threat to the peace” – is defined with such vagueness that it cannot be ruled out that it envisages situations of danger arising from behaviour of individuals, rather than from state conduct. It is understandable that, at the time of the San Francisco Conference, the United Nation’s “Founding Fathers” were, above all, thinking of cases of “threats to the peace” resulting from the conduct of States, and from this viewpoint one can understand that Article 41 lists as examples only measures conceived as means of pressure against States. Nevertheless, it would be unreasonable to maintain that they were intending to set up a system of collective security destined to remain inactive because a situation representing a threat to peace did not arise from actions carried out by States but by non-state entities or, simply, by individuals.

Having said that, it does not seem contrary to the *ratio* of Chapter VII that the Security Council should decide the application of enforcement measures against individuals once it has determined, under Article 39, that their conduct is a “threat to the peace.” This is all the more so because a systematic interpretation of the Charter allows the conclusion that, for the application of enforcement measures against States, the Security Council certainly is already authorized to exercise “vicarious State activities”,⁶⁰ also in direct contact with individuals subject to the Member States’ sovereignty. One can reach this conclusion, once again, from the provisions of the last sentence of paragraph 7 of Article 2, according to which the principle of non-intervention by the United Nations into state “domestic jurisdiction” shall not constitute an obstacle to the application of enforcement measures taken under Chapter VII. Indeed, this explicit exception reveals its practical use precisely with regard to the Member States called upon to carry out the decisions on enforcement measures against a ‘target State’. If, for the application of these same measures, the Security Council carries out actions at the level of national law and hence within the sphere of relations between individuals, substituting itself for the organs of one or more implementing States,

⁵⁹ Moreover, the Charter expressly refers to “enforcement measures against any state” (Article 50) and of “enforcement action” taken by the United Nations against a “state” (Article 2, para. 5).

⁶⁰ For the definition of this kind of activities, usually known as “operational” or “supranational”, see G. Arangio-Ruiz, *The Normative Role of the United Nations General Assembly and the Declaration of Principles of Friendly Relations, with an Appendix on The Concept of International Law and the Theory of International Organization*, 137 Recueil des Cours 419, p. 668 (1972).

the latter cannot use the argument that such a substitution constitutes interference on the part of the United Nations in their reserved domain to reject the binding (“mandatory”) nature of those Security Council decisions.⁶¹

In its practice, the sector in which the Security Council has made use of this prerogative, attributed to it by paragraph 7 of Article 2 (last sentence), is above all that of the control of compliance with enforcement measures decided by it. Certain resolutions adopted by the Security Council in the 1990s, for example, can be interpreted in this way, i.e., the resolutions under which States and/or regional organizations carried out some maritime operations of monitoring/interdiction to ensure the observance of sanction measures against States.⁶² It was not by chance that it was requested that such activity, in accordance with an expression recurring in those same resolutions, be carried out “under the authority of the Security Council”. This condition expressed the will of the Security Council to introduce the stopping and inspection, in international waters, of ships suspected of violating the embargo regime, as a ‘UN operation’ instead of as an operation of the intervening States. Indeed, that activity of monitoring/interdiction also implied the exercise of powers at the level of relations between individuals, *in place of* the competent flag States which, as a rule, have the exclusive jurisdiction on the high seas. It is a substitution that can well be considered lawful according to the last sentence of paragraph 7 of Article 2, provided it is, in effect, an activity attributable to the United Nations, the only entity authorized to make use of this exception through an enforcement action decided by the Security Council.⁶³

⁶¹ This seems to be the most logical conclusion in the light of the above-mentioned (footnote 23) Arangio-Ruiz interpretation of “domestic jurisdiction”.

⁶² See para. 1 of Res. 665 (1990), concerning the *maritime operation* carried out in the Persian Gulf in support of the embargo against Iraq; Res. 787 (1992), para. 12, under which a NATO/WEU naval interdiction operation was carried out in the Adriatic Sea to ensure the application of the measures against the Federal Republic of Yugoslavia (Serbia and Montenegro); Res. 875 (1993), para. 1, with respect to the control of maritime traffic towards Haiti, to ensure the observance of the relevant sanctions decided by the Council. On the naval interdiction operations carried out under Security Council’s resolutions, see, for example, F. Presutti, *L’uso della forza per garantire l’applicazione di misure non implicanti l’uso della forza: il caso della risoluzione n. 665 del Consiglio di Sicurezza*, RDI, p.380 *et seq.* (1990); G. Cataldi, *La risoluzione n. 787 (1992) del Consiglio di Sicurezza e il controllo in mare del rispetto dell’embargo nei confronti della Repubblica federale di Jugoslavia*, RDI, p. 139 *et seq.* (1993); F. Pagani, *Le misure di interdizione navale in relazione alle sanzioni adottate dall’ONU*, RDI, p.720 *et seq.* (1993); P. Martin-Bidou, *Les mesures d’embargo prises à l’encontre de la Yougoslavie*, 39 AFDI 262, p.267 *et seq.* (1993); H. A. Soons, A “New” Exception to the Freedom of the High Seas: the authority of the U.N. Security Council, in T. D. Gill and W. P. Heere (Eds. by), *Reflections on Principles and Practice of International Law, Essays in Honour of Leo J. Bouchez*, 205 (2000).

⁶³ On this point see M. Odoni, *La partecipazione della N.A.T.O. ad azioni per il mantenimento della pace realizzate “under the authority” del Consiglio di Sicurezza*, in F. Lattanzi and M. Spinedi (Eds.) *Le organizzazioni regionali e il mantenimento della pace nella prassi di fine XX secolo*, 293 at footnote 82, p. 320 *et seq.* (2004). Subsidiary organs of the Council which, as a rule, carry out control activity at an international level (such as the well-known “sanctions committees”) may also, from certain points of view, find themselves operating at the level of relations between *individuals*; this is again due to the exception to the principle of non-intervention in the State reserved domain, relating to the application of enforcement measures *ex* Chapter VII. The case of the Committee established by Res. 724 (1991) to monitor the observance of the sanctions adopted in 1992 against

6. CONCLUSIONS

At this point, the present writer believes he has highlighted enough arguments of a logical/normative nature on the basis of which to proceed to the evaluation of the legitimacy of Resolution 1757. As has already been pointed out, it appears essential to specifically identify the rule, or rules, of Chapter VII applied by the Security Council in the case under consideration, so that one can give an opinion on the crucial point of the interference in Lebanon's internal affairs. An attempt will therefore be made to reconstruct the 'will' of the Security Council based on the text of the Resolution and its annexes, on some of the statements made by Member States before and after voting and on the events that preceded the adoption of the Resolution.

In the operative part of the Resolution (para. 1) the Security Council merely "[d]ecides, acting under Chapter VII of the Charter [...], that: (a) The provisions of the annexed document, [...], on the establishment of a Special Tribunal for Lebanon *shall enter into force* on 10 June 2007 [...]" (emphasis added). The expression "enter into force", once one has excluded (for the reasons already specified *sub* para. 3) that it can be interpreted as "entry into force" of an agreement in the proper sense, itself reveals the sole aim pursued by the Resolution: to give binding legal effect to a text that could not acquire such force on consensual grounds. This conclusion is confirmed by the statement of the United Kingdom – one of the sponsors of the Resolution – that "[t]he use of Chapter VII carries *no connotation other than that it makes this resolution binding*."⁶⁴ Further (though indirect) confirmation can also be inferred from the opinion expressed by one

Serbia and Montenegro may be cited here. In order to make the control activity more incisive, by means of Res. 820 of 17 April 1993 the Security Council decided that "transshipments of commodities and products through the Federal Republic of Yugoslavia (Serbia and Montenegro) on the Danube shall be permitted only if *specifically authorized by the Committee established by resolution 724 (1991)* and that each vessel so authorized must be subject to effective monitoring while passing along the Danube between Vidin/Calafat and Mohacs" (para. 15, emphasis added). A blockade of the river traffic upstream (Mohacs, Hungary) and downstream (Vidin, Bulgaria/Calafat, Romania) of the border with the Federal Republic of Yugoslavia was thus set up. The aspect that is interesting to point out here is that, even though it was up to the riparian States "to ensure that adequate monitoring is provided to all cabotage traffic involving points that are situated between Vidin/Calafat and Mohacs" (para. 16), such a mechanism necessarily involved the above-mentioned Council's subsidiary organ. In particular, the Sanctions Committee, established by means of Resolution 724 (1991), and being called upon to decide specifically - with regard to every single vessel - whether or not to authorize the transit between the two points of the blockade, ended up by taking the place of some of the riparian States in exercising administrative power within the respective domestic legal systems. An intervention of this type in the domestic jurisdiction of those States explains why, in this case too, the following *condition* was established: that the stopping and inspection of the boats be carried out "under the authority of the Security Council" (para. 17 of the same Res. 820), in accordance with the expression already employed by the Council on other occasions in order to (try to) "accredit" the Organization with an *intrusive* activity that was, in reality, carried out by Member States.

⁶⁴ S/PV.5685, p. 6, emphasis added. *Id.*, the British delegate also specified that "[i]t is a long-held United Kingdom view that, to make this decision binding, it was necessary for such a resolution, inter alia, to be taken under Chapter VII".

of the Members of the Security Council who abstained from voting on the Resolution, namely Qatar. The delegate of Qatar criticized “the insistence of the sponsors to present the draft resolution under Chapter VII – although all Security Council resolutions are binding, in accordance with Article 25 of the Charter [...]”⁶⁵ Leaving out the issue of the effects of Article 25, which is of no interest here, the fact remains that the disagreement is only about the appropriateness of the legal basis chosen by the sponsors to achieve the desired result: to make obligatory (“binding”) the Resolution and the documents annexed to it.

So, one may think what one likes about the specific rule of Chapter VII implicitly invoked as the basis for such an effect (a rule that, in the opinion of the present writer, must be Article 39),⁶⁶ but there is no doubt that the sponsor States themselves seem to dismiss the fact that the Resolution has as its subject the decision of enforcement measures under that Chapter.

In theory, as was said about the *ad hoc* Tribunals, one could have maintained that also the Special Tribunal for Lebanon is an “enforcement measure under Chapter VII” (directed against individuals).⁶⁷ The point is, however, that in Resolution 1757 and its annexes, it is not possible to discover any mechanism of the sort provided by Resolutions 827 (1993) (para. 4) and 955 (1994) (para. 2). In contrast to these, in the case under consideration, the Security Council does not address all Member States to bind them to ensure full cooperation with the new jurisdiction, nor does it even address such a demand to Lebanon itself.⁶⁸ Above all, in Resolution 1757 there is no decision aimed at obligating this State to take “any measures necessary under their domestic law” to apply the Statute of the Tribunal and particularly the rules that outline the “primacy” of the latter over Lebanese national courts.

To get down to the facts, there are no arguments to affirm that a “request for assistance” or an “order” by the Special Tribunal “shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of

⁶⁵ S/PV.5685, p. 3.

⁶⁶ On the point of the *decisions* that may be adopted *ex* Article 39 by the Security Council, *see supra*, section 5.

⁶⁷ *See, id.*

⁶⁸ In this sense, it would not be of use to appeal to the so-called “*Agreement*”, in particular to its Article 15 (Cooperation with the Special Tribunal) of which para. 2 provides that “The Government shall comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to: (a) Identification and location of persons; (b) Service of documents; (c) Arrest or detention of persons; (d) Transfer of an indictee to the Tribunal”. Indeed, the *alleged* obligatory value of such a provision, as well as of Res. 1757 itself and the whole of its annexes, is *a priori* excluded because of the inadequate legal basis chosen by the Council for the adoption of the Resolution. Since the consequence of the cooperation requested by the rule involves unavoidable interference “in matters which are essentially within the [Lebanon’s] domestic jurisdiction”, from an organ established by the Council, this latter cannot give it binding effect by means of a “generic” decision *ex* Chapter VII (in particular, *ex* Article 39). Given its intrusive nature, the action taken could be considered lawful and the State could be deemed *bound* to tolerate and/or facilitate it only if it were conceived as the application of an “enforcement measure under Chapter VII”. But this precise *coercive* connotation of the Council Resolution seems to be denied by the British statement that “[t]he use of Chapter VII carries no connotation other than that it makes this resolution binding” (*see, supra*, in the text).

the United Nations”.⁶⁹ This may also be deduced from the evident trust of the Security Council in the future attitude of spontaneous cooperation on the part of the Lebanese Executive, a trust based on the assumption that it was this very body that had requested the adoption of a binding resolution. For this precise reason, the sponsors of Resolution 1757 did not dare to base the establishment of the Tribunal on a mechanism of enforcement under Chapter VII, on the (erroneous) presumption that it would be possible to give binding effect to the “annexed document” and its “attachment” by a generic decision (even if “under Chapter VII”). One can understand the political reasons for the choice made: reference, even indirect, to the powers of enforcement under Chapter VII would have probably induced certain Members to vote against the adoption of the Resolution). However, apart from the already-criticized effect of allowing the Security Council to interfere, like a *deus ex machina*, in a conflict of a constitutional nature within a State (by giving substantial backing to the actions of one domestic organ to the detriment of the others) it is still questionable the legal basis on which the Beirut Government may ensure the full cooperation of the Lebanese judicial machinery.⁷⁰ Indeed, such a result seems uncertain in the absence of specific measures to adapt the internal legal system, which would also require the involvement of the legislative power.

The non-configuration of the Special Tribunal as an enforcement measure and the consequent inapplicability of the exception provided for in the last sentence of paragraph 7 of Article 2 of the Charter seem to prejudice, already *prima facie*, the legitimacy of the Resolution *de quo* and the binding effects themselves pursued by it. In reality, the generic reference to Chapter VII is not sufficient to provide

⁶⁹ For this very reason Judge Antonio Cassese, President of the Special Tribunal for Lebanon, is drafting an agreement for judicial cooperation, which will be offered to the five countries of the region, Egypt, Jordan, Syria, Iran and Turkey and to countries where many Lebanese are living, such as France, Brazil, Argentina, Venezuela and Australia (*Hariri Tribunal Judge Antonio Cassese Talks to Asharq Al-Awsat*, 28 April 2009, <<http://www.asharq-e.com/news.asp?section=3&id=16550>>).

It should be recalled the opinion expressed by the Secretary General, at the time of the establishment of the Tribunal for the former Yugoslavia, that the requests and the orders provided by Article 29 of the Statute of the same “shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations”. This rule had been recalled in para. 4 of Res. 827 (1993) to bind all States to specifically ensure its application by taking “any measures necessary under their domestic law”. For a thorough analysis of the problems raised by Article 29 of the Statute of the ICTY and on the measures taken within domestic legal systems in order to apply it, see F. Lattanzi, *La répression pénale des crimes du droit International: Des juridictions internes aux juridictions internationales*, in Commission européenne, *Le droit international face aux crises humanitaires*, Vol. I, p. 153 et seq. (1995).

⁷⁰ So far the Lebanese judicial authority has responded cooperatively to the Special Tribunal’s requests and orders (*see* the “Procedural Background” in the Order issued by the Pre-Trial Judge on 29 April 2009, regarding the *Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others*, available on the website of the Tribunal: <<http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/PreTrialChamber/09-04-29%20PTJ-Order%20on%20Detained%20Persons-EN.pdf>>). *See* also the letter addressed to the Special Tribunal by the Lebanese Minister of Justice Ibrahim Najjar, on February 2009, regarding the Lebanese judicial system’s cooperation with the Tribunal (<<http://www.nowlebanon.com/NewsArticleDetails.aspx?ID=81752>>).

valid legal cover for the intrusive action taken by the Security Council. Not even in the cases of the *ad hoc* Tribunals did the Security Council claim to impose the respective Statutes as normative texts directly applicable within the Member States' national legal systems.⁷¹ However, in the case of the Special Tribunal for Lebanon, the Security Council actually seems to be trying to insert directly into that country's legal system, a set of rules (the Tribunal's Statute and, even before that, the text forming the so-called "Agreement") that aspire to automatic internal application, irrespective of the functioning of any mechanism of adaptation required by the national law. In other words, by way of Resolution 1757, the Security Council has claimed to take the place of the Lebanese legislator both in the political choice of establishing a special jurisdiction (of a 'hybrid' nature) and in regulating the substantive and procedural aspects of the latter within the internal legal system itself.

⁷¹ Indeed, both Res. 827 (1993) and Res. 955 (1994) expressly provide the obligation upon Member States to take "any measures necessary under their domestic law" to carry out these same Statutes. An obligation which, since it is linked to the application of an enforcement measure under Chapter VII, the Member Countries could not question by claiming respect for their domestic jurisdiction, "as all States [are] under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII" (this opinion, as has already been recalled, was expressed by the Secretary General when the Tribunal for the former Yugoslavia was about to be established).