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The Long, Steep Fall of the Lebanon Tribunal

Heiko Wimmen

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(Heiko Wimmen is a doctoral candidate at Freie Universität Berlin and a fellow at the German Institute for International and Security Studies in Berlin. A condensed German version of this article was published by the German Institute for International and Security Affairs at: http://www.swp-berlin.org/common/get_document.php?asset_id=7573.)

After five long years, the Special Tribunal for Lebanon is expected to hand down its indictments at long last. By the end of 2010, or perhaps the beginning of 2011, the Tribunal will accuse a number of individuals of direct involvement in the murders of former Prime Minister Rafiq al-Hariri and several other prominent Lebanese political figures between 2005 and 2008. Officially, the investigators keep mum about the identity of their targets. Unofficially, a steady stream of "insider information" has converged into a kind of received wisdom: High-ranking members of the Shi'i Islamist party Hizballah will be indicted for association with the engineering of the assassinations. The various actors in Lebanon now treat the "leaks" that formed this received wisdom as a set of established facts.

The fallout of such indictments would be dramatic: As has been manifest time and time again since 2005, Lebanon simply cannot be governed without the cooperation of Hizballah and its allies, the Shi'i Amal movement and the predominantly Christian Free Patriotic Movement. These three parties, now commonly referred to by local media as "the former opposition," are part of a "government of national unity" established after the mini-civil war of May 2008. Indictments and arrest warrants aimed at Hizballah are hence liable to destabilize the country, but unlikely to apply justice, let alone aid in healing the wounds of the past.

An indictment-deferring compromise of any kind, on the other hand, appears to be far off. Prime Minister Saad al-Hariri, the son of the murdered man, has tied his personal and political credibility to the Tribunal to such a degree that it is difficult to see how his leadership could survive a retreat. The younger Hariri rode to the top of Lebanese politics atop the wave of popular outcry for "the truth" about the 2005 killings, a phrase that became a mantra for Hariri-owned media and a stand-in for deeper yearnings. The assassination of Hariri the father has galvanized the Sunni community, which previously had been politically docile, and avenging the blood of the posthumously idolized leader has acquired meaning far beyond a mere legal procedure. Partly owing to factors external to Lebanon, such as the Iraq war and the concern of pro-Western Arab regimes to limit the appeal of pro-Palestinian postures struck by Iran and its

regional allies, this newly assertive communal sentiment has acquired an increasingly anti-Shi'i hue. Resentment has been running especially high since May 2008, when Saad al-Hariri's lightly armed and poorly led supporters suffered ignominious defeat at the hands of Hizballah, Amal and some of their smaller but equally ferocious allies, and West Beirut -- a "Sunni city," in the eyes of the Hariri camp -- was taken over by mostly Shi'i militias. Angry reactions and further communal entrenchment are certain to follow if Hariri is seen as betraying the blood debt of his slain father. While there is, for now, no political organization or leader capable of converting this resentment into larger-scale radicalization, a growing number of youths may become susceptible to the viciously anti-Shi'i rhetoric of militant Sunni fringe groups.

Hizballah, on the other hand, has challenged the legitimacy and integrity of the Tribunal since its inception, walking out of cabinet meetings to protest the inquiry in late 2005 and citing it as a major grievance in advance of the constitutional crisis in 2006. Now, with the party seeing itself in the dock, the reservations have turned into outright rejection. According to these views, the Tribunal and the preceding investigation never actually intended to finger the perpetrators. Rather, they were from the beginning geared exclusively toward US strategic interests in the region, which, in this worldview, equal Israeli interests. Thus, when isolating Syria and perhaps effecting regime change in Damascus were high on the US agenda back in 2005, the inquiry zeroed in on the top ranks of the Syrian power structure. Now, as attention has shifted to Iran and its nuclear program, the focus has shifted to its ally Hizballah. In late August, the Hizballah secretary-general, Hasan Nasrallah, moved one decisive step further and accused Israel not only of exploiting Hariri's assassination, but also of instigating or even commissioning it, with the objective of framing the Syrians, and potentially everybody seen as detrimental to Israel's interests.

Sabotage as Strategy

In 2005, with the calls for "the truth" akin to a clamor and Syrian troops departed from Lebanon partly in response, the international inquiry into Rafiq al-Hariri's death appeared momentous indeed. The presumed culprits, Syria or its Lebanese allies, seemed to be backed into a corner. The Bush administration, its grandiose Middle East ambitions not yet curtailed, eagerly supported the investigation as part of a campaign to cow the remaining regional actors hostile to US hegemony. Much of world opinion, particularly as the killings in Lebanon continued, was likewise sanguine.

Perhaps in anticipation of pressures on future Lebanese governments, UN Security Council Resolution 1757 and the agreements concluded between Lebanon and the UN provided the Tribunal with far-reaching autonomy. Thus, the Tribunal may issue indictments and even warrants of arrest, which the Lebanese authorities are obliged to execute without further inquiry. Lebanon is supposed to cover 49 percent of the Tribunal's budget and nominate half of the bench, yet UNSC 1757 explicitly authorizes the UN secretary-general to obtain alternative funding if the Lebanese contributions are not forthcoming, while the nomination process for the Lebanese judges is already complete, leaving little for current or future cabinets to do -- or dither over. Since UNSC 1757 was passed under Chapter 7 of the UN Charter, which binds the international community to action, even Lebanon's unilateral withdrawal from the subsequent agreements would not compromise the international legal basis of the Tribunal.

Such loss of Lebanese "ownership" will lend support, however, to the strategy adopted by Hizballah, which is to undermine the local legitimacy of the Tribunal to a point where the Lebanese authorities will no longer be capable -- in practical, but perhaps also in legal, terms -- of providing the assistance they are nominally obliged to, whether in serving indictments or arresting suspects.

The allegations of bias rendered above strike a chord among many non-affiliated Lebanese who are suspicious of the international community and, in particular, the United States. To these people, the accusations are corroborated by a number of blunders in the investigation, particularly during its early stages. Reports published and information leaked in 2005 by the German prosecutor Detlev Mehlis, then head of the UN International Independent Investigation Commission, showed an apparently exclusive focus on major figures in the Syrian regime and a reliance on hearsay and dubious witnesses who later recanted or were deemed not credible.

The question of whether these testimonies had been purposely planted, and if so by whom, has never been investigated -- a fact capitalized upon by opponents of the Tribunal to cast doubt on the whole process. In contrast, the Belgian Serge Brammertz, who took over from Mehlis in January 2006 and served until January 2008, and the Canadian chief investigator and future chief prosecutor Daniel Bellemare, have attempted to project an image of strict objectivity and professionalism, while avoiding any hint of who may and may not, or no longer, be in the crosshairs of the investigation. Yet the uninterrupted flow of supposed insider information from the Tribunal to journalists has largely undermined these efforts.[1] While opponents felt vindicated by the fact of the leaks, if not their content, the Tribunal has also drawn fire from the other side of the political aisle for an alleged lack of will or competence in sniffing out the Hizballah trail much earlier.

Meanwhile, the conflict over a possible investigation into the making of the "false witnesses" of the Mehlis days, with the implication that prominent members of the Hariri camp may be compromised, has pervaded the political debate in the fall of 2010, already forcing the cancellation of several cabinet meetings and emergency mediation to save others. The controversy has thus served as a trial run for the second element of Hizballah's strategy: sabotage of political and institutional processes by procedural means. Since the party and its allies form one third of the government, such means are in ample supply. The "former opposition" has so far blocked the budgets for 2010 and 2011 over objections to the funding of the Tribunal, and may paralyze the executive by simply boycotting cabinet sessions altogether, which would deny that body the quorum it needs to convene. Furthermore, according to the Lebanese constitution, the government is considered dissolved if more than one third of its ministers resign, a threshold that the former opposition can likely clear if desired.[2] Or Nabih Berri, speaker of Parliament and head of Hizballah's close ally Amal, could schedule a legislative session to discuss ratification of the UN-Lebanese agreements for the establishment of the Tribunal -- a procedure that is mandatory according to the constitution, but was never performed. A defeat of the Hariri camp in such a vote would bring into question the legal basis upon which Lebanese institutions cooperate with the Tribunal.[3]

In fact, there are signs that Hariri's majorities in Parliament (71 of 128 MPs) and the cabinet (16 of 30 ministers) have dwindled since his narrow win in the 2009 elections. (As in all majority

electoral systems, in Lebanon a slim margin of victory or even a loss in the nationwide popular vote can translate into a comfortable majority in Parliament. In 2009, the opposition carried the popular vote, but lost several crucial swing districts.) The clearest indicator yet of the turning tide is the refusal of the government majority -- which soon may also acquire the descriptor "former" -- to put the dispute over the "false witnesses" of the Mehlis inquiry to a cabinet vote, as demanded by the opposition. A key role in these calculations falls, once again, to the mercurial Druze leader Walid Jumblatt, who controls a decisive swing vote of three ministers in the cabinet and some ten deputies in Parliament. Jumblatt adopted brazenly anti-Syrian and anti-Hizballah stances between 2005 and 2008. While still officially part of the Hariri camp during the 2009 elections and the subsequent cabinet formation, he has since sought some distance from his former allies and is now casting himself in a centrist position. Yet his increasingly frequent and friendly visits to Damascus and his ominous warnings about the Tribunal's dangers have led many observers to conclude that he has defected to the opposition. On November 24, the Druze chieftain explicitly called upon the cabinet to reject the Tribunal, which he described as "aimed at destabilizing Lebanon rather than rendering justice."

For one thing appears certain: Any attempt to arrest members of Hizballah will be met with firm, and most likely armed, resistance. To quote Nasrallah, "The hand that tries to touch our fighters will be cut off." There can be little doubt about how a confrontation between the well-equipped and rigorously drilled Hizballah militia and the poorly supplied Lebanese security forces would end, particularly because officers and troops with oppositional loyalties -- mostly, but not exclusively, Shi'a -- would be liable to refuse orders. While Hizballah aims to prevent Lebanon's cooperation with the Tribunal, through a mix of delegitimizing rhetoric, procedural stalling and political intrigue, these formal methods are ultimately backed up with the threat of military force.

Crisis in Installments

Yet there is little reason to credit the much reported doomsday scenarios of an imminent "coup," let alone a deliberate attack by Hizballah upon Israel to distract attention from the investigation, as some speculative accounts would have it. For one thing, it is highly unlikely that the government majority would be inclined to risk a physical confrontation, as it would be entirely hopeless, but might still wreak excessive damage. Likewise, it does not seem plausible that Hizballah would want to incur the material and the political costs of a military option, not to mention the consequences of an even deeper Shi'i-Sunni division, as long as it possesses the means of delaying and obstructing the investigation on the political and institutional levels, and in a technically legal fashion.

According to available information, and barring the possibility that the 18-month flood of "leaks" was disinformation that the Tribunal somehow felt unable to dispel, the indictments to come will be largely based on analysis of communication patterns between several groups of cellular phones that were allegedly used in the preparation and execution of the Hariri assassination, and were traced back to senior Hizballah figures, among them members of Parliament. This body of evidence, impressive as it may look, must be deemed circumstantial -- for instance, there are apparently no recordings or transcripts of what was actually said during all these calls. The "telecoms," as police call this type of evidence, will presumably have to be corroborated with more substantial material, such as testimonies, and to what extent the cases

can hold up in a court of law is one of the big open questions. Technically speaking, the Tribunal may choose to keep the questions open by declining to disclose the content of the indictments, or parts thereof, or disclosing them only to the Lebanese or other governments, citing "the interests of justice."[4] There is precedent for secrecy of this kind: For example, an arrest warrant issued by the International Criminal Court for Congolese rebel leader Jean-Pierre Bemba was kept secret until Bemba traveled to a country that would carry it out.

But to proceed in such a fashion with the Lebanon inquiry, and indeed to impose any substantial restrictions upon the transparency of the indictments,[5] would only serve to cast renewed doubt on the process, ignite another flash of controversy and perpetuate what Walid Jumblatt has aptly described as a "dangerous soap opera" of unverified rumors. While Hizballah has lately been the main subject of the whispers, Syria cannot be sure that it will be off the hook, given the close relations between Damascus and the Shi'i party and the presence of senior cadre like the late Hizballah strategist 'Imad Mughniyya (assassinated in 2008, presumably by Israeli agents) in the Syrian capital.

Lebanese media outlets, most of which are openly partisan, can be relied upon for intense and obsessively detailed dissection of whatever evidence becomes available. If, indeed, mobile phone records are the heart of the cases presented by Daniel Bellemare, significant debate can be expected around the alleged penetration of the Lebanese cellular network by Israeli intelligence agents,[6] and their potential manipulation of the records in question. Hizballah itself will most likely persist in its strategy of rejecting the investigation wholesale, and deploy one or a combination of the means of political and constitutional blockage outlined above. A prolonged stalemate may result, one that the government majority will be unable and perhaps also unwilling to break. Hizballah and its allies may also resort to demonstrations and carefully staged acts of "civil disobedience" and "popular rage" (such as the attack on investigators heading for the clinic of a gynecologist in a Hizballah-dominated part of Beirut in late October) as reminders of what could be at stake. Faced with such a situation, Saad al-Hariri may opt to control the damage to his political credibility by stepping down as prime minister, all the while maintaining his commitment to pursuit of "the truth." A caretaker government would then perform essential tasks for the functioning of the state, while conveniently lacking the constitutional competence to make decisions of deep consequence.

On the Fault Line

Apart from the domestic balance of power, a web of competing interests and influences also constrains the Lebanese actors. Syria is exerting its still -- or again -- considerable influence to prevent damage to Hizballah, a strategic asset in its confrontation with Israel. Saudi Arabia, the most important regional ally of the Hariri camp, needs Syrian cooperation in its attempts to protect the interests of the Sunni Arab community in Iraq and to improve its strained relations with Tehran toward this end. In these Arab chanceries, the crisis in Beirut appears not only as a losing gamble, but also as detrimental to strategic interests of much larger magnitude. Saudi diplomats have been at the forefront of explorations for a solution, still elusive, in intense talks with Damascus, led by a son of King 'Abdallah.

With regard to Lebanon, Saudi foreign policy is often reduced to the royal family's rivalry with Iran and tight alliance with the US. The reality appears at times ambiguous, not only because these priorities may conflict, as when Riyadh needs to court Syria, but perhaps also because of differences of opinion among the ruling elite. While King 'Abdallah and Foreign Minister Sa'ud al-Faisal consistently promote Arab cooperation, and a partly autonomous agenda that seeks to avoid open conflict through a strategy of regional engagement, a faction centered around Crown Prince and Minister of Defense Sultan bin 'Abd al-'Aziz is said to advocate much closer ties to the US and a confrontational attitude vis-à-vis Iran and Syria. The two positions nearly converged in the aftermath of the 2006 Lebanon war, and Saudi-Syrian relations hit a low point, partly as a result of a sharp personal conflict between Syrian President Bashar al-Asad and King 'Abdallah over the Saudi position in the war. The two men made up after the Gaza war of 2008-2009, and engaging Syria has again become a cornerstone of the regional strategy pursued by the Saudi king.[7]

The US, on the other hand, has been actively shoring up international support for the Tribunal, adopting a tougher tone with Syria, and dispatching leading State Department officials such as Jeffrey Feltman and Hillary Clinton herself to the region. On November 3, the US ambassador to the UN, Susan Rice, pledged additional funding for the Tribunal to compensate for the shortfall caused by Hizballah's sabotage of the budget in Beirut, despite reports of increasing American exasperation with the pace and efficiency of the investigation. From Washington's perspective, Hizballah is not only a threat to its ally Israel, but also acts as a bridgehead of Iranian influence in the Levant. The Lebanese Shi'i party, the US worries, could serve as a deterrent to possible strikes on Iranian nuclear installations through its capacity to attack crucial elements of Israeli infrastructure with its ever growing arsenal of short- and mid-range missiles. Hence, any damage inflicted on the party must appear beneficial, even or perhaps especially if Hizballah were to succeed in obstructing the Tribunal, once again exposing itself as a rogue actor.

At the same time, it appears doubtful whether the autumn's chorus of diplomatic backing will do much to strengthen the resolve of Hariri and his allies, or enhance their willingness to take additional risks. Still fresh are the memories of how, during the 2008 crisis, the solemn declarations of support received from all major Western capitals did not translate into tangible action when Hizballah unleashed the fury of its fighting squads.

Realpolitik and the Limits of International Justice

As it will, in all likelihood, turn out to be impossible to apprehend the accused and take them to The Hague to be tried, the Tribunal will be obliged, after a certain grace period, to conduct trials in absentia.[8] Convictions obtained through such trials may find only limited international recognition, due to the controversial status of proceedings in absentia in different jurisdictions around the world, and in particular if such convictions are primarily based on circumstantial evidence. They will certainly fail to impress Hizballah and its allies, or detract from the party's support base among a populace that is immersed in communal identity politics and perceives international institutions and procedures as perennially skewed in favor of the interests of the party's enemies, notably Israel and the US. Opponents of Hizballah may feel a certain satisfaction at official international recognition of what they believed all along, only to be frustrated by the lack of any real consequences. For none of the international actors who are

today throwing their full rhetorical weight behind the Tribunal will be prepared to put boots on the ground to enforce its rulings, and sensibly so, since this act would require nothing less than a full-blown military campaign to disarm Hizballah and dissolve its military structures.

The crisis over the Tribunal thus appears to be a clear example of the limits of international justice in ongoing conflicts, in particular where complex and powerful international interests are involved. It is not surprising, of course, that the side with reason to fear indictment accuses the Tribunal of bias and subservience to the interests of its opponents and their foreign partners. Even those who profess vigorous support for the Tribunal, however, clearly have only qualified trust in its independence and appear seriously concerned that justice may be sacrificed in the cause of a political deal struck between regional actors.

Whatever the result of the inquiry, it is safe to expect that a significant portion of the Lebanese population will simply reject the findings, irrespective of the value of the evidence presented, if they clash with the particular version of "the truth" postulated by their leaders. Amidst a political and sectarian confrontation that is portrayed as existential and perceived in zero-sum terms, no room is left for deliberation over facts, and not an inch will be yielded to an opponent, whatever merit his case may have. Thus, rather than delivering justice and initiating a process of reconciliation, the Tribunal will deepen the internal rifts of Lebanon. Relations between Sunnis and Shi'a, in particular, will take yet another dangerous turn for the worse.

Likewise, the political gains for Western countries, including the US, will be modest at best. True, a few more countries may agree to classify Hizballah as a terrorist organization and sever whatever ties they may have with the party. Those from the upper echelons of the party who used to travel to Western countries may desist even if they are not indicted, bearing in mind that additional, secret indictments may exist. It is debatable that such point scoring would qualify as a political gain for the West. At the very minimum, as long as several thousand troops from key European countries are staffing the UN buffer force in southern Lebanon, one of Hizballah's strongholds, cutting off all links to the party hardly appears advisable or even feasible. All the while, the popular support that the party and its allies enjoy will make it impossible to ignore or work around them in the domestic political sphere. If anything, the conflict over the Tribunal will serve to reinforce Hizballah's determination to remain firmly entrenched at the core of the Lebanese state in order to ward off any domestic challenge to its independent military capabilities, or what it refers to as "the path of resistance."

Endnotes

[1] Neil Macdonald of the Canadian Broadcasting Corporation has aggregated the information that has become public over the years at: http://www.cbc.ca/world/story/2010/11/19/f-rfa-macdonald-lebanon-hariri.html.

[2] Officially, the "former opposition" holds ten of the 30 seats in the cabinet -- one short of veto power -- while the government majority holds 15, one short of a simple majority. But two of the five "neutral" ministers nominated by President Michel Sulayman are considered to be loyal to one of the two camps, bringing the count up to 11 vs. 16. The quorum necessary to convene a valid cabinet session is two thirds, or 20 ministers, so that whoever

controls 11 seats wields the power to paralyze government. See the chart compiled by the International Foundation for Electoral Systems at: http://www.ifes.org/~/media/Files/Publications/Papers/2009/1572/Lebanons_new_government.pdf.

[3] Reportedly, sources close to the Tribunal dispute this view and hold that Lebanon's commitment to the UN Charter renders the Tribunal constitutional even in the absence of ratification. *Al-Nahar*, November 5, 2010. Whatever the merit of this line of thought, it is difficult to see how Lebanese institutions could uphold cooperation with the Tribunal based on such arguments, if Parliament were to reject the agreements.

[4] Special Tribunal for Lebanon, *Rules of Procedure and Evidence,* p. 74, available online at: http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/RPE_EN_November%202010.pdf.

[5] Recent statements by Tribunal representatives, as to what kind of evidence will become public and when, leave room for interpretation. *Al-Hayat*, November 2, 2010. The *Rules of Procedure and Evidence* also allow for anonymous witnesses (p. 93), with the limitation that convictions "may not be based solely, or to a decisive extent" on testimonies obtained in this fashion (p. 149).

[6] *Ha'aretz*, July 16, 2010.

[7] See Guido Steinberg, *Saudi-Arabien als Partner deutscher Nahostpolitik,* SWP-Research Paper 35/2008 (Berlin: German Institute for International and Security Affairs, 2008), pp. 7-10.

[8] *Rules of Procedure and Evidence*, p. 105.