



Security Council

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Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005)

I. Introduction

1. The Security Council, by its resolution 1644 (2005) of 15 December 2005, requested me to help the Government of Lebanon to identify the nature and scope of the international assistance needed to try those eventually charged with the terrorist attack that killed former Lebanese Prime Minister Rafik Hariri and 22 others before a tribunal of an international character. The Council's request was made in response to a letter dated 13 December 2005 from the Prime Minister of Lebanon addressed to me requesting the establishment of a tribunal of an international character to try all those who are found responsible for the crime (S/2005/783, annex). The resolution requested that I report to the Council in a timely manner. The present report is submitted in response to that request.

2. In his letter of 13 December 2005, the Lebanese Prime Minister also requested that the mandate of the International Independent Investigation Commission be expanded to all terrorist attacks that have occurred since 1 October 2004. In resolution 1644 (2005), the Security Council requested that I consult with the International Independent Investigation Commission and the Lebanese Government and present recommendations to the Council to expand the mandate of the Commission to include investigations into other attacks that have occurred in Lebanon since 1 October 2004. In the same resolution, the Council also authorized the International Independent Investigation Commission to extend its technical assistance, as appropriate, to the Government of Lebanon with regard to the latter's investigations of the attacks since 1 October 2004. The Commission has established contacts with the Lebanese Government and taken steps to increase its capacity to fulfil that mandate. Based on ongoing consultations with the Commission and the Lebanese Government and on an assessment of the effectiveness of the technical assistance provided by the Commission, I will present recommendations to the Council at a later date.

II. Consultations with the Lebanese authorities

3. Discussions with the Lebanese authorities were carried out in two stages. Nicolas Michel, Under-Secretary-General for Legal Affairs and the Legal Counsel, led a small team composed of staff of the Office of Legal Affairs and the

Department of Political Affairs on a mission to Beirut on 26 and 27 January 2005. During the visit, Mr. Michel met with the Lebanese President, the Prime Minister and the Speaker of the National Assembly. He also met with the Minister for Foreign Affairs and had an extended and detailed meeting with the Minister of Justice and a senior legal team. Following Mr. Michel's mission to Beirut, a Lebanese delegation visited United Nations Headquarters for further consultations. That delegation, consisting of two senior judges, discussed with Mr. Michel and colleagues from the Office of Legal Affairs and the Department of Political Affairs legal issues related to the establishment of a tribunal of an international character. Those meetings, carried out from 24 to 28 February, were substantive and detailed.

4. I should note that Mr. Michel and his colleagues did not engage in negotiations with the Lebanese delegation. In accordance with the mandate of the Security Council, the main issues to be addressed in future possible negotiations were thoroughly explored and it was agreed that the consultations were without prejudice to future negotiating positions, should the Council decide to proceed. The key issues and questions for further consideration raised in the consultations are set forth below.

III. International assistance needed for the establishment of a tribunal of an international character

5. By mandating me to help the Lebanese Government to explore the requirements for a tribunal of an international character, the Security Council reflected a shared assumption that a purely national tribunal would not be able to effectively fulfil the task of trying those accused of the crime. At the same time, it became clear from our consultations with the Lebanese authorities that the creation of an exclusively international tribunal would remove Lebanese responsibility for seeing justice done regarding a crime that primarily and significantly affected Lebanon. Therefore, it appears that the establishment of a mixed tribunal would best balance the need for Lebanese and international involvement in the work of the tribunal. That balance would be determined by such important characteristics as the tribunal's founding instrument, jurisdiction, applicable law, location, composition and financial arrangements.

6. United Nations practice over the past 13 years has revealed three different types of founding instruments for international or internationally assisted tribunals. Tribunals have been established by Security Council resolution, by national statute or by agreement between the United Nations and the country directly interested in the creation of the tribunal. A key lesson learned from those experiences was that the interested State should be associated in the establishment of the tribunal. As a result of a thorough discussion of the issue with our Lebanese interlocutors, there is a common understanding that it would be most appropriate to establish the tribunal through an agreement concluded between Lebanon and the United Nations. The conclusion of such an agreement would leave it to the Lebanese authorities to determine whether national legislative action is needed. Such an approach would also not exclude the need for the Council to take complementary measures to ensure the effectiveness of and cooperation with the tribunal.

7. The jurisdiction of the tribunal would have to be determined with respect to persons involved and acts committed. Paragraph 6 of Security Council

resolution 1644 (2005) provides guidance regarding subject matter jurisdiction, that is, the 14 February 2005 terrorist bombing that killed Mr. Hariri and 22 others. However, paragraph 7 of the resolution raises the possibility of expanding the investigation of the International Independent Investigation Commission to include all terrorist attacks since 1 October 2004. This is an issue that will require further careful exploration. The Security Council has provided broad direction regarding personal jurisdiction in its resolutions related to the Commission. In its resolution 1595 (2005), the Council reiterated its call on the Lebanese Government to bring to justice the perpetrators, organizers and sponsors of the crime. This wording was echoed by the Lebanese authorities in our consultations, in which they expressed a preference for the tribunal to have personal jurisdiction over all those responsible for the death of Mr. Hariri and 22 others.

8. The process of choosing the tribunal's applicable law must take into account the types of crimes committed and respect the legal culture of Lebanon, as well as the international criminal justice standards that have developed over the past years in the work of other tribunals. Consultations with the Lebanese authorities made it clear that applying Lebanese substantive criminal law would play an important role in ensuring that the tribunal would have a national dimension. The specific charges against the accused will also depend on the results of the investigation. The drafting of the rules of procedure of and evidence applicable in the tribunal could benefit from the experience gained in the existing international tribunals, giving due consideration to the specific circumstances of the matter at hand.

9. The choice of the location of the tribunal is not directly dependent on either its legal basis or the applicable law. Rather, the selection of a location should balance the objective of basing a judicial process within the territory of the affected State against the security of the judges, prosecutor and staff of the tribunal, as well as of the witnesses and the accused. The decision as to where a tribunal would sit would also have to take logistical and financial implications into account. The consultations with the Lebanese authorities made apparent the importance of concerns for security. At this stage, it is clear that there is a belief, among the Lebanese authorities, based on security concerns, that the tribunal might not be able to operate effectively in Lebanon. It will be necessary to consider this issue carefully and fully.

10. The composition of the tribunal was discussed during the consultations. The Lebanese authorities emphasized that significant international participation would be essential for the tribunal to fulfil its purpose effectively. Whatever the outcome of discussions regarding composition, it is of the utmost importance that the judges, the prosecutor and other court personnel be selected in a way that ensures the independence, objectivity and impartiality of the judicial process.

11. The cost of establishing and supporting a tribunal of an international character should not be underestimated. In the case of a possible tribunal for Lebanon, the source of financing should receive careful consideration. I discussed the question of financing tribunals in my report to the Security Council on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616). In that report I wrote that, "The operation of judicial bodies cannot be left entirely to the vagaries of voluntary financing". The Lebanese authorities acknowledged in our consultations that Lebanon should make a financial contribution to the tribunal in an amount in keeping with the financial situation of the country. The establishment of a

tribunal makes it necessary that sources of funding be found to ensure that the tribunal has adequate funds to guarantee its continuity and effective functioning. A phasing-in of the tribunal's activities, with an initial focus on the most necessary tasks, might provide useful cost savings and increase its effectiveness.

12. It is important to note that the adoption of the legal basis of and framework for the tribunal would not predetermine when it might commence operations, nor would it prevent the gradual phasing-in of the different elements of the tribunal. In addition, it will be necessary to ensure, at an appropriate time, a smooth transition between the current investigation and a future judicial mechanism.

IV. Conclusions

13. The attack on Mr. Hariri and the other similar bombings in Lebanon have contributed to the creation of a climate of insecurity and intimidation, which seriously affects the functioning of the country's political institutions as well as economic and social life. The consultations with the Lebanese authorities highlighted the urgent need in Lebanon to find the truth behind the killing of Mr. Hariri and others and to bring those who carried out the attack to justice. Our interlocutors have suggested that a solution to these issues could contribute to returning the country to stability and putting in place the conditions for a durable peace.

14. Our consultations with the Lebanese authorities have increased the Secretariat's understanding of the issues that would require further consideration if steps are taken toward the establishment of a tribunal of an international character to bring to justice those accused of the killing of Mr. Hariri and others in the terrorist attack of 14 February 2005. If the common understanding achieved between the Secretariat and the Lebanese authorities regarding the key issues is acceptable to the Security Council, the Council may wish to consider adopting a resolution requesting me to initiate negotiations with the Lebanese Government aimed at establishing a tribunal of an international character along the lines set forth in the present report.
