

## **We received the policeman, now we could use the judge**

### **An open judicial process is needed if the UN's Hariri probe is going to lead to a successful trial**

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*By Chibli Mallat*

In the better order of international matters stand draft resolutions at the UN, which give a unique insight into the work of a Security Council (SC) not famed for its transparency. For the concerned citizen far away, whose society and country are affected dramatically by every single word in a resolution, the publication of the draft resolution a few days ahead of its formal discussion at the Council is a unique occasion to vent his or her concern. More often than not, criticism and suggestions go nowhere. For instance, we suggested to UN colleagues, representatives of SC member-states at various levels, and whomever wished to hear us, that the paragraph in the SC draft resolution (which became 1559) that dealt with disarming the militias, and specifically targeting Hizbullah, was superfluous. We argued in that fateful week at the end of August 2004 that such reference would unnecessarily divide Lebanese opinion on a matter which would solve itself naturally once Lebanon regained its sovereignty (Syrian troops leaving) and its normal constitutional course (reversing the extension of the presidential mandate). Such remonstrance was to no avail at the time, but at least the current retreat of the U.S. government on "the priorities" of disarming Hizbullah underlines retrospectively the usefulness of the argument.

Sometimes improvements occur. Such long-distance lobbying was successful when the word federalism, and the reliance on Iraqi forces rather than on the UN, were included in Resolution 1546 (June 2004) on Iraq, in the wake of an e-mail and public campaign, openly in the media and privately with colleagues in New York and with Iraqi leaders. Also in the case of 1559, we warned on the eve of the resolution on September 3, in both the Arab and English media, the Syrian and Lebanese presidents not to take the matter lightly. At least they cannot say they were not warned.

We have now the draft of the SC resolution tabled by the French government in the wake of the Fitzgerald report. Overall it is a draft which fulfils a universal request for justice. Still, it needs a key improvement, because it does not clearly include judicial oversight over the committee to be formed. One of the weaknesses of the task assigned to the Fitzgerald team was the absence of rules in the process of interrogation and the deposition of witnesses, which slowed down its work and turned it, unnecessarily in our view, into a fact-finding mission which it wasn't originally. While a legal specialist - a Moroccan national - accompanied the team, officials and non-officials who were interrogated by the Fitzgerald Committee had not been warned of the possible penal consequences of their testimony, or of their refusal to provide one. The famous "Miranda warning" was missing, which requires the presence of a lawyer should the person deposed so desire for fear of her testimony being used against her (or simply for his or her peace of mind).

I have not seen in the Investigation Committee planned in the draft Resolution an open trace for a judge. If UN precedents are to be followed, notably those leading to

the trial of people responsible for crimes in the Balkans and in Rwanda, then there is need to mention a prosecutor, or if the civil law system is followed, an investigative judge. The absence of judicial oversight risks unnecessary controversy, as in the case of the Fitzgerald report, which is the subject of criticism levelled by the Syrian letter to the UN about the request to hear President Bashar Assad on the concurring statements reported by the Commission concerning his physical threat to Rafik Hariri in their last meeting. Assad should have been warned of the consequences of his refusal to meet with the Committee.

In the present draft, the Committee will be independent, and will seek the assistance of the Lebanese Judiciary (and vice-versa). It would be useful to develop this scheme, and contemplate the establishment of a mixed tribunal by the UN, like the one set up for Sierra Leone. This machinery may be heavy considering the nature of a tribunal to be discussed now at the UN, but at least a prosecutor should be appointed by the Resolution for the sake of due process and in anticipation of any trial.

We owe it to the professionalism of Fitzgerald that his report reads so remarkably well, whatever the criticism we have heard from various Syrian and Lebanese quarters. But in order not to replicate his work, and to bring the investigation up to the level needed, leading to the trial of persons involved in the attempted assassination of Marwan Hamade, and the assassination of Hariri, - it cannot be left to a committee with imprecise instructions from the SC. Numbers do not matter, whether 50, 100, or a team of three. What matters is an open judicial process, with particular attention to the protection of potential defendants in the crime. In the Fitzgerald report we had an outstanding policeman at the helm. We now need an outstanding judge.

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